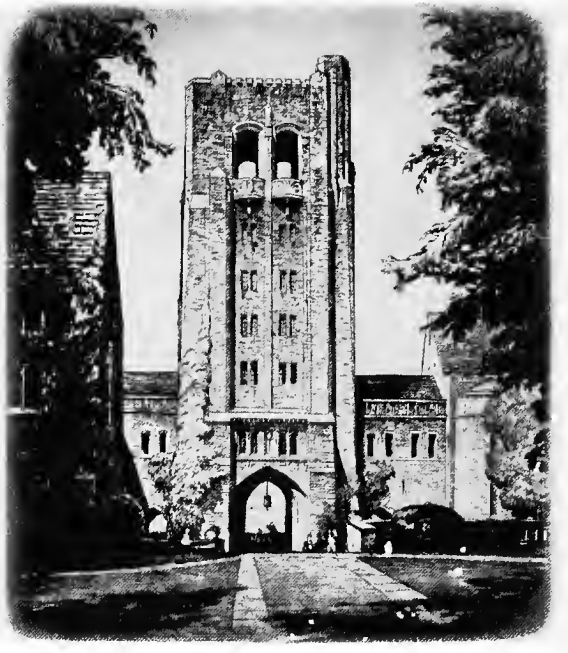

A TREATISE ON THE LAW

OF

NEGOTIABLE INSTRUMENTS,

INCLUDING

BILLS OF EXCHANGE; PROMISSORY NOTES; NEGOTIABLE BONDS AND COUPONS; CHECKS; BANK NOTES; CERTIFICATES OF DEPOSIT; CERTIFICATES OF STOCK; BILLS OF CREDIT; BILLS OF LADING; GUARANTIES; LETTERS OF CREDIT; AND CIRCULAR NOTES.

By JOHN W. DANIEL,
OF THE LYNCHBURG (VA.) BAR.

"Out of the old fieldes,
Cometh al this new corne."—CHAUCER.

"Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentis, et omni tempore, una eademque lex obtinebit."—CICERO.

IN TWO VOLUMES.

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BY JOHN W. DANIEL, THE AUTHOR,
AND CHARLES A. DOUGLASS
OF THE BAR OF THE DISTRICT OF COLUMBIA, AND
PROFESSOR OF THE LAW OF NEGOTIABLE INSTRUMENTS IN
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TABLE OF CONTENTS OF VOL II.

BOOK IV.

PROTEST AND NOTICE; AND EXCUSES FOR WANT OF PRESENTMENT, PROTEST, AND NOTICE.

CHAPTER XXVIII.

PAGE

THE PROTEST OF BILLS AND NOTES, ... 1

SECTION I. The nature and necessity of protest, ... 1
II. By whom and where protest should be made, ... 7
III. Formal making, preparation, and authentication of protest, 10
IV. Contents of protest, ... 15
V. The protest as evidence, ... 18

CHAPTER XXIX.

NOTICE OF DISHONOR OF NEGOTIABLE INSTRUMENTS, ... 29

SECTION I. Nature and necessity of notice, ... 29
II. Formal and essential elements of notice, ... 31
III. Who may give notice of dishonor, . . . 45
IV. To whom notice of dishonor should be given, . . 51
V. Mode and formalities of giving notice when the party giving and the party to receive it reside in the same place, ... 59
VI. Mode of serving notice when the party giving and the party to receive it reside in different places, ... 74
VII. Time within which notice may and must be given, . . 86
VIII. The allegation and proof of notice, ... 95

CHAPTER XXX.

CIRCUMSTANCES OF A GENERAL NATURE WHICH EXCUSE WANT OF PRESENTMENT, PROTEST, AND NOTICE, ... 104

SECTION I. War, interdiction of intercourse, and occupation of country by public enemy, ... 105
II. Political disturbance, epidemic disease, and overwhelming calamity or accident, ... 108

CHAPTER XXXI.

PAGE

SPECIAL CIRCUMSTANCES OF EXCUSE WHICH SHOW AN ORIGINAL ABSENCE OF RIGHT TO REQUIRE PRESENTMENT, PROTEST, OR NOTICE, . . 113

SECTION I. Drawing a bill without a right to do so, . . . 113

II. When the party is under an obligation to provide for payment, ... 123

CHAPTER XXXII.

SPECIAL CIRCUMSTANCES OF EXCUSE FOR WANT OF PRESENTMENT, PROTEST, AND NOTICE, ARISING FROM SPECIAL ACTS OF WAIVER, . . 129

SECTION I. Special written and verbal waivers of presentment, protest, and notice. General principles respecting waivers, . 129

II. Special waivers after the execution of the bill or note, . 138

III. By whom and to whom waiver of demand, protest, and notice must be made, ... 144

CHAPTER XXXIII.

SPECIAL CIRCUMSTANCES OF EXCUSE WHICH SHOW AN INABILITY ON THE PART OF THE HOLDER TO MAKE DUE DEMAND, PRESENTMENT, OR PROTEST, OR GIVE DUE NOTICE, ... 146

SECTION I. When there is no person in existence upon whom demand can be made, or who is legally bound, . . . 146

II. The impracticability of finding the party to whom presentment should be made or notice given; or ascertaining his residence or place of business, . . 149

III. Receiving the bill or note too late as excuse for want of presentment and notice, ... 158

IV. Sickness of, or accident to, the holder, . . . 159

CHAPTER XXXIV.

SPECIAL CIRCUMSTANCES OF EXCUSE FOR WANT OF PRESENTMENT, PROTEST, AND NOTICE, ARISING FROM THE CONDUCT OF THE PARTY, . 161

SECTION I. When party has received means to take up the bill or note, 161

II. When party has received securities out of which to provide for payment, ... 161

III. When maker or acceptor has absconded, . . 173

IV. When maker or acceptor has removed his domicile to another State or a foreign country, ... 175

CHAPTER XXXV.

SPECIAL WAIVERS OF PRESENTMENT, PROTEST, AND NOTICE, AND OF THE EVIDENCE THEREOF, BY PROMISES TO PAY AND PART PAYMENTS AFTER MATURITY, ... 178

SECTION I. Waiver by promise of the drawer or indorser to pay, made after maturity, with knowledge of holder's default, 178

PAGE

SECTION II. Promise to pay as presumptive evidence of knowledge of laches, ... 184
III. Promise to pay as evidence of diligence, or waiver of proof of negligence, ... 186
IV. What amounts to acknowledgment or promise to pay, . . 191
V. Waiver by part payment after maturity, ... 193

CHAPTER XXXVI.

CIRCUMSTANCES WHICH WILL NOT EXCUSE FAILURE TO MAKE PRESENTMENT OR PROTEST, OR GIVE NOTICE, ... 196
SECTION I. The want of injury to the party, ... 196
II. The bankruptcy or insolvency of the acceptor or maker, 198
III. The loss or mislaying of the bill or note, ... 200
IV. The appointment of the drawer or indorser as executor or administrator of maker or acceptor, ... 201
V. The transfer of the bill or note as collateral security, . . 203
VI. The death of the maker or acceptor, ... 203
VII. The misdating of a bill or note by a foreign resident, . . 205

BOOK V.

ACTION ON NEGOTIABLE INSTRUMENTS; AND DEFENCES, DISCHARGES AND DAMAGES.

CHAPTER XXXVII.

ACTION OR SUIT UPON BILLS AND NOTES, ... 207
SECTION I. General principles as to who may sue, ... 207
II. Who may sue when instrument is payable to an agent, 212
III. Who may sue upon instruments payable to one party and discounted by another, ... 216
IV. Who may sue upon instruments payable to bearer, or indorsed in blank, ... 217
V. What constitutes the right to sue, and the evidence thereof, 224
VI. Who may be sued, ... 227
VII. When right of action accrues, ... 229
VIII. When right of action expires, ... 235
IX. Evidence in actions upon bills and notes, ... 239

CHAPTER XXXVIII.

PAGE

THE DISCHARGE OF BILLS AND NOTES BY PAYMENT, ... 243

SECTION I. The nature of payment, ... 243
II. Who may make payment, ... 247
III. To whom payment may be made, ... 254
IV. When payment may be made, ... 257
V. The effect of payment, and who may reissue a bill or note, 260
VI. In what medium payment may be made. The legal tender cases, ... 267
VII. Appropriation of payment, ... 273
VIII. Payment *supra protest*, or for honor, ... 277

CHAPTER XXXIX.

CONDITIONAL AND ABSOLUTE PAYMENT. TAKING BILL OR NOTE FOR OR ON ACCOUNT OF A DEBT, ... 281

SECTION I. When the presumption of payment arises from taking a bill or note, ... 281
II. Suspension of right of action by taking bill or note for or on account of a debt, ... 294
III. Rights and duties of holder of bill or note taken in conditional payment, ... 296
IV. The effect of taking a bill or note upon a lien, . . . 301

CHAPTER XL.

DISCHARGES OF BILLS AND NOTES OTHERWISE THAN BY PAYMENT, . . 305

SECTION I. Discharges of bills and notes by operation of law, . . 305
II. Discharges by agreement of the parties, ... 306
III. Discharge of a joint party, ... 311
IV. Discharge of partnership debt by bill or note of one partner, 315

CHAPTER XLI.

WHAT DISCHARGES A SURETY. THE LAW OF PRINCIPAL AND SURETY IN ITS APPLICATION TO BILLS AND NOTES, ... 319

SECTION I. Who are principals, and who sureties; and general principles of sureties' liabilities, ... 319
SECTION II. What acts of creditor discharge a surety for the debt, . 323
III. What acts of creditor will not discharge a surety, . . 341
IV. Latent sureties. Accommodation and joint parties as sureties, ... 346
V. Surety's remedies, ... 357

CHAPTER XLII.

PAGE

THE FORGERY OF NEGOTIABLE INSTRUMENTS, ... 364

SECTION I. The definition and nature of forgery, ... 364
II. Liability of party who adopts a forged signature as his own, ... 368
III. When one party is estopped from denying genuineness of another's signature, ... 373
IV. Recovery of money paid upon forged instruments, . . 385

CHAPTER XLIII.

THE ALTERATION OF NEGOTIABLE INSTRUMENTS, ... 391

SECTION I. Definition and nature of alteration, ... 391
II. Alteration of date, time, place, amount, and medium of payment, ... 394
III. Alterations in respect to the parties to the instrument, . 407
IV. Alterations in respect to the operation of the instrument, 412
V. Immaterial and authorized changes of the instrument, 418
VI. *Bona fide* holder of altered bill or note, ... 424
VII. The effect of alteration, ... 431
VIII. The burden of proof of alteration, ... 437

CHAPTER XLIV.

THE LAW OF SET-OFF IN ITS APPLICATION TO NEGOTIABLE INSTRUMENTS, 443

SECTION I. The general doctrines of set-off, ... 443
II. How far the law of set-off is applicable to negotiable instruments, ... 450

CHAPTER XLV.

EXCHANGE AND RE-EXCHANGE; AND DAMAGES UPON DISHONORED NEGOTIABLE PAPER, ... 453

SECTION I. Nature of damages and of exchange, ... 453
II. Nature of re-exchange, and drawer's liability, . . . 457
III. Indorser's and acceptor's liability for re-exchange and damages. Accumulations of re-exchange against drawer and indorser, ... 460
IV. Re-exchange and damages upon promissory notes. Other charges, ... 466

CHAPTER XLVI.

LOST AND DESTROYED BILLS AND NOTES, ... 472

SECTION I. Rights and duties of the loser, finder, and holder of a lost negotiable instrument, ... 472
II. Suit against parties to a lost negotiable instrument, 481

BOOK VI.

VARIETIES OF NEGOTIABLE INSTRUMENTS OTHER THAN BILLS AND NOTES.

CHAPTER XLVII.

PAGE

COUPON BONDS, ... 490

SECTION I. The definition and nature of coupon bonds, . . . 493
II. The formal parts of negotiable bonds and coupons, . . 497
III. The negotiability of coupon bonds, and the rights and duties of the holder or purchaser, ... 507
IV. Action on negotiable bonds and coupons, . . . 521

CHAPTER XLVIII.

THE VALIDITY OF MUNICIPAL BONDS, ... 530

SECTION I. Nature of municipal corporations, and what powers may be conferred upon them, ... 530
II. Express and implied powers of municipal corporations. When they may issue negotiable bonds, . . . 540
III. Power of a municipal officer or agent to bind the municipality. Views of the United States Supreme Court, 551
IV. How invalidity of the bond is cured by acquiescence or ratification of the municipality, ... 564
V. Correct principles as to the liability of municipal corporations upon negotiable bonds, ... 569
VI. Legislative control over municipal obligations, . . 578

CHAPTER XLIX.

THE LAW OF CHECKS, ... 590

SECTION I. What is a check, ... 590
II. Formal parts and varieties of checks. Business and memorandum checks, ... 600
III. Presentment and notice of dishonor; and protest of checks, 606
IV. Certification of checks, ... 620
V. Whose checks should be paid by the bank, . . . 632
VI. What checks should be paid by the bank, . . . 638
VII. Payment by checks, ... 652
VIII. Over-checks, ... 657
IX. Cancelled dishonored, and stale checks, ... 659

PAGE

SECTION X. Right of holder of uncertified checks to sue the bank, . 662
XI. How far a check is an assignment of the fund drawn upon, 672
XII. Checks as evidence, ... 675
XIII. Negotiability and transfer of checks, ... 678
XIV. Forgeries of checks, ... 681
XV. Alterations of checks after issue, ... 687

CHAPTER L.

BANK NOTES, ... 692
SECTION I. The definition, nature, and formal elements of bank notes, 692
II. How far bank notes are similar to money, ... 695
III. Liability of transferrer of bank notes, ... 697
IV. Rights, duties, and remedies of the holder or owner of bank notes, ... 703
V. Payment in bank notes, and set-off, ... 709
VI. Lost or destroyed bank notes, ... 712

CHAPTER LI.

CERTIFICATES OF DEPOSIT, ... 716
SECTION I. Definition, origin, and nature of certificates of deposit, 716
II. Transfer and negotiability of certificates of deposit, . 719

CHAPTER LII.

CERTIFICATES OF STOCK AND OTHER QUASI NEGOTIABLE INSTRUMENTS, . 726
SECTION I. Certificates of stock, ... 726
II. Other *quasi* negotiable instruments, ... 737

CHAPTER LIII.

BILLS OF CREDIT, ... 746
SECTION I. What are bills of credit, ... 746
II. What are not bills of credit, ... 752

CHAPTER LIV.

BILLS OF LADING, ... 755
SECTION I. Definition and nature of bills of lading, . . . 755
II. Bills of lading accompanying bills of exchange drawn on shipments, ... 768
III. The elements of a bill of lading, ... 775
IV. Transfer of bills of lading, ... 782

CHAPTER LV.

PAGE

GUARANTIES, AND THE LAW OF GUARANTY AS APPLICABLE TO NEGOTIABLE INSTRUMENTS, ... 788

SECTION I. Definition, nature, and construction of guaranties, . . 788
II. The consideration of guaranties, and the operation of the statute of frauds, ... 793
III. Forms and varieties of guaranties. Absolute and conditional guaranties, ... 799
IV. Limited and unlimited, and temporary and continuing guaranties, ... 801
V. The negotiability of guaranties, ... 805
VI. Requisites to the establishment and preservation of guarantor's liability, ... 812

CHAPTER LVI.

LETTERS OF CREDIT AND CIRCULAR NOTES, ... 820

SECTION I. Definition and nature of letters of credit, ... 820
II. To whom a letter of credit is available, and how far it is negotiable, ... 824

THE NEGOTIABLE INSTRUMENTS LAW, ... 831

INDEX, ... 869

NEGOTIABLE INSTRUMENTS.

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BOOK IV.

PROTESTS AND NOTICE; AND EXCUSES FOR WANT OF PRESENTMENT, PROTEST, AND NOTICE.

CHAPTER XXVIII.

THE PROTEST OF BILLS AND NOTES.

SECTION I.

THE NATURE AND NECESSITY OF PROTEST.

§ 926. First, as to what instruments must or may be protested.— When a foreign bill of exchange is presented for acceptance or payment, and acceptance or payment is refused, the holder must take what is called a protest, in order to charge the drawer or any indorser. According to the law of most foreign nations, a protest is essential in the case of the dishonor of any bill;[1] but by the custom of merchants in England,[2] and wherever the law merchant prevails in the United States, the protest is only necessary in the case of foreign bills;[3] though by statute in most of

1. Thompson on Bills (Wilson's ed.), 307; Hoffman v. Hollingsworth, 10 Ind. App. 353, 37 N. E. 960, citing text.

2. Orr v. Maginnis, 7 East, 359; Gale v. Walsh, 5 T. R. 239; Leftly v. Mills, 4 T. R. 170; Borough v. Perkins, 1 Salk. 131; Chitty on Bills (13th Am. ed.) [*332], 372; Byles on Bills (Sharswood's ed. [*249], 394.

3. Burke v. McKay, 2 How. 66; Young v. Bryan, 6 Wheat. 146; Union Bank v. Hyde, 6 Wheat. 372; Bailey v. Dozier, 6 How. 23; Bank of the United States v. Leathers, 10 B. Mon. 64; Hubbard v. Troy, 2 Ired. 134; McMarchey v. Robinson, 10 Ohio St. 496; Smith v. Curlee, 59 Ill. 221; Green v. Louthain,

the States inland bills and promissory notes may be protested in like manner.[4] So indispensable is the protest of a foreign bill in case of its dishonor, that no other evidence will supply the place of it, and no part of the facts requisite to the protest can be proved by extraneous testimony,[5] and it has been said, that it is a part of the constitution of a foreign bill.[6] But, while the practice is usually followed to protest inland bills and notes, under the permissive statutes, it is not a practice which makes it incumbent to protest them; and the holder may waive the privilege if he choose to do so, and produce other evidence of dishonor.[7]

§ **927.** The requisition of a protest in the case of foreign bills was in order to afford authentic and satisfactory evidence of due dishonor to the drawer, who, from his residence abroad, would experience a difficulty in making proper inquiries on the subject, and be compelled to rely on the representations of the holder. "It also," observes a distinguished author, "furnishes an indorsee with the best evidence to charge an antecedent party abroad; for foreign courts give credit to the acts of a public functionary in the same manner as a protest under the seal of a foreign notary is evidence in our courts of the dishonor of a bill payable

49 Ind. 139; Ocean Nat. Bank v. Williams, 102 Mass. 141; Phœnix Bank v. Hussey, 12 Pick. 483; Gilman v. First Nat. Bank of New York, 63 Hun, 480, 18 N. Y. Supp. 495, citing text; Citizens' Sav. Bank v. Hays, 96 Ky. 365, 29 S. W. 20; Wood River Bank v. First Nat. Bank, 36 Nebr. 744, 55 N. W. 239.

4. See Virginia Code of 1873, chap. 141, p. 987, §§ 7, 8, wherein it is provided: "§ 7. Every promissory note, or check for money payable in this State, at a particular bank, or at a particular office thereof, for discount or deposit, or at the place of business of a savings institution or savings bank, or at the place of business of a licensed broker, and every inland bill of exchange, payable in this State, shall be deemed negotiable, and may, upon being dishonored for nonacceptance or nonpayment, be protested, and the protest be in such case evidence of dishonor, in like manner as in the case of a foreign bill of exchange.

"§ 8. The protest, both in the case of a foreign bill and in the other cases mentioned in the preceding section, shall be *prima facie* evidence of what is stated therein, or at the foot, or on the back thereof, in relation to presentment, dishonor, and notice thereof." Ashe v. Beasley & Co., 6 N. Dak. 192, 69 N. W. 188.

5. Union Bank v. Hyde, 6 Wheat. 572; Carter v. Union Bank, 7 Humphr. 548.

6. Borough v. Perkins, 1 Salk. 121, 2 Ld. Raym. 992; Chitty on Bills (13th Am. ed.) [*333], 373; Edwards on Bills, 581.

7. Bailey v. Dozier, 6 How. 23; Wanger v. Tupper, 8 How. 234; 2 Rob. Pr. (new ed.) 121; Hoffman v. Hollingsworth, 10 Ind. App. 353, 37 N. E. 960, citing text.

abroad." [8] Such was the convenience of evidence in this form, obviating the necessity of the attendance of witnesses, and preserving their testimony where otherwise it might be lost by death or removal, that it became common to protest inland bills, and promissory notes as well; and the holder was often disappointed in finding that such protest was not evidence of dishonor.[9] This led to a very general enactment of statutes authorizing protests in such cases; and giving them the like effect as in cases of foreign bills.

The law merchant requires a protest and notice only in cases of bills negotiable by the custom of merchants.[10] Bills payable "in currency," or any other medium than legal money, are not of this character, and therefore no protest is necessary, nor is it, unless by statute, evidence of any fact therein stated.[11]

§ **928. Foreign promissory notes.**— In the case of promissory notes executed in one State or country, and payable in another, no notice, of course, is necessary to charge the maker; and if there be no indorser there can be no analogy between the note and a bill. But as soon as a promissory note is indorsed it becomes closely assimilated to a bill, the maker being primarily liable, like the acceptor, and the indorser, secondarily, like the drawer. It is often said that every indorser is a new drawer, and, in fact, the indorser's obligation is precisely like that of the drawer on an accepted bill. Therefore, when an indorsed note is payable in a State or country different from the one where it is drawn — perhaps more especially when the indorser is not of the State or country where it is payable, though no distinguishing difference, it seems to us, exists — almost every consideration of convenience which would make a protest necessary and competent evidence of presentment and notice, in case of a foreign bill, would recognize it as equally competent in respect to the indorser of the note. It has been well said that "the similarity between the indorsement of notes, and the drawing and indorsement of bills of exchange is so great, that there can be no sound reason given for establishing or preserving a distinction between them, and re-

8. Byles on Bills (Sharswood's ed.) [*249], 395; Ashe v. Beasley & Co., 6 N. Dak. 192, 69 N. W. 188, citing text.

9. 2 Rob. Pr. (new ed.) 181.

10. Kampmann v. Williams, 70 Tex. 571.

11. Bank of Mobile v. Brown, 42 Ala. 108; Ford v. Mitchell, 15 Wis. 304.

quiring a different character of evidence to prove the same facts with regard to two instruments, which, though different in some respects as to their phraseology, are so essentially similar in their nature and operations." [12] And there are well-considered cases sustaining it.[13] This view has been taken in Kentucky, respecting an indorsed certificate of deposit.[14]

There are cases in which the converse view has been taken, it being considered that the certificate of protest of a promissory note is a document unknown to the law; and although the note be payable in a foreign place, is inadmissible;[15] and although the argument *ab inconveniente* is strong against this rejection of such testimony, in strict law, it seems to us, it must be excluded.[16] A general usage would probably be controlling.[17]

§ **929. As to the meaning of protest,** the term includes, in a popular sense, all the steps taken to fix the liability of a drawer or indorser, upon the dishonor of commercial paper to which he is a party.[18] More accurately speaking, it is the solemn declaration on the part of the holder against any loss to be sustained by him by reason of the nonacceptance, or even nonpayment, as the case may be, of the bill in question; and a calling of the notary to witness that due steps have been taken to prevent it.[19] The word "protest" signifies to testify before; and the testimony before

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12. Parker, C. J., in Williams v. Putnam, 14 N. H. 540; Carter v. Burley, 9 N. H. 558; Smith v. Little, 10 N. H. 526; Edwards on Bills, 584; Brown v. Wilson, 45 S. C. 519, 23 S. E. 630, 55 Am. St. Rep. 779, citing text.

13. Ticonic Bank v. Stackpole, 41 Me. 302, held admissible at common law.

14. Piner v. Clary, 17 B. Mon. 645.

15. Kirtland v. Wanzer, 2 Duer, 278.

16. In Corbin v. Planters' Nat. Bank, 87 Va. 664, 13 S. E. 98, 24 Am. St. Rep. 673, Lewis, P., citing text, said: "The rule does not extend to promissory notes and inland bills. As to these the protest is not regarded as an official act and accordingly, in the absence of statute, is not receivable as evidence of dishonor; and where a State statute makes the certificate of protest when executed by a notary of that State evidence of dishonor in such cases, it does not authorize the notary to act beyond its notarial limits or accord the same effect to his account when beyond them." § 959; 96 Am. Dec. 608.

17. See Burke v. McKay, 2 How. 66.

18. Townsend v. Lorain Bank, 2 Ohio St. 345; Coddington v. Davis, 1 N. Y. 186; Wolford v. Andrews, 29 Minn. 251, citing the text; Ocoee Bank v. Hughes, 2 Coldw. 52; The Johnson, etc., Bank v. Lowe, 47 Mo. App. 151, citing text.

19. Walker v. Turner, 2 Gratt. 536; Chitty on Bills (13th Am. ed.) [*458], 516; Swayne v. Britton, 17 Kan. 629.

the notary that proper steps were taken to fix the drawer's liability is the substance, and the certificate of the notary the formal evidence, to which the term "protest" is legally applicable.

§ 930. Protest for nonacceptance.— According to the English law, the protest must be made in the case of dishonor by nonacceptance[20] as well as dishonor by nonpayment. And the same rule prevails in the United States,[21] although it was decided by the Supreme Court of the United States, in an action on a protest for nonpayment of a foreign bill, that a protest for, or notice of, nonacceptance, need not be shown, inasmuch as they were not required by the custom of merchants in this country.[22] But the English rule has been deemed the most consistent with commercial policy by the highest authorities, and Story and Kent adopt it as the true one; the former observing that the decisions of the Supreme Court, if they would now be held law by that court, would be so held only upon the ground of the local law of Pennsylvania (to which State the decisions appertained), as to bills drawn or payable there.[23]

§ 931. As to what constitutes a refusal to honor a bill, which will authorize or require a protest, a distinction exists between the dishonor for nonacceptance and dishonor for nonpayment. If the drawee accepts the bill, he is bound to provide for its payment at maturity; and if the holder present it at his home or place of business at maturity, and finds that he has absented himself, and left no one with funds to meet it, such conduct is in itself a refusal to pay, and the bill may be at once protested (and, if foreign, must be), and notice given. But absence from home or place of business, without leaving any one to accept a bill, is not a refusal to accept, for the drawee may not be aware that the

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20. Gale v. Walsh, 5 T. R. 239; Benjamin's Chalmers' Digest, 176; 2 Ames on Bills and Notes, 114.

21. Thompson v. Cumming, 2 Leigh, 321; Mason v. Franklin, 3 Johns. 202; Watson v. Loring, 3 Mass. 557; Phillips v. McCurdy, 1 Harr. & J. 187; Sterry v. Robinson, 1 Day, 11; Winthrop v. Pepoon, 1 Bay, 468; Allen v. Merchants' Bank, 22 Wend. 215; Story on Bills, § 273; Edwards on Bills, 444; 2 Ames on Bills and Notes, 114.

22. Brown v. Barry, 3 Dall. 365; Clarke v. Russell, 3 Dall. 295, followed in Pennsylvania, in Read v. Adams, 6 Serg. & R. 358.

23. Kent Comm. 95; Story on Bills, § 273, note; Edwards on Bills, 448; Chitty on Bills (13th Am. ed.) [*332], 372.

bill is drawn, and is not bound (in the absence of a promise to accept) to be prepared for its presentment.[24]

§ **932.** There is no difference in respect to the necessity for protest whether the bill be payable at a certain time after date or after sight, for, although it is not necessary to present a bill payable at a certain time after date until its maturity, yet, if such a bill be presented for acceptance and dishonored, it is necessary to make protest and give notice, in order to charge drawer or indorsers.[25] If a bill has been protested for nonacceptance, and its dishonor duly notified, it is not necessary to present it again for payment, and protest it separately for nonpayment, or to give separate notice of nonpayment.[26] But there may be a subsequent protest for nonpayment at maturity.[27]

§ **933. Notarial charges.**—It is considered by high authority that notarial charges are not a legal charge except where the protest is required by the law merchant, although it is certainly usual to pay them where they are reasonable, and made in good faith, and in conformity with usage.[28] It being an entirely unnecessary act to protest an inland bill or a note in order to charge the drawer or an indorser, and purely voluntary and for his own convenience on the part of the holder, there is obvious force in this suggestion. But it is, doubtless, in almost every case the cheapest, easiest, and safest way of proving notice. The defendant would be chargeable with costs of other testimony more cumbrous and more expensive, where liable, and custom has so extensively sanctioned the practice, that we anticipate the courts will be slow to hold that it is not a legitimate charge, in cases where there is a drawer or indorser to charge by notice.[29] But where there is no drawer or indorser to charge, the protest would

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24. Bank of Washington v. Triplett, 1 Pet. 35. See *ante*, § 589, vol. 1.

25. Bank of Washington v. Triplett, 1 Pet. 25; United States v. Barker, 4 Wash. C. C. 464; O'Keefe v. Dunn, 6 Taunt. 305, 5 Maule & S. 282; Story on Bills, § 273.

26. De la Torre v. Barclay, 1 Stark. (part 2) 7; Thompson on Bills (Wilson's ed.), 308.

27. Campbell v. French, 6 T. R. 200; Chitty, Jr., on Bills, 541.

28. 1 Parsons on Notes and Bills, 646; Johnson v. Bank of Fulton, 29 Ga. 260; Legg v. Vinal, 165 Mass. 555, 43 N. E. 518, citing text in regard to notarial charges allowed in above case under Stat. 1880, chap. 4; Pub. Stats. 77, § 22.

29. Merritt v. Benton, 10 Wend. 117.

be useless, and notarial fees could not be recovered,[30] unless, indeed, the protest were authorized by statute, in which case a different rule might perhaps be applicable.

SECTION II.

BY WHOM AND WHERE PROTEST SHOULD BE MADE.

§ **934. By whom the protest should be made.**—As to the person by whom the protest should be made, it is necessary, as a general rule, that it should be made by a notary public in person,[31] and by the same notary who presented and noted the bill.[32] The notary is a public officer, commissioned by the State, and possessing an official seal, and full faith and credit are given to his official acts, in foreign countries as well as his own.[33]

§ **934a. But when no notary can be conveniently found,** the protest may be made by any respectable private person of the place where the bill is dishonored.[34]

In England it is required by statute that, in case of inland bills, the protest by a private person shall be made in the presence of two or more credible witnesses.[35] And it has been said that when a private person protests a bill, it should be done in the presence of two witnesses.[36] Certainly it is sufficient if it be so

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30. German v. Ritchie, 9 Kan. 110; Noyes v. White, 9 Kan. 640; Cramer v. Eagle Mfg. Co., 23 Kan. 400. An agreement between a bank and a notary public whereby it is agreed between them that in consideration of the notary's employment he will accept in full payment for his services in protesting the bank's negotiable paper, one-half the usual and legal fees charged for such work, is void for want of consideration and also upon the ground that it is against public policy. Ohio Nat. Bank v. Hopkins, 8 App. D. C. 146.

31. Cribbs v. Adams, 13 Gray, 597; Ocean Nat. Bank v. Williams, 102 Mass. 141; *ante*, §§ 579, 587; Sacriber v. Brown, 3 McLean, 481.

32. Commercial Bank v. Varnum, 49 N. Y. 269; Commercial Bank v. Barksdale, 36 Mo. 563; 2 Ames on Bills and Notes, 450, 863.

33. See chapter XX, on Presentment for Payment, section I, vol. I, §§ 579, 587. And accordingly it has been held that as a general rule a bank is not responsible for a malicious protest made and published by a notary public employed by it — such notarial acts being that of a public officer. See May v. Jones, 88 Ga. 308, 14 S. E. 552, 30 Am. St. Rep. 154, note.

34. Burke v. McKay, 2 How. 66; Read v. Bank of Kentucky, 1 T. B. Mon. 91.

35. 9 & 10 William III, chap. 17.

36. Bayley on Bills (5th ed.), 258. No authority is referred to; and "*Quære*, if not confined to inland bills," say the editors of Chitty. Chitty on Bills [*333], 374, note *u*. In Todd v. Neal's Admr., 49 Ala. 273, it is said by

made,[37] but it does not appear to be necessary to require witnesses to the protest of a foreign bill by a private person.[38] The notary to whom the bill or note is given for protest is bound to follow the instructions given him, and it is not his duty to determine whether or not it should be protested on a certain day. If he follows instructions he is not liable to any person for any irregularity in its course.[39]

§ **935. Where the protest should be made.**— As to the place of protest it is usually made at the place where the dishonor occurs.[40] When the protest is for nonacceptance, the place of protest should be the place where the bill is presented for acceptance.[41] But when the bill is drawn upon the drawees in one place, and is payable in another, the question has arisen, whether the protest should be at the place of acceptance or place of payment. Mr. Chitty says, in respect to protest for nonpayment, that "if a bill be drawn abroad, directed to the drawee at Southampton or any other place, requesting him to pay the bill in London, the protest for nonacceptance may be made either at Southampton or in London."[42] But as the presentment for acceptance must be at the former place, it would be better to make the protest for nonacceptance there also.[43] It has been held that it is sufficient if the protest for nonpayment, where there has been a refusal to accept, be made at the place of the drawee's residence;[44] and in

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Peters, J.: "If there be no legal notary there, on demand and refusal of payment, it is sufficient if the protest be made out and drawn up by a respectable inhabitant of the place where the bill is payable, in the presence of two witnesses."

37. Story on Bills, § 276; 1 Parsons on Notes and Bills, 633; Byles on Bills (Sharswood's ed.) [*249], 395.

38. Brooks' Notary, 103; Chitty on Bills (13th Am. ed.) [*333], 374, note *u*.

39. Commercial Bank v. Varnum, 7 Hun, 236, 49 N. Y. 269.

40. Chitty on Bills (13th Am. ed.) [*170], [*456]; Benjamin's Chalmers' Digest, 175; 2 Ames on Bills and Notes, 450; Edwards on Bills, 580; Bigelow on Bills, 275; Byles on Bills (Sharswood's ed.) [*250], 396. See *post*, § 936.

41. Story on Bills, § 282.

42. Chitty on Bills (13th Am. ed.) [*334], 374.

43. Thompson on Bills, 308; Mar. 107, 108.

44. Mitchell v. Baring, 4 Car. & P. 35, 10 B. & C. 8 (19 Eng. C. L. 261). The Code of Virginia, chap. 144, § 2, provides as follows: "If a bill of exchange, wherein the drawer shall have expressed that it is to be payable in any place other than that by him mentioned therein to be the residence of the drawee, shall not, on the presentment thereof for acceptance, be accepted, such bill may, without further presentment to the drawee, be pro-

England, it being conceived that the decision cast a doubt upon the legality of making protest at the place specified for payment, the statute 2 and 3 William IV., c. 98, was enacted, declaring that a protest at the place of payment in case of a refusal to accept, without further presentment to the drawee, should be sufficient. It is conceived that this statute was merely declaratory of the common law. Where there has been an acceptance by the drawee in one place, to pay in another, the latter would seem to be clearly the place at which the protest should be made.[45]

§ 936. As to the law controlling the protest: it should be made according to the law of the place of presentment for acceptance, if it be for nonacceptance, or of the law of the place where the bill is payable, if it be for nonpayment; in other words, according to the law of the place where the dishonor occurs.[46]

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tested for nonpayment in the place in which it shall have been by the drawer expressed to be payable, unless the amount thereof be paid to the holder on the day on which the will would have become payable had it been duly accepted." This section was first incorporated in the Code of 1849, upon recommendation of the revisers, who said in their report to the General Assembly: "It is a general rule of law that the protest for nonpayment is to be at the place where the drawee resides. In Mitchell, etc. v. Baring, etc., 4 Car. & P. 35, 19 Eng. C. L. 261, 10 B. & C. 4, 21 Eng. C. L. 12, the drawer of a bill made in America had expressed that it was to be payable in London, yet Liverpool was mentioned therein as the residence of the drawee; on the presentment thereof for acceptance, it was not accepted, and the protest for nonpayment was at Liverpool. Under particular circumstances appearing in the case, this protest was held sufficient; the general question whether, if the acceptance had been in the usual form, a protest in London would have been sufficient, was left undecided. It appeared from the evidence of several witnesses, some of them notaries and others merchants, that, where a foreign bill, drawn upon a merchant residing at Liverpool, payable in London, was refused acceptance by the drawee, the usage was to protest it for nonpayment in London. Yet, though this was the usage, the doubt arose after the decision in Mitchell, etc. v. Baring, etc., whether such usage would be sustained by the courts, and the statute of 2 and 3 Wm. IV., chap. 98, was passed to remove the doubt. We propose, it will be perceived, to adopt the same statute in Virginia." Report of Revisers, p. 719. See *ante*, § 651, vol. 1.

45. Story on Bills, § 284; Thompson on Bills (Wilson's ed.), 309.

46. Shanklin v. Cooper, 8 Blackf. 41; Turner v. Rogers, 8 Ind. 139; Carter v. Union Bank, 7 Humphr. 548; Onondaga County Bank v. Bates, 3 Hill (N. Y.), 53; Rothschild v. Currie, 1 Q. B. 43; Brown v. Jones, 25 N. W. 454, citing the text; *ante*, § 935. See chapter XXVII, vol. I, section IX; Bigelow on Bills, 275; Wharton on Evidence, § 123; Brown v. Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227, citing with approval the text.

SECTION III.

FORMAL MAKING, PREPARATION, AND AUTHENTICATION OF PROTEST.

§ **937.** As to the formality of making protest, and preparing the certificate thereof, it generally comprises three distinct steps: (1), Making the presentment, and demand of payment; (2), Noting the dishonor; and, (3), Extending the protest.

§ **938. (1) The presentment and demand of payment.**— The first step taken is the presentment of the instrument to the drawee, or acceptor, or maker, by the notary, and a demand of payment. By the law merchant, it is absolutely necessary that the notary himself should make this formal presentment and demand. And, although the holder may have already presented the bill and demanded acceptance or payment, and been refused, it is still necessary that the presentment and demand, which are to be made the basis of the notary's certificate, should be made by him in person. For otherwise his testimony contained in the protest would be hearsay and secondary, and would lack the very element of certainty which the protest is especially designed to assure. Not even his clerk, nor, unless authorized by law, his deputy, can perform these functions for the notary, as it is to his official character that the law imputes the solemnity and sanction which are accorded his certificate. The authorities on this subject are collated in the chapter on "Presentment for Payment," in the first volume of this work.[47]

§ **939. (2) Noting the dishonor.**— As soon as the presentment and demand have been made, or at some seasonable hour during the same day, the notary makes a minute on the bill, on a ticket attached thereto, or in his book of registry, consisting of his initials; the month; the day; the year; the refusal of acceptance or payment; the reason, if any, assigned for such refusal; and his charges of protest. This is the preliminary step toward the protest, which may be afterward written out in full — extended, as the elaboration of these minutes is termed — and it is called noting.[48] "Noting," it was said in an early case, "is un-

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47. Chapter XX, section I, §§ 579, 587.

48. Benjamin's Chalmers' Digest, 173; Chitty on Bills (13th Am. ed.) [*333], 373; Byles on Bills (Sharswood's ed.) [*251]; 1 Parsons on Notes and Bills, 644; Bigelow on Bills, 275; Edwards on Bills, 461.

known to the law, as distinguished from the protest; it is merely a preliminary step to the protest, and has grown into practice within these few years." [49] But it is now quite well established in England, Scotland, and the United States, that the noting is a kind of "initial protest," as Thompson aptly terms it, not self-sufficient as a protest, but sufficient in the meantime, if the certificate of protest is regularly extended afterward.[50] It must be made on the very day of dishonor by nonacceptance or nonpayment, otherwise it cannot be made the basis of the extended protest.[51] For the notary will not be permitted to trust to his memory for the requisite particulars. It is to his contemporaneous written statement that the law gives credit.[52] Where, in Scotland, the original protest could not be used, because not properly stamped, it was allowed to be used as a note for extending a valid protest,[53] and it seems unimportant in what particular form the noting is done.

§ 940. (3) Extending the protest.— The extension of the protest is the completion of the instrument of protest, from minutes or "initial protest," as they are called, noted down on the day of dishonor. This extension may be made at any time. As said by Lord Kenyon: "If the bill was regularly presented, and noted at the time, the protest might be made at any future period," [54] and it is well settled to this effect in the United

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49. Leftly v. Mills, 4 T. R. 170, Buller, J.

50. Chaters v. Bell, 4 Esp. 48; Geralopulo v. Wieler, 10 C. B. 690, 3 Eng. L. & Eq. 515; Edwards on Bills, 581; Thompson on Bills (Wilson's ed.), 311; Story on Bills (Bennett's ed.), § 278.

51. Dennistoun v. Stewart, 17 How. 606; Buller N. P. 373; Thompson on Bills (Wilson's ed.), 315; Leftly v. Mills, 4 T. R. 170, Buller, J.

52. Thompson on Bills, 312; Benjamin's Chalmers' Digest, 174; Story on Bills, §§ 278, 283; Bayley on Bills, chap. 7, § 2, pp. 266, 267; Bigelow on Bills, 275; Chitty, Jr., on Bills, 62; Chitty on Bills (13th Am. ed.) [*336], 377; Byles on Bills (Sharswood's ed.) *250. In Buttler v. Play, 1 Mod. 27 (1669); Chitty, Jr., on Bills, p. 161, it is said that protest "must regularly be the day of the bill due, especially if the party be not present on the place." In a note to Benjamin's Chalmers' Digest, p. 174, it is said (citing Brooks' Notary, p. 80), that in practice, foreign bills are frequently not noted till the day after their dishonor, and that "it is conceived that if the bill has been duly presented this is sufficient." But this is against the current of authority, and is not the accepted view.

53. Thompson on Bills, 312.

54. Chaters v. Bell, 4 Esp. 48 (1801). To same effect, Geralopulo v. Wieler, 10 C. B. 690, 3 Eng. L. & Eq. 515; Robins v. Gibson, 1 Maule & S. 288; Chitty

States.[55] The extension may be made even at any time before suit is brought,[56] or after trial has commenced, and when made, it is antedated, as of the day when the initial protest was made.[57] And if the certificate of protest has been lost, a second may be given by the notary, and read in evidence with the same force and effect as the original.[58]

In Scotland, the extension of a protest was permitted fifteen years after noting.[59]

§ 941. In cases of payment supra protest.— It has been contended that in the case of payment for honor, which must be made *supra protest,* the formal extension of the protest must be made before the payment, on the ground that unless this were done, the allegation that the bill was continued and paid under protest would not be proved, inasmuch as the protest should be understood to mean such protest as would give a right of action to the person paying for honor. But this distinction is not recognized.

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on Bills (13th Am. ed.) [*336], 377; Bigelow on Bills, 275; Benjamin's Chalmers' Digest, 174; Story on Bills, 278; 1 Parsons on Notes and Bills, 644, note; Byles on Bills (Sharswood's ed.), *250; Chitty, Jr., on Bills, 62; Goostrey v. Mead, Buller N. P. 271, cited in Orr v. Maginnis, 7 East, 358 (*semble*); Commercial Bank v. Barksdale, 36 Mo. 563.

55. Bailey v. Dozier, 6 How. 23; Bank of Decatur v. Hodges, 9 Ala. 631; Cayuga County Bank v. Hunt, 2 Hill, 635.

56. Dennistoun v. Stewart, 19 How. 606; Brooks' Notary, 97; Orr v. Maginnis, 7 East, 358 (*semble*).

57. In Byles on Bills [*250], 396, it is said: "The protest of a foreign bill should be begun at least (and such an incipient protest is called noting) on the day on which acceptance or payment is refused; but it may be drawn up and completed at any time before the commencement of the suit, or even during the trial, and antedated accordingly." To same effect, see Thompson on Bills (Wilson's ed.), 312. That it may be at any time before trial, see Story on Bills (Bennett's ed.), § 278, citing Geralopulo v. Wieler, 3 Eng. L. & Eq. 515, 10 C. B. 690. That it may be at any time. Benjamin's Chalmers' Digest, 174. "It is not too late to make it after the bringing of suit, and in the course of trial." Bigelow on Bills, 275. Chitty says: "It is said it should be made before the commencement of suit." Chitty on Bills (13th Am. ed.) [*477], 540. Prof. Ames says in vol. 2, Bills and Notes, 860: "The dictum in Dennistoun v. Stewart, that the protest may be drawn up at any time before trial, cannot be defended upon principle." But the text is supported by the general tenor of authority, and we can perceive no sound doctrine that it trenches upon.

58. Kellam v. McKoon, 38 N. Y. S. C. 519.

59. Alexander v. Scott, Thompson on Bills, 312.

It is true that the declaration that the payment was made for honor must precede the protest, and that the noting of such declaration and of the dishonor must be then made, and that unless the declaration were then made, no after act could give to the payment the character of payment *supra protest.*[60] But the protest in this, as in other cases, may be extended at any time, provided it was duly noted.[61]

§ **942.** When there is a protest for nonacceptance, and subsequently a protest for nonpayment, it is not sufficient to simply note the bill for nonacceptance, and extend only the protest for nonpayment; but wherever proof of protest is requisite, the extended protest alone will suffice.[62]

§ **943. Copy of protest, and of instrument protested.**— If the drawer reside abroad, it has been said that a copy, or some memorial of the protest, should accompany the notice of dishonor.[63] But it is now well settled, that it is only necessary for the drawer or indorser to receive a notice of the protest, without any copy or memorial of the instrument itself, in order to fix his liability, the protest not being necessary until the trial.[64]

§ **944.** It is usual, and highly important, to prefix a copy of the bill or note, with all indorsements thereon, *verbatim et literatim,* to the instrument of protest, for the purpose of identifying the bill or note with certainty, and indicating to the drawer or indorsers what party is entitled to payment.[65]

§ **945. How the protest is authenticated or proved.**— The official seal of a notary attached to the certificate of protest is everywhere received as a sufficient *prima facie* proof of its authenticity. The courts take judicial notice of the seal, and it proves itself by its

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60. Vanderwall v. Tyrrell, 1 Moody & M. 87.

61. Geralopulo v. Wieler, 10 C. B. 690, 3 Eng. L. & Eq. 515.

62. Rogers v. Stephens, 2 T. R. 713; Orr v. Maginnis, 7 East, 359.

63. Byles on Bills (Sharswood's ed.) [*252], 399.

64. Goodman v. Harvey 4 Ad. & El. 870 (31 Eng. C. L.); Robins v. Gibson, 1 Maule & S. 288; Cromwell v. Hynson, 2 Esp. 511; *Ex parte* Lowenthal, L. R., 9 Ch. 591; Dennistoun v. Stewart, 17 How. 606; Lenox v. Leverett, 10 Mass. 1; Wells v. Whitehead, 15 Wend. 527; Wallace v. Agry, 4 Mason, 336; Chitty on Bills (13th Am. ed.) [*344], 375; Bigelow on Bills, 275; 2 Ames on Bills and Notes, 115; *post,* § 986.

65. Story on Bills, § 276; Chitty on Bills (13th Am. ed.) [*458], 517.

appearance upon the certificate.[66] But it may be controverted as false, fictitious, or improperly annexed.[67]

§ **946.** It is not always essential to the admissibility in evidence of the certificate of protest that it should be under the notary's seal; nor is it essential in all cases, as already seen, that it should be made by the notary in person; but in either of these cases it does not prove itself, and there must be extraneous evidence to show that it was duly made by the person officiating, and is sufficient without a seal, according to the laws of the country where it was made.[68] In some cases it has been held that a notary's certificate of protest is sufficient without a seal, the law giving full effect as evidence to his protestations and attestations;[69] while other authorities hold that by the law merchant the notary's seal is an essential part of the certificate protest, and that without such seal the certificate is insufficient as proof of protest.[70]

§ **947.** An impression of the notarial seal on the paper of the protest is *prima facie* sufficient, and it will be presumed to have been affixed according to the laws of the country where the dishonor occurred until there is something to impeach it.[71] But it seems that a mere scrawl would not be.[72] The use of wax, or some other adhesive substance, in making the seal has long since ceased to be regarded as important, and in the absence of positive legal requirement, an impression on the paper is now deemed sufficient.[73]

§ **948.** It is well settled that where the laws of the State in which the protest is made require that it shall be made under the

66. Nichols v. Webb, 8 Wheat. 326; Townsley v. Sumrall, 2 Pet. 170; Dickens v. Beal, 10 Pet. 582; Pierce v. Indseth, 106 U. S. 549; Mullen v. Morris, 2 Barr, 86; Nelson v. Fotterall, 7 Leigh, 180; Carter v. Burley, 9 N. H. 558; Bryden v. Taylor, 2 Harr. & J. 399; Bank of Kentucky v. Pursley, 3 T. B. Mon. (Ky.) 240; Bradley v. Northern Bank, 60 Ala. 258; Douglas v. Bank, 97 Tenn. 133, 36 S. W. 874, citing text; Brennan v. Vogt & Son, 97 Ala. 647, 11 So. 893.

67. Ibid.

68. Carter v. Burley, 9 N. H. 558; Chanoine v. Fowler, 3 Wend. 173.

69. Bank of Kentucky v. Pursley, 3 T. B. Mon. 240 (1826); Huffaker v. National Bank, 12 Bush, 287 (1876), Lindsay, C. J., saying: "The notary being an officer of this State, his official signature is all that is required to the protest." Lambeth v. Caldwell, 1 Rob. (La.) 61.

70. Donegan v. Wood, 49 Ala. 251–252. See 2 Parsons on Notes and Bills, 634; Story on Bills, § 277; Kirksey v. Bates, 7 Port. 529.

71. Carter v. Burley, 9 N. H. 558; Conolly v. Goodwin, 5 Cal. 220; Bank of Manchester v. Slason, 13 Vt. 334; Bradley v. Northern Bank, 60 Ala. 258.

72. Carter v. Burley, 9 N. H. 558. See Donegan v. Wood, 49 Ala. 251.

73. Pierce v. Indseth, 106 U. S. 548; Pillow v. Roberts, 13 How. 472.

notary's seal, it will not be received in evidence in another State without such seal, and no other mode of authentication is available.[74]

§ **949.** The protest should be signed by the notary; but if his act, in fact, it may be signed by his clerk in his name, or may be in printing, it being requisite only that it should be by his authority.[75]

SECTION IV.

CONTENTS OF PROTEST.

§ **950.** The protest, or, more strictly speaking, the notarial certificate thereof, should set forth: (1) The time of presentment; (2) the place of presentment; (3) the fact and manner of presentment; (4) the demand of payment; (5) the fact of dishonor; (6) the name of the party by whom presentment was made; and (7) the name of the person to whom presentment was made. And in respect to notice, it should state: (1) The person notified; (2) the manner of notification; and (3) when not served on the party in person, it should specify distinctly whether it was delivered at his house or place of business; or, if sent by mail, that it was addressed to the post-office nearest to him, or at which he usually received his business letters.[76] These, at least, are the elements of a regular and perfect protest. The admissibility of the protest as evidence of notice, and its statements in reference to notice, are considered under a separate head.

§ **951. As to the time.**— It is essential that the time of presentment and demand should be stated, for otherwise it cannot appear from the certificate that the bill was duly dishonored. And if it state that the bill was "this day protested," and is dated on a day previous to, or after, the day of maturity, it is invalid upon its face.[77]

It is better to state that the presentment and demand were made during the usual hours of business, but where the hour of the day

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74. Ticknor v. Roberts, 11 La. 14; Bank of Rochester v. Gray, 2 Hill (N. Y.), 227; Wharton's Conflict of Laws, § 699*a*.

75. Fulton v. McCracken, 18 Md. 528.

76. Insurance Co. v. Wilson, 29 W. Va. 550, citing the text; Union Nat. Bank of Troy v. Williams Milling Co., 117 Mich. 535, 76 N. W. 1, citing text.

77. Walmsley v. Acton, 44 Barb. 312. See *post*, § 984.

is not stated, it will be presumed that they were made at the proper time of day.[78]

§ **952. As to the place.**— If the bill is not payable at a particular place, it is not absolutely necessary to state at what place the presentment and demand were made; but if it were payable at a bank, or other specified place, the certificate is insufficient unless it state presentment and demand at such place.[79]

§ **953. As to the manner and fact of presentment and demand.**— The presentment of the bill and the demand of payment should be separately stated. The usual expression of the certificate is, that the notary "did exhibit said bill," and it is certain that there must be some expression importing *ex vi termini* that the bill was presented to the drawee or acceptor.[80] The mere statement that payment was "demanded" has been held by the United States Supreme Court to be insufficient in itself, because not necessarily implying a "presentment also."[81] But there can be no legal demand without presentment, and the term "demanded" has been considered sufficient in Louisiana.[82] The mere statement of "presentment" is not in itself sufficient without also a statement of demand.[83]

§ **954. As to the fact of dishonor.**— The dishonor of the bill must be stated, and it is usually expressed in the phrase that the person to whom it was presented "answered that it would not be accepted or paid," or that such person "refused to accept or pay it," or some such language. If it does not, in some terms, inform the party of the dishonor, it is fatally defective.[84] But it is not material what words are used. If it states that the reason of pro-

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78. Burbank v. Beach, 15 Barb. 326; De Wolf v. Murray, 2 Sandf. 166; Cayuga County Bank v. Hunt, 2 Hill, 227; Skelton v. Dunston, 92 Ill. 49.

79. People's Bank v. Brooke, 31 Md. 7; May v. Jones, 88 Ga. 308, 14 S. E. 552, 30 Am. St. Rep. 154, note, citing text; Union Nat. Bank of Troy v. Williams Milling Co., 117 Mich. 535, 76 N. W. 1, citing text.

80. Union Bank v. Fowlkes, 2 Sneed, 555; Bank of Vergennes v. Cameron, 7 Barb. 143.

81. Musson v. Lake, 4 How. 262, Woodbury and McLean, JJ., dissenting on this point; Knickerbocker Life Ins. Co. v. Pendleton, 115 U. S. 347.

82. Nott v. Beard, 16 La. 308.

83. Nave v. Richardson, 36 Mo. 130; Farmers' Bank v. Allen, 18 Md. 475.

84. Taylor v. Bank of Illinois, 7 T. B. Mon. 576; Arnold v. Kinloch, 50 Barb. 44; Littledale v. Maberry, 43 Me. 264.

test was nonpayment, it is sufficient.[85] If it does not show that at the time it was made, the time for payment had expired, it has been held insufficient to show dishonor, and to charge the drawer with payment of the bill.[86]

§ **955. As to the name of the person** upon whom demand was made, it should be stated, especially when it was not made at the place of business of the drawer or acceptor. In the latter case, it is sufficient to describe the person as a clerk, or person in charge.[87] If a firm were the drawer or acceptor, it would be fatally defective in not stating the name of the person on whom demand was made, as well as that he was a member of the firm.[88]

If the bill is payable at a bank, nothing more need be stated than that the notary presented it and demanded payment at the bank, and that it was refused, without stating the name of the person or officer of the bank to whom it was presented.[89]

§ **956.** The certificate frequently states the name of the party who requests the protest to be made, and who looks to the drawer or indorser for payment; but this is not necessary.[90]

§ **957.** It is said to be important that the reasons given by the drawee for nonacceptance or nonpayment should be stated in the certificate of protest;[91] and it may be usual to do so. But the reasons for a refusal to accept or pay, while they may sometimes be of such a character as to excuse protest or notice, as against the drawer, are not an essential part of the protest, and it makes no difference if they are not stated.

§ **958.** No mere verbal inaccuracy or mistake in the certificate of protest will vitiate it, if in fact the protest was properly made and the notice given. Thus, a misdescription of the acceptor as "Chas." instead of "And. E. Byrne," was held not fatal to the

85. Young v. Bennett, 7 Bush, 477.

86. Thornburg v. Emmons, 23 W. Va. 335.

87. Nelson v. Fotterall, 7 Leigh, 179; Stainback v. Bank of Virginia, 11 Gratt. 260; May v. Jones, 88 Ga. 308, 14 S. E. 552, 30 Am. St. Rep. 154, note, citing text; Union Nat. Bank of Troy v. Williams Milling Co., 117 Mich. 535, 76 N. W. 1, citing text.

88. Otsego County Bank v. Warren, 18 Barb. 290.

89. Hildeburn v. Turner, 6 How. 69; Douglass v. Bank, 97 Tenn. 133, 36 S. W. 874, citing text; Ashe v. Beasley & Co., 6 N. Dak. 191, 69 N. W. 188, citing text.

90. Duckert v. Van Lilienthal, 11 Wis. 56.

91. Chitty on Bills (13th Am. ed.) [*458], 516, 517; Story on Bills, § 276.

protest;[92] and so a misstatement of the date.[93] Nor is it necessary to copy the bill in the certificate.[94]

SECTION V.

THE PROTEST AS EVIDENCE.

§ 959. The original instrument of protest, or a duly authenticated copy, is respected by the courts of a foreign country, and whenever admissible in testimony is regarded as *prima facie* evidence of all the facts therein stated, so far as they come within the scope of the notary's duty in making the presentment and demand and protest.[95] But it is *prima facie* evidence only, and any statement made in the protest may be rebutted by any competent testimony to the contrary.[96]

Although the notary, when examined, has no recollection of the facts stated in the certificate of protest, it is still *prima facie* evidence until contradicted.[97]

But as, by the law merchant, the protest is only necessary, or receivable as evidence of dishonor, in the case of foreign bills or of indorsed notes, which are of the nature of foreign bills and come within the reason of the law respecting them, the protest of an inland bill or of an inland promissory note is not evidence of dishonor in a foreign State, although it may be in the State where the dishonor occurred by statute.[98] And where a State statute

92. Dennistoun v. Stewart, 17 How. 606.

93. Bank at Decatur v. Hodges, 9 Ala. 631.

94. Lionberger v. Mayer, 12 Mo. App. 575.

95. Townsley v. Sumrall, 2 Pet. 170; Chase v. Taylor, 4 Harr. & J. 54; Insurance Co. v. Wilson, 29 W. Va. 547, citing the text; Northup v. Cheney, 27 App. Div. 418, 50 N. Y. Supp. 389; Fletcher v. Arkansas Nat. Bank, 62 Ark. 265, 35 S. W. 228, 54 Am. St. Rep. 294.

96. Dickens v. Beal, 10 Pet. 582; Ricketts v. Pendleton, 14 Md. 320; Howard Bank v. Carson, 50 Md. 27; Wharton on Evidence, § 123; Union Bank v. Fowlkes, 2 Sneed, 555; Nelson v. Fotterall, 7 Leigh, 180; Spence v. Crockett, 5 Baxt. 576; Applegarth v. Abbott, 64 Cal. 459.

97. Sherer v. Easton Bank, 33 Pa. St. 134; Johnson v. Brown, 154 Mass. 105, 27 N. E. 994, holds that "An instrument purporting to be a protest of a bill or note duly certified by a notary public under his hand and official seal, is competent evidence thereof, without proof that the signature is his, or that he is a notary at the date of the protest."

98. Dutchess County Bank v. Ibbottson, 5 Den. 110. See Kirtland v. Wanzer, 2 Duer, 278, on this point. But see *supra* as to other points in which it is not approved. Corbin v. Planters' Nat. Bank, 87 Va. 661, 13 S. E. 98, 24 Am. St. Rep. 673, citing the text. See *ante*, § 928.

makes the protest, when executed by a notary of that State, evidence as to demand and notice, it does not authorize the notary to act beyond its territorial limits, or accord the same effect to his act when beyond them.[99]

§ 960. By the law merchant protest not evidence as to notice.— When the notary who has in charge the bill for presentment has presented it for acceptance or payment, as the case may be, and has protested it in the event of its dishonor by a refusal, his official duty is fulfilled; and it is not incumbent on him to go farther and give notice.[1] Although, if the holder desires him to do so, he may, as well as a private person, act as his agent in giving notice.[2] It being no part of the notary's official duty to give notice, which is entirely distinct from the protest, the certificate of protest made out by the notary is not by the law merchant evidence of any fact stated therein respecting the service or transmission of notice, but only of such things as pertain to his official duty in respect to the protest.[3] By statutes, in the States of the Union, it is very generally provided that the certificate of protest shall be evidence of the facts stated therein respecting notice, it being found by experience to be a more convenient method, and as reliable as any other, of making the proof.[4] Prof. Parsons expresses the opinion that without the aid of a statute, the certificate is evidence "not only of presentment, demand, and dishonor, but of

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99. Dutchess County Bank v. Ibbottson, 5 Den. 110. In First Nat. Bank v. Briggs, 70 Vt. 599, 41 Atl. 586, it was held that a notary's certificate of nonpayment, protest, and notice, made without the State, was not evidence by common law under the Vermont statute of notice to the drawer or indorser in the absence of proof, of the law of the State where the protest was made. Corbin v. Planters' Nat. Bank, 87 Va. 664, citing text. See *ante*, § 928.

1. Dickens v. Beal, 10 Pet. 582; Morgan v. Van Ingen, 2 Johns. 204; Miller v. Hackley, 5 Johns. 384; Bank of Rochester v. Gray, 2 Hill, 231; Insurance Co. v. Wilson, 29 W. Va. 550, citing the text; Bank of Lindsberg v. Ober, 31 Kan. 600; Standard Sewing Machine Co. v. Smith, 1 Marv. 330, 40 Atl. 1117; State ex rel. Banking Co. v. Edmunds, 66 Mo. App. 47, citing text; People's Bank v. Scalzo, 127 Mo. 164, 20 S. W. 1032, text cited.

2. See chapter XX, on Presentment for Payment, section I, vol. I, § 572.

3. Dickens v. Beal, 10 Pet. 582; Walker v. Turner, 2 Gratt. 536; Williams v. Putnam, 14 N. H. 540; Rives v. Parmley, 18 Ala. 256; Couch v. Sherrill, 17 Kan. 624; Swayze v. Britten, 17 Kan. 625. See *post*, § 991; Hobbs v. Chemical Nat. Bank, 97 Ga. 524, 25 S. E. 348, citing text; Citizens' Savings Bank v. Hays, 96 Ky. 365, 29 S. W. 20.

4. First Nat. Bank v. Hatch, 78 Mo. 13; Bettis v. Schreiber, 31 Minn. 332; Wilson v. Richards, 28 Minn. 339; Fisk v. Miller, 63 Cal. 368.

such notice as it asserts to have been given." [5] When a statute makes the certificate of protest evidence of the facts stated therein, and it states the due mailing of notice to the proper post-office, properly directed, the mere fact that notice does not reach the indorser will not rebut the statements of the certificate.[6]

§ **960a. Effect of custom and usage.**—Proof of custom and course of business on the part of banks cannot dispense with documentary evidence, when such evidence is requisite in law to verify the act done, or to make it complete, such as protest and notice of dishonor, when these are necessary; but the custom or usage of a bank holding a draft in support of the belief expressed by the cashier (based on such usage and course of business) that the draft was duly presented is admissible in evidence, to be weighed by the jury.[7]

§ **961. How notice proved.**— The notice must be proved by the notary himself when he gives it, or by other witnesses in depositions duly taken as in any other case, or by examination *ore tenus*, at the trial.[8] The certificate of protest is in no sense, unless by statutory enactment, a certificate of notice, nor is a certificate of the notary subjoined to the protest, nor a separate affidavit of the notary, admissible to prove the fact, it not being a legal form of testimony.[9] When the notary undertakes to act as agent of the holder, the engagement does not inure to the benefit of any one but his principal, and, therefore, where the notary had engaged to give notice to the first and second indorsers, but only gave it to the second, of whom the holder received the amount of the bill, the second indorser who paid it could not sue him for not giving notice to the first.[10]

§ **962. Protest only evidence of facts stated.**— It cannot be inferred from the mere fact of protest when it is admissible as evi-

5. 2 Parsons on Notes and Bills, 498; Bank of Rochester v. Gray, 2 Hill, 231, disapproving Cape Fear Bank v. Steinmetz, 1 Hill, 45.

6. Wilson v. Richards, Minn. Sup. Ct., Oct., 1881, Alb. L. J., Jan. 7, 1882, p. 18, Clark, J.

7. Knickerbocker Life Ins. Co. v. Pendleton, 115 U. S. 341.

8. Dickens v. Beal, 10 Pet. 582; Miller v. Hackley, 5 Johns. 384; Lloyd v. McGair, 3 Barr, 482. See *post*, § 967.

9. Walker v. Turner, 2 Gratt. 536; Bank of Vergennes v. Cameron, 7 Barb. 144.

10. Morgan v. Van Ingen, 2 Johns. 204; Hobbs v. Chemical Nat. Bank, 97 Ga. 524, 25 S. E. 348, citing text.

dence of the manner and service of notice, or of the facts stated respecting the giving of notice, that any step was regularly taken, or any fact existed, which is not certified to. In other words, the admission of the certificate of protest as evidence, only makes it evidence of such things as it distinctly states, and purports to give evidence of.

Therefore, where the certificate of protest is by statute admissible evidence of the facts stated as to notice, and it simply states that notice was addressed to the indorser at a certain place, without adding that such place was the post-office or residence of the indorser, there can be no inference that such was the fact, and the certificate is consequently insufficient in itself to prove due notice.[11] Such, at least, is the view which has been taken in the cases cited in the subjoined note, and which seems to us consistent with reason and with the strict principles of the law merchant, which throws the burden of proving due notice on the plaintiff. But the Supreme Court of the United States, it seems, takes a different view, though this precise question was not before it. The question in the case before it arose upon a demurrer to evidence, the notary who made the certificate being examined as a witness, and testifying that he sent notice by mail addressed to the indorser at Alexandria, without any evidence that that was his place

11. Bradshaw v. Hedge, 10 Iowa, 402 (1860); Sprague v. Tyson, 44 Ala. 340 (1870). In Turner v. Rogers, 8 Ind. 140 (1856), the certificate stated that, "I notified Henry Turner and John H. Woodfill by letter to each at New Albany, Indiana, per mail the same day." The parties named were indorsers. The court said, there was "no evidence that the defendant resided at New Albany or anywhere else. The notary's statement in the protest that he notified the indorsers is qualified by specifying the manner in which it was done — that is, by addressing notices to them at New Albany. The bill was drawn, indorsed, and payable in Ohio. There is no presumption that they resided in New Albany." To same effect, see also Sullivan v. Deadman, 19 Ark. 486. In Stiles v. Inman, 55 Miss. 472 (1877), notarial certificate stated that notice was mailed to Stiles, the indorser, at Vicksburg. The court said: "There was no evidence that Stiles, the indorser, resided at Vicksburg, or that Vicksburg was his place of residence, or his nearest post-office, or the one at which he received his mail matter. For all that appears, the notice might as well have been sent by mail to Boston or New Orleans," and held that the proof of notice was insufficient, citing Walker v. Tunstall, 3 How. (Miss.) 259; Ellis v. Commercial Bank, 7 How. (Miss.) 294. The case of Raine v. Rice, 2 Pat. & H. 530 (1857), is often quoted for the same doctrine. The syllabus of the reporter is misleading, and no such question was decided, as is shown in Linkous v. Hale, 27 Gratt. 674 (1876). Hobbs v. Chemical Nat. Bank, 97 Ga. 524, 25 S. E. 348, citing text.

of residence; and the court held that the jury would have been warranted to infer that the indorser's residence was in Alexandria.[12] In Virginia this case was recently cited with approval by the Supreme Court of Appeals, and applied where there was no evidence but the notary's certificate that he mailed notice to the indorsers at Blacksburg, Virginia; but while the court considered that on the demurrer to evidence, in which form the question arose, it should be inferred that their residence was at Blacksburg, it held that no such inference would be justified in the case of a special verdict, it being an inflexible rule that the court, upon a special verdict, cannot infer other facts from those found by the

12. Bank of the United States v. Smith, 11 Wheat. 171 (1826). In this case it appeared that the notary who protested the note in Washington swore on the trial, being examined as a witness, that on the day of dishonor he put in the post-office notice of nonpayment, addressed to the defendant at Alexandria. This was the only evidence of due notice, and the defendant demurred to the evidence on the ground that it did not appear that Alexandria was the post-office to which notice should have been sent. Thompson, J., said, rendering the unanimous opinion of the court: "If the defendant's place of residence was Alexandria, it is not denied that but due and regular notice was given to him. The notary was a sworn officer, officially employed to demand payment of this note, and it is no more than reasonable to presume that he was instructed to take all necessary steps to charge the indorsers. This must have been the object in view in demanding payment of the maker. And it is fair also to presume that he made inquiry for the residence of the defendant before he addressed a letter to him, for it is absurd to suppose he would direct to him at that place without some knowledge or information that he lived there, this being the usual and ordinary course of such transactions and with which the notary was, no doubt, acquainted. The jury would, undoubtedly, have been warranted to infer from this evidence that the defendant's residence was in Alexandria. If that was not the fact, this case is a striking example of the abuse which may grow out of demurrers to evidence. For a single question to the witness would have put at rest that point one way or the other, if the least intimation had been given of the objection. It was manifestly taken for granted by all parties that the defendant lived at Alexandria. And if a party will upon the trial remain silent, and not suggest an inquiry which was obviously a mere omission on the part of the plaintiff, a jury would be authorized to draw all inferences from the testimony given that would not be against reason and probability, and the court, upon a demurrer to the evidence, will draw the same conclusions that the jury might have drawn." It will be perceived that this case does not determine the sufficiency of the evidence if it were merely contained in a statement of the protest. In such case the defendant could have no opportunity to cross-examine and to elicit the facts respecting reasonable inquiry by the notary, and although the decision just quoted militates strongly against the doctrine of the text, it is, therefore, not necessarily inconsistent with it.

jury.[13] In a late case in Iowa it was said by the court that "the bare certificate of the notary that he notified the makers and indorsers is itself *prima facie* evidence that they were notified. If he specifies the mode in which he did it, such specification does not destroy the *prima facie* case, nor render it necessary to prove that such mode would effectuate such result, unless indeed it should appear affirmatively that the mode adopted could not have done so. But if the notary only certify the mode he adopted to give the notice, and not to the fact that he did give it, then, unless it further appeared that such mode would effectuate notice, the certificate does not make a *prima facie* case."[14] This distinction is very refining, and without just ground. In Indiana it was not taken in a similar case.[15] A certificate of notice to a drawer sent to a place where the bill bears date would stand on a different footing, that being presumably the drawer's place of residence.[16] So where the protest states that notice of protest "was left at the boarding-house of A. B., or the office of C. D., it is not sufficient evidence that it was left in the proper manner.[17] And where it states presentment of a note payable at bank to the cashier, it has been held that it is not to be inferred that the note was in the bank, or unless it was in the bank, that the cashier was at the bank, but that might be proved by other testimony.[18]

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13. Linkous v. Hale, 27 Gratt. 668–674 (1876), Moncure, P. See Slaughter v. Farland, 31 Gratt. 134; People's Bank v. Scalzo, 127 Mo. 164, 20 S. W. 1032, text cited.

14. Walmsley v. Rivers, 34 Iowa, 466 (1871). In which case the notary certified that he notified the indorsers, and that he delivered the notice at the post-office addressed to them, "Des Moines." And the case was distinguished from Bradshaw v. Hedge, 10 Iowa, 402 (*supra*), in which the notary merely stated that he put notice in the post-office addressed to a certain place named.

15. Turner v. Rogers, 8 Ind. 140.

16. See chapter XX, on Presentment for Payment, vol. I, § 639, and chapter XXIX, on Notice, vol. II, §§ 1030, 1031.

17. Rives v. Parmley, 18 Ala. 262, Dargan, C. J., said: "Notice might have been left at the boarding-house of the defendant in a manner wholly insufficient to charge him. Indeed, the notice might have been left at the house on the day stated, and yet the notary might have been guilty of gross neglect, as if he had merely stopped at the house and left the notice without inquiry for the defendant, or saying a word about the object of his visit, or delivering the notice to any one to be handed to the defendant, when he could have delivered it to the party himself by inquiring for him."

18. Magoun v. Walker, 49 Me. 420; Seneca County Bank v. Neass, 5 Den. 329; *ante*, § 644. But see Barbaroux v. Waters, 3 Metc. (Ky.) 304, and *ante*, § 659.

§ 963. **As to the mere fact that due notice was given,** however, when there is no question raised as to the person upon whom, or the place where, it was served, the certificate that "due notice was given or mailed, or that the person was duly notified," is sufficient evidence that the notice in itself corresponded to the protest, and was in proper legal form.

A legal notice is a definite legal instrument, and where a statute makes the certificate of the notary evidence as to the service, or as to facts stated respecting notice, it would seem, that his certificate that notice was given, would be as definite as if it detailed the minutiæ of the instrument thus described.[19] But it has been held, that the protest, unless it states the contents of the notice, is only evidence that what purported to be notice was sent, and not of its sufficiency in law.[20] It seems to us that the separate facts as to service and place, and person should be stated, but that the contents of the notice are to be presumed to be conformable to law.

§ 964. **Presumptions in favor of protest.**— But legal presumptions are made in favor of the protest under proper circumstances. Thus, when the certificate of protest states that demand was made of the clerk of the drawee, found at his office or place of business, the drawee himself being absent, it is evidence not only of the fact of demand, but also that the person named was the drawee's clerk, duly authorized to refuse acceptance or payment.[21] And it would be presumed, if not stated, that the drawee was absent.[22] So (where it is evidence as to notice), if it state that notice was left "at the indorser's desk in the custom-house, he being absent, with a person in charge," it is *prima facie* evidence that such was his place of business, and that it was properly left there, it not appearing that better service could have been made.[23] So, if it

19. Tate v. Sullivan, 30 Md. 464; Pattee v. McCrillis, 53 Me. 410; Orono Bank v. Wood, 49 Me. 26; Lewistown Bank v. Leonard, 43 Me. 144; Ticonic Bank v. Stackpole, 41 Me. 321; Simpson v. White, 40 N. H. 540; Bushworth v. Moore, 36 N. H. 144; Galladay v. Bank of Union, 2 Head, 57; Union Bank v. Middlebrook, 33 Conn. 95; McFarland v. Pico, 8 Cal. 626; Kern v. Van Phul, 7 Minn. 426.

20. Duckett v. Van Lilienthal, 11 Wis. 56; Smith v. Hill, 6 Wis. 154; Kimball v. Bowen, 2 Wis. 224. See *post*, § 1051, and notes.

21. Nelson v. Fotterall, 7 Leigh, 179; Stainback v. Bank of Virginia, 11 Gratt. 260; Whaley v. Houston, 12 La. Ann. 585.

22. Gardner v. Bank of Tennessee, 1 Swan, 420.

23. Bank of Commonwealth v. Mudgett, 44 N. Y. 514.

states demand at his office or place of business, of his bookkeeper,[24] or agent,[25] or clerk,[26] it is evidence that such person was the drawee's agent. But unless the demand was at the drawee's place of business it would be different; and where the protest was legal evidence of the manner of service of notice, it was held, nevertheless, that the certificate that "a notice to D. B. P., the indorser, was left at the residence of J. P. S., his attorney in fact, with a female white servant, the said J. P. S. not being in," was not evidence that S. was P.'s attorney in fact to receive notice, but only of such matters as it was the notary's duty to certify.[27]

§ **965. Recitals in foreign notarial certificate.**— And so a recital in a foreign notarial certificate, that the notary had served the protest on the acceptor, in his own name, and as agent of the drawer, is no evidence of the agency in a suit against the drawer.[28] There is obvious reason in this distinction. When the notary finds a clerk or other person acting as the drawee's representative in his office or place of business, he has a right to presume that he is duly authorized to represent him. Being held out as his clerk or agent, parties may so regard him. But when it is alleged that a mere outside person is an agent, it is an allegation to be sustained by distinct evidence, like any other separate fact.

If the certificate state that a bill drawn on a firm was presented to A., one of the members thereof, it is evidence of his membership, upon the same principle that it is evidence as to the identity of an individual to whom presentment is made.[29]

When the protest states that notice was sent by mail, it will be presumed that the postage was prepaid.[30]

§ **966. Not evidence of collateral facts.**— But the certificate of protest is not evidence of any collateral facts which may have been stated in it. Thus, if it state that the reason given by the drawee for nonacceptance was, that he had no effects or funds of the drawer, it is no evidence of the want of effects or funds.[31] Nor is

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24. Phillips v. Poindexter, 18 Ala. 579.

25. Dickerson v. Turner, 12 Ind. 223.

26. Bradley v. Northern Bank, 60 Ala. 259.

27. Drumm v. Bradfute, 18 La. Ann. 681; Hobbs v. Chemical Nat. Bank, 97 Ga. 524, 25 S. W. 348, citing text.

28. Coleman v. Smith, 26 Pa. St. 255.

29. Elliott v. White, 6 Jones, 98. **30.** Brooks v. Day, 11 Iowa, 46.

31. Dakin v. Graves, 48 N. H. 45; Dumont v. Pope, 7 Blackf. 367; 1 Parsons on Notes and Bills, 639; Wharton on Evidence, § 123.

it evidence that the drawee expressed his willingness to pay in certain bank bills.[32]

Nor is it evidence of a course of conduct not specified in particular acts. Thus, where the notary stated in the protest that he "made diligent search and inquiry" for the makers, it was considered not proof of that fact, what search and inquiry not being stated.[33] This seems to us correct, for what constitutes due diligence is a matter of law, to be adjudicated upon the facts, and is not a matter of notarial judgment and determination.[34]

§ **967. Protest as secondary evidence of notice.**— Even where there is no statute authorizing it, there may arise circumstances which, upon general principles of the law of evidence, render the protest of a promissory note competent to show due demand and notice. Thus, where the notary who had made the protest had died before the trial, and his testimony could not be procured, the protest of a note, coupled with the deposition of the notary's daughter, as to the uniform habit of her father in his notarial acts, was considered admissible secondary evidence for the purpose of conducing to prove demand and notice.[35] So, where the messenger of a bank was dead, his book, in which he entered his acts respecting service of notices, was held admissible to prove that he notified an indorser.[36] And in respect to the form of notice, the notary being dead, his clerk's evidence as to the forms he was accustomed to use, is admissible.[37]

§ **968. When suit is brought in State or country where protest is made, is it evidence?** — As has been already said, the instrument of protest is only admissible evidence of the facts it asserts in

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32. Maccoun v. Atchafalaya Bank, 13 La. 342.

33. Bennett v. Young, 18 Pa. St. 261. In Cockrill v. Loewenstine, 9 Heisk. 206 (1872), the notarial certificate stated that the notary "made diligent search and careful inquiry" to find the maker. The court held that this statement was not *prima facie* evidence that he did these things. Sneed, J., said: "The question of diligence is a question of law and fact, to be determined by the court and jury, and not to be certified by the notary. * * * The notarial protest by the law and usage of merchants is credited everywhere, and is generally *prima facie* evidence of the facts it recites; but it must state facts, and not legal conclusions."

34. Cockrill v. Loewenstine, *supra.*

35. Nicholls v. Webb, 8 Wheat. 450.

36. Welsh v. Barrett, 15 Mass. 380.

37. Wetherall v. Claggett, 28 Md. 465.

cases of foreign bills, except where statutory enactment has extended their admissibility in cases of inland bills and promissory notes.[38] And it has been held that it can only be used to prove the dishonor when made in a foreign country; and that if the bill were drawn in a foreign country, and payable in England, and suit were brought in England, the protest should be proved in the same manner as if it were an inland bill.[39] For this ruling there is the high authority of Lord Ellenborough, who expressed himself as "quite clear" in the opinion, but no precedent was quoted, and it has been criticised by Story, who considers that if the bill be foreign, the protest should be admitted.[40] The United States Supreme Court has intimated its approval of the English precedent quoted; but Story's views seem to us more judicious. Doubtless, the original reason of convenience, which recognized the protest of a bill made in foreign parts as evidence of dishonor, does not apply to a case in which the witnesses are within the country. But protest of all foreign bills is essential, irrespective of the place of payment; and if the holder is required to make the protest, it would seem singular and unequal to deny him the benefit of its production.[41]

§ 969. Evidence to supply omissions of protest.— When the protest has been made at the proper time and place, and in the proper manner, but does not upon its face make all the statements necessary to prove due demand and notice, parol evidence is admissible to supply the omission, provided it be in furtherance of, and not inconsistent with or contrary to, the statements that are made in the protest. Thus, where the protest stated a demand of the cashier, but omitted to state that the note was in, or the cashier at the bank, it was held admissible to prove these facts by parol testimony.[42] So where it did not state where the presentment and demand were made, or that the note was in the bank where it

38. Union Bank v. Hyde, 6 Wheat. 572; Young v. Bryan, 6 Wheat. 146; Sullivan v. Deadman, 19 Ark. 484; Bond v. Bragg, 17 Ill. 69; Sumner v. Bowen, 2 Wis. 524.

39. Chesmer v. Noyes, 4 Campb. 129; Byles on Bills (Sharswood's ed.) [*254], 401; Edwards on Bills, 468.

40. Story on Bills, § 277.

41. Nicholls v. Webb, 8 Wheat. 326.

42. Magoun v. Walker, 49 Me. 420; Seneca County Bank v. Neass, 5 Den. 329; Cook v. Merchants' Nat. Bank of Vicksburg, 72 Miss. 982, 18 So. 481, citing text.

was made payable,[43] or where it fails to inform the indorser of a demand on the maker and a refusal,[44] or to state the fact of non-payment,[45] any legitimate extrinsic evidence is admissible to show that any of these facts existed, or steps were taken. And if there be any question as to the agency of the person to whom presentment was made, evidence is admissible to show it.[46]

In like manner, any defect in the statements respecting notice may be supplied — and, indeed, as we have seen, notice may be proved without any aid from the protest, which is only admissible, and not necessary evidence of it.[47]

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43. Wetherall v. Claggett, 28 Md. 465; Hunter v. Van Bomhorst, 1 Md. 504.

44. Wetherall v. Claggett, 28 Md. 465; Nailor v. Bowie, 3 Md. 252.

45. Sasscer v. Farmers' Bank, 4 Md. 429.

46. Stainback v. Bank of Virginia, 11 Gratt. 269.

47. Graham v. Sangston, 1 Md. 59. See Reynolds v. Appleman, 41 Md. 615.

CHAPTER XXIX.

NOTICE OF DISHONOR OF NEGOTIABLE INSTRUMENTS.

SECTION I.

NATURE AND NECESSITY OF NOTICE.

§ **970.** When a negotiable bill or note is dishonored by non-acceptance on presentment for acceptance, or by nonpayment at its maturity, it is the duty of the holder to give immediate notice of such dishonor to the drawer, if it be a bill, and to the indorser, whether it be a bill or note. The party primarily liable is not entitled to notice, for it was his duty to have provided for payment of the paper; and the fact that he is maker or acceptor for accommodation does not change the rule.[1]

Notice is not due to any party to a bill or note not negotiable, the rules of the law merchant concerning notice and protest applying to none but strictly commercial instruments.[2]

It is regarded as entering as a condition in the contract of the drawer and indorser of a bill, and of the indorser of a note, that he shall only be bound in the event that acceptance or payment is only demanded; and he notified if it is not made. And in default

1. Hays v. N. W. Bank, 9 Gratt. 127. See § 995.

2. Pitman v. Breckenridge, 3 Gratt. 129. In Early v. Preston, 2 Pat. & H. 229, the following notice was accepted as good in form, and seems in every respect unobjectionable:

RICHMOND, August 20, 1842.

SIR:— Please take notice that a draft drawn by S. H. Davis on Samuel S. Saunders, dated Lynchburg the 18th of February, 1842, for two thousand dollars, at six months' date, and indorsed by Joel Early and Pleasant Preston, and A. Tompkins, Cashier, has been protested for nonpayment by the President and Directors of the Farmers' Bank of Virginia, payment having been refused at the counting-room of S. S. Saunders on the 20th inst., and you are held liable as indorser for all loss, damages, principal, interest, costs, and charges sustained or to be sustained by reason of the nonpayment aforesaid.

Yours,

ARCHIBALD BLAIR,
Notary Public.

Citizens' Savings Bank v. Hays, 96 Ky. 365, 29 S. W. 20.

of notice of nonacceptance or nonpayment, the party entitled to notice is at once discharged, unless some excuse exist which exonerates the holder.[3]

This, then, is one of the most important branches of the law of negotiable paper.

§ **970a. Power of government to regulate notice.**— In England, in France, and in other countries where there is no restraint by constitutional law upon the legislative department, interdicting its interference with contracts, it is within the power of that branch of the government to extend the time of payment of negotiable and other securities, and consequently to preserve the liability of a drawer or indorser without the preliminary steps respecting protest and notice being taken at the stipulated time of payment, according to the terms of the instrument.[4] But in the United States, where the States are prohibited by the Federal Constitution from passing any law "impairing the obligation of contracts," it is not within the power of any State legislative body, whether a convention, or an ordinary representative assembly, by ordinance, resolution, or enactment, to alter contracts entered into; and as the condition of due notice is regarded as incorporated in the contract of the drawers and indorsers of negotiable paper, it would not be within their power to dispense with it, or change the time within which it must be given, so as to affect existing instruments. This view of the law in the United States was recently taken, and elaborately set forth by the Supreme Court of Appeals of Virginia, which held void an ordinance of the State convention, the effect of which was to dispense with demand, protest, and notice upon all checks, bills, and notes payable at a bank located in any city or town, if at the time of the maturity of such instruments, the town was occupied, invested, or access thereto interrupted by the public enemy; and also an Act of the General Assembly which extended the time for giving notice to ten days after the removal of the obstruction created by the presence of the enemy.[5]

3. Rothschild v. Currie, 41 Eng. C. L. 43; Musson v. Lake, 4 How. 262; Merchants' State Bank v. State Bank of Philips, 94 Wis. 444, 69 N. W. 170; Patillo v. Alexander, 96 Ga. 60, 22 S. E. 646, citing text; Holmes v. Preston *et al.*, 70 Miss. 152, 12 So. 202.

4. Rouquette v. Overman, L. R., 10 Q. B. 525 (1875).

5. Duerson's Admr. v. Alsop, 27 Gratt. 230 (1876). See also Farmers' Bank v. Gunnell, 26 Gratt. 144 (1875). See § 871, and Cook v. Googins, 126 Mass. 410.

§ 971. Failure to notify party entitled to notice discharges debt for which bill was drawn or indorsed.— So absolute is the necessity for notice to an indorser, in order to charge him, that if a note has been indorsed to the holder in conditional payment of a debt, the failure to give notice to the indorser will not only discharge the indorser as a party to the note, but also a debtor upon the original consideration, even though it be secured by a mortgage or deed of trust. The note, then, is made an absolute discharge of his liability, and the indorsee must look solely to prior parties.[6] And so in respect to the drawer of a bill given in conditional payment.[7] The neglect to give notice to the drawer of a renewed bill not only discharges him from liability to pay that bill, but discharges him from liability to pay the prior bill, to satisfy which it was drawn;[8] and this although it be expressly agreed that the taking of such second bill shall not exonerate any of the parties to the first bill until actual payment.[9]

SECTION II.

FORMAL AND ESSENTIAL ELEMENTS OF NOTICE.

§ 972. Notice may be verbal or written.— The notice need not be in writing; it is sufficient to be given verbally;[10] but for precision and safety written notice is preferable. Verbal notice must be necessarily confined to those cases in which notice is directly

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6. Shipman v. Cook, 1 Green, 251; Peacock v. Purcell, 14 C. B. (N. S.) 728. See also §§ 828, 1276, 1277; Benjamin's Chalmers' Digest, 180; Patillo v. Alexander, 96 Ga. 60, 22 S. E. 646, citing text; Carter *et al.* v. Odom, 121 Ala. 162, 25 So. 774.

7. Darrach v. Savage, 1 Show. 155 (1691); Bridges v. Berry, 3 Taunt. 130; Gale v. Walsh, 5 T. R. 239; Rogers v. Stephens, 2 T. R. 713; Allan v. Eldred, 50 Wis. 136; Batterton v. Roope, 3 Lea, 220; Rucker v. Hiller, 16 East, 43, 3 Campb. 217; Smith v. Miller, 43 N. Y. 171 (1870), 52 N. Y. 546 (1873); Edwards on Bills, 445. See *supra*, §§ 452, 828, and *infra*, § 1276.

8. Bridges v. Berry, 3 Taunt. 130, 3 Maule & S. 362; Chitty on Bills [*433], 488 [*444], 500. See § 1276.

9. Reid v. Coates, Bro. P. C.; Chitty on Bills [*434], 488.

10. Boyd's Admr. v. City Savings Bank, 15 Gratt. 501; Glascow v. Pratte, 8 Mo. 366; First Nat. Bank v. Ryerson, 23 Iowa, 508; Cuyler v. Stevens, 4 Wend. 506; Thompson v. Williams, 14 Cal. 160; Pierce v. Schader, 55 Cal. 406; Merritt v. Woodbury, 14 Iowa, 299; Bank v. Brooking, 2 Litt. 41; Gilbert v. Dennis, 3 Metc. (Mass.) 495; Byles on Bills (Sharswood's ed.), 411; Story on Notes, § 341; 1 Parsons on Notes and Bills, 477; Thompson on Bills, 336; 2 Ames on Bills and Notes, 432; Tindal v. Brown, 1 T. R. 167; Housego v.

given to the party in person, or is sent by a messenger to his place of business or residence. It seems that a verbal notice is less strictly construed than a written one, especially when its sufficiency is impliedly admitted by the party's response.[11] Thus, where the holder's clerk told the drawer that the bill had been duly presented, and that the acceptor could not pay it, and the drawer replied that he would see the holder about it, this was held to be sufficient evidence to warrant the jury in finding that the fact of the dishonor of the note was sufficiently communicated to the drawer.[12]

Mere knowledge of dishonor does not constitute notice.[13] Notice signifies more; but when the fact of dishonor is communicated by one entitled to call for payment, it becomes notice, as it is then to be inferred that the intention is to hold the party notified responsible.[14]

§ 973. **As to the form of the notice,** no particular phrase or form is necessary. The object of it is to inform the party to whom it is sent: 1, that the bill or note has been presented; 2, that it has been dishonored by nonacceptance, or nonpayment; and, 3, that the holder considers him liable, and looks to him for payment. And in framing the notice, all that is necessary to apprise the party of the dishonor of the instrument is, to intimate that he is expected to pay it.

In order that a notice should answer these conditions, and duly intimate dishonor to the drawer or indorser, it should, therefore, either expressly or by just and natural implication, comprise the following elements: (1) A sufficient description of the bill or note to ascertain its identity. (2) That it has been duly presented for acceptance or payment to the drawee, acceptor, or maker. (3)

Cowne, 6 L. J. Exch. 110; Crosse v. Smith, 1 Maule & S. 545; Martin v. Brown, 75 Ala. 448; First Nat. Bank v. Hatch, 78 Mo. 13; Stanley v. McElrath (Cal.), 25 Pac. 16, citing the text; Standard Sewing Machine Co. v. Smith, 1 Marv. 330, 40 Atl. 1117.

11. Byles on Bills [*264], 211, 212; Phillips v. Gould, 8 Car. & P. 355 (34 Eng. C. L.).

12. Metcalf v. Richardson, 11 C. B. 1011 (73 Eng. C. L.).

13. Juniata Bank v. Hale, 16 Serg. & R. 157; Bank of Old Dominion v. McVeigh, 29 Gratt. 559, 26 Gratt. 852; Brown v. Ferguson, 4 Leigh, 37; Story on Bills, § 375.

14. Caunt v. Thompson, 7 C. B. 400; Miers v. Brown, 11 M. & W. 372; Tindal v. Brown, 1 T. R. 167.

That it has been dishonored by nonacceptance or nonpayment. (4) That the holder looks to the party notified for payment.[15]

§ **974. Description of the bill or note dishonored.**— The notice should describe the bill or note in unmistakable terms; should state where the note is, that the party notified may find it; should state who the holder is, and who gives the notice, or at whose request it is given. Such, at least in theory, are the requisites of a proper notice; and a good business man should never neglect to comply with them. But the courts are not strict in requiring this thorough description of the dishonored instrument; and the requirements of the law are considered as satisfied by any description which, under all the circumstances of the case, so designates the bill or note as to leave no doubt in the mind of the party, as a reasonable man, what bill or note was intended." [16]

§ **975.** The object of the law in requiring a correct description of the bill or note to be given in the notice to the drawer or indorser is, that he may be put upon notice of the extent of his liability, and placed in possession of the material facts necessary to enable him to secure the liability of others over to him, and his own reimbursement upon payment of the note. The rule was not intended to subserve a technical purpose, but to promote substantial justice; and when it sufficiently appears that the drawer or indorser, at the time of receiving the notice, knew what particular piece of paper was referred to, and could not have been prejudiced by the failure to describe it, he should not be permitted to object that his information was not communicated in a

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15. Bank of Old Dominion v. McVeigh, 29 Gratt. 558; Thompson v. Williams, 14 Cal. 162; Story on Notes, § 348.

16. Gilbert v. Dennis, 3 Metc. (Mass.) 495; Shelton v. Braithwaite, 7 M. & W. 436; 1 Parsons on Notes and Bills, 472, 474; Glicksman v. Earley (Wis.), 47 N. W. 272. Where sundry notes are given, payable in three, six, nine, and twelve months after date, and a contemporaneous written agreement with provision, "that if default be made in payment of any of the notes constituting a particular series, as above provided, all notes of subsequent series held by us, and all portion of our several claims then unpaid, shall be due and payable immediately, and the making of this agreement shall in no way prejudice our right to the immediate enforcement of our said claims." Held, that due notice of the dishonor of the first note to the indorsers thereon, is sufficient to hold and charge the indorsers upon all of the notes. Creteau v. Glass Co., 40 App. Div. 215, 57 N. Y. Supp. 1103; King v. Hurley, 85 Me. 525, 27 Atl. 463.

particular manner.[17] Accordingly, it has been held in California that where the holder verbally informed the indorser that "he had demanded payment of that note, and should endeavor to make him liable," the indorser was bound, although the note was neither produced nor described, as it appeared that he knew what note was referred to, and was in no respect misled.[18] Describing a bill as having been left for collection by the indorser, when in fact it was left by the holder, would make no difference.[19]

§ 976. Circumstances may be regarded in testing sufficiency of description.— Story says that "the description of the note should be sufficiently definite to enable the indorser to know to what one in particular the notice applies; for an indorser may have indorsed many notes of very different dates, sums, and times of payment, and payable to different persons, so that he may be ignorant, unless the description in the note is special to which it properly applies or which it designates."[20] This is undoubtedly the correct statement of the general rule, as to the best mode of preparing notice; but if it were intended to confine the parties to the mere face of the notice to ascertain its sufficiency, it would be clearly erroneous. For there is no doubt that the circumstances of each particular case, and the indorser's or drawer's knowledge of them, may be looked to, to ascertain whether or not the notice is sufficient. And if the drawer or indorser could not reasonably confound the bill or note mentioned in the notice with another, the notice would be sufficient, although meager in its description. And if full and ample in setting forth the terms of the note, it would make no difference that the notice left the indorser in doubt as to what instrument it referred to, it being his misfortune, if from his having indorsed several notes, a complete description of one of them, in every essential feature, does not enable him to identify it.[21]

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17. Thompson v. Williams, 14 Cal. 162, language of Cope, J.

18. Thompson v. Williams, *supra*.

19. Billson v. Hodd, 5 Vict. R. 125.

20. Story on Promissory Notes, § 349; Cook v. Litchfield, 9 N. Y. 289; Glicksman v. Earley, 78 Wis. 223, 47 N. W. 272.

21. Hodges v. Shuler, 22 N. Y. 115 (1860). The defendant executed a number of notes in all respects alike, and distinguishable only by the numbers marked on the margin. It was held that the omission to state the number in a notice of nonpayment of one of them, did not vitiate it.

§ **977.** In New York, where defendant was payee and indorser of four several notes made by J. L. Caren, and dated each "Detroit, April 2d, 1849," it appeared that each note was for the sum of $740, and were precisely the same terms, except that one was payable in nine, one ten, one eleven, and the other twelve months from date. Each note was presented and protested on the day of maturity, and notices addressed to the indorser, each stating that the note to which it referred "was duly protested for nonpayment on the day that the same became due." In a suit upon the notes it was held by the Superior Court that the notices were sufficient, inasmuch as they informed the indorser that each note was protested on the day it became due, and although they did not describe the respective notes by their dates, they sufficiently identified them as the notes falling due on the very days they were respectively protested.[22] This decision was subsequently reversed by the Court of Appeals, on the ground that the description of the notes was insufficient, in not distinguishing the one from the other, and a new trial ordered.[23] And finally judgment was rendered for the plaintiff, the jury having found as a fact that the defendant knew to what particular notes the notices respectively related.[24] The Superior Court reluctantly bowed to the authority of the Court of Appeals in respect to the doctrine enunciated; and the views of the Superior Court seem to us altogether unanswerable.[25]

§ **978.** The entire omission of the maker's name in the notice of dishonor of a note would be fatal;[26] but not so the omission of the names of other indorsers unless the indorser notified be misled.[27] But notice to the acceptor describing the bill as "drawn by you," though not naming the drawer, has been held sufficient, there being no proof that he had drawn or indorsed any other paper with which it could be confounded, and it being otherwise correctly described.[28] And likewise, notices describing a note as a

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22. Cook v. Litchfield, 5 Sandf. 340 (1851), Duer, J.

23. Cook v. Litchfield, 9 N. Y. 286 (1853), Ruggles, C. J.

24. Cook v. Litchfield, 2 Bosw. 147 (1857), Bosworth, J.

25. See Hodges v. Shuler, 22 N. Y. 115, and *ante*, § 976.

26. Home Ins. Co. v. Green, 19 N. Y. 518. See also Stockman v. Parr, 11 M. & W. 809, 1 Car. & K. 41; King v. Hurley, 85 Me. 525, 27 Atl. 463.

27. King v. Hurley, 85 Me. 525, 27 Atl. 463.

28. Gill v. Palmer, 29 Conn. 54.

bill,[29] a bill as a note,[30] or the drawer as acceptor,[31] or the indorser as maker,[32] have been held not vitiated thereby.

Where a note is made payable to two persons jointly, and indorsed by each, it is not indispensable that notices of protest should be addressed to them jointly, or refer to their joint indorsement, and notices addressed to them severally, each describing the note as indorsed by the person to whom it is addressed, without mentioning the other indorser, are sufficient to charge them, being in other respects unobjectionable.[33]

§ 979. **What notice need not state.**— The notice need not state who is the holder of the bill or note,[34] nor at whose request it is given.[35] For although the protest and notice are nullities, unless proceeding from the request of a party entitled to direct them, the objection that the party is a stranger must appear from proof, and is not presumable from the mere omission of the notice to state the interest or relation of the party sending it;[36] nor where the demand was made;[37] nor at what hour the paper was pre-

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29. Messenger v. Southey, 1 M. & G. 76 (39 Eng. C. L.).

30. Stockman v. Parr, 11 M. & W. 809.

31. Mellersh v. Rippen, 7 Exch. 578, overruling, in effect, Beauchamp v. Cash, 1 Dowl. & R. 3, where it was held that a notice calling the "drawer" an "indorser" was bad.

32. Haines v. Dubois, 1 Vroom, 259.

33. Cayuga County Bank v. Warden, 6 N. Y. 19.

34. Mills v. Bank of the United States, 11 Wheat. 431; Bradley v. Davis, 26 Me. 45; Howe v. Bradley, 19 Me. 35; Brown v. Jones, 25 N. W. 454, citing the text.

35. Shed v. Brett, 1 Pick. 401; Brown v. Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227, quoting with approval the text.

36. Gillespie v. Nevill, 14 Cal. 408; Woodthorpe v. Lawes, 2 M. & W. 109.

37. Mills v. Bank of the United States, 11 Wheat. 431. In this case, the Supreme Court said: "The last objection to the notice is, that it does not state that payment was demanded at the bank when the note became due. It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of nonpayment of the note, and that the holder looks to the indorser for indemnity. Whether the demand was duly and regularly made is a matter of evidence, to be established at the trial. If it be not legally made no averment, however accurate, will help the case; and a statement of nonpayment and notice is, by necessary implication, an assertion of right by the holder, founded upon his having complied with the requisitions of law against the indorser. In point of fact, in commercial cities, the general, if not universal, practice is not to state in the notice the

sented;[38] nor where it is lying, nor on whose behalf payment is demanded;[39] nor that the party presenting had the paper with him at the time;[40] nor at what time it fell due;[41] nor the absence of the maker when it was presented.[42]

But it should be signed or indicated from whom it proceeds — otherwise it will be insufficient.[43] It is not necessary that the party should know the fact of dishonor, if the notice unequivocally states it.[44]

The decisions in the United States go to the extent of holding that a notice to the indorser of a note, simply stating the name of the maker, the amount, and the fact that it was indorsed by the party to whom notice was sent, is sufficient.[45] But if there are any circumstances which caused this meager description to mislead the party receiving the notice — as, for instance, if he were the indorser of two or more notes to which the terms of the notice might equally apply — then the notice might be void for uncertainty of description.[46]

A notice without date, stating that the instrument had been "this day presented for payment," would be defective, in not fixing the date of dishonor, though extraneous evidence might doubtless be introduced to show that the defect did not mislead the indorser, and that the dishonor was, in fact, at the proper time.[47]

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mode or place of demand, but the mere naked fact of nonpayment." See remarks on this case in Gilbert v. Dennis, 3 Metc. (Mass.) 409, quoted *post*, § 983.

38. Fleming v. Fulton, 6 How. (Mo.) 473.

39. Woodthorpe v. Lawes, 2 M. & W. 109; Harrison v. Ruscoe, 15 M. & W. 231.

40. Mainer v. Spurlock, 9 Rob. (La.) 161.

41. Denegre v. Hiriart, 6 La. Ann. 100.

42. Sanger v. Stimpson, 8 Mo. 260.

43. Klockenbaum v. Pierson, 16 Cal. 375; Walker v. State Bank, 8 Miss. 704.

44. Jennings v. Roberts, 4 El. & Bl. 615 (82 Eng. C. L.).

45. Housatonic Bank v. Laflin, 5 Cush. 546; Youngs v. Lee, 18 Barb. 187; Beals v. Peck, 12 Barb. 245; Witkowski v. Maxwell & Peal, 69 Miss. 56, 10 So. 453.

46. 1 Parsons on Notes and Bills, 473; Story on Bills, § 301; Cook v. Litchfield, 9 N. Y. 279; Cayuga Bank v. Warden, 1 N. Y. 415.

47. Wynn v. Alden, 4 Den. 163; Thompson v. Williams, 14 Cal. 164; Reynolds v. Appleman, 41 Md. 615. But this is doubtful. 1 Parsons on Notes and Bills, 474.

§ 979a. No misdescription of the date of the instrument will vitiate the instrument, unless it misleads.[48]— Nor will such a misdescription of the amount;[49] nor of the names of the parties;[50] nor of the time the paper fell due.[51]

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48. Mills v. Bank of the United States, 11 Wheat. 431. In the case cited, the note of Wood & Ebert, for $3,600, was dated "20th July, 1819," and was payable "sixty days after date, at the office of discount and deposit of the Bank of the United States, at Chilicothe," and the notice was as follows:

"CHILICOTHE, 22d September, 1819.

"SIR: You will hereby take notice that a note, drawn by Wood & Ebert, dated 20th day of September, 1819, for $3,600, payable to you or order in sixty days at the office of discount and deposit of the Bank of the United States, at Chilicothe, and on which you are indorser, has been protested for nonpayment, and the holders thereof look to you.

"Yours, respectfully,

"LEVI BELT, Mayor of Chilicothe.

"PETER MILLS, Esq."

The notice was sustained, the court saying that the error of substituting September for July was apparent on the face of the notice, and immaterial, as the mistake could not mislead. Dennistoun v. Stewart, 17 How. 606; Tobey v. Lennig, 14 Pa. St. 483; Kilgore v. Buckley, 14 Conn. 362; Ross v. Planters' Bank, 5 Humphr. 335; Cayuga County Bank v. Warden, 1 N. Y. 413; Byles on Bills (Sharswood's ed.) [*269], 417; Thompson v. Williams, 14 Cal. 162; Townsend v. Dry Goods Co., 85 Mo. 508, citing the text; Northup v. Cheney, 27 App. Div. 418, 50 N. Y. Supp. 389, citing text.

49. Bank of Alexandria v. Swann, 9 Pet. 33, in which case the court said: "The misdescription complained of in this case is in the amount of the note. The note is for $1,400, and the notice describes it as for the sum of $1,457. In all other respects the description is correct; and in the margin of the note is set down in figures, 1,457; and the question is, whether this was such a variance or misdescription as might reasonably mislead the indorser as to the note for payment of which he was held responsible. If the defendant had been an indorser of a number of notes for Humphrey Peake, there might be some plausible grounds for contending that this variance was calculated to mislead him. But the special verdict finds that from the 5th of February, 1828 (the date of a note for which the one now in question was a renewal), down to the day of the trial of this cause, there was no other note of the said Humphrey Peake indorsed by the defendant, discounted by the bank, or placed in the bank for collection, or otherwise. There was, therefore, no room for any mistake by the indorser as to the identity of the note."

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50. Dennistoun v. Stewart, 17 How. 606; Carter v. Bradley, 19 Me. 62; Smith v. Whiting, 12 Mass. 6.

51. Smith v. Whiting, 12 Mass. 6. See § 984; Witkowski v. Maxwell & Peal, 69 Miss. 56, 10 So. 453; King v. Hurley, 85 Me. 525, 27 Atl. 463.

§ **980. As instances.**— Notices in which the indorser was termed "Samuel A. Bradbury," while his real name was "Samuel A. Bradley;"[52] describing "J. Cushman" as "J. Cushing;"[53] one "Byron" as "Pyron,"[54] have been held sufficient. So notices describing the bill as dated "28th October," whereas it bore date the "23d;"[55] describing a note as for "$200," which was only for "$175;"[56] describing the amount as "$999.52," instead of "$599.52;"[57] and the amount as "$300," instead of "600,"[58] have been held sufficient, the party not being misled.

§ **981.** Where there was a misstatement in the notice of the party on whose behalf it was given, it was held that the notice was not thereby wholly avoided; but the party giving it was placed in the same situation, as to the party to whom it was given, as if the representation had been true. And, therefore, that defendant would be entitled to every defense against the plaintiff that he would have had if the notice had been given by the party named.[59]

§ **982. In the second and third places, as to the statement of presentment and dishonor.**— It was held at one time that the presentment and dishonor of the bill or note must appear on the face of the notice "in express terms or by necessary implication;"[60] but the later and better ruling is that it is sufficient if this appear

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Bank of Rochester v. Gould, 9 Wend. 279; Reedy v. Seixas, 2 Johns. Cas. 337; Rowan v. Odenheimer, 5 Smedes & M. 44; Snow v. Perkins, 2 Mich. 238; Wood v. Watson, 53 Me. 300. In Cayuga County Bank v. Warden, 1 N. Y. 413, 6 N. Y. 19, the note was for $600, and the notice to the indorsers described it as for $300. It being the only note of the maker, Warden, indorsed by the defendants, and "$600" being indorsed on the margin of the notice, it was held sufficient. Jewett, Ch. J.: "Who can doubt but that this notice conveyed to the minds of the defendants the information that this identical note had been dishonored, although it misdescribed the note as it respects the sum for which it was made in the body of it?" See also Downer v. Remer, 23 Wend. 670.

52. Carter v. Bradley, 19 Me. 62.

53. Smith v. Whiting, 12 Mass. 6.

54. Moorman v. Bank of Alabama, 12 Ala. 353.

55. McCune v. Belt, 38 Mo. 291.

56. Snow v. Perkins, 2 Mich. 238.

57. Downer v. Remer, 23 Wend. 670, 25 Wend. 277.

58. Cayuga County Bank v. Warden, 1 N. Y. 413, 6 N. Y. 19.

59. Harrison v. Ruscoe, 15 M. & W. 231.

60. Solarte v. Palmer, 7 Bing. 530 (20 Eng. C. L.), 5 Moore & P. 475, 1 Cromp. & J. 417, 1 Tyrw. 371; Boneton v. Welsh, 3 Bing. N. C. 688; Byles on Bills (Sharswood's ed.) [*265], 413.

by "reasonable intendment."[61] Though properly understood, the sense of the two phrases is pretty much the same, for "necessary implication means not natural necessity, but so strong a probability that an intention contrary to that which is imputed cannot be supposed."[62] But it is quite clear that it will not be sufficient merely to state in the notice the fact of nonpayment of the bill or note, without stating that payment was demanded of the maker, drawee, or acceptor, as the case may be, or stating some legal excuse for not making such demand. It should state whether or not the paper has been presented for payment; and if not, why not, for the reason that the indorser has a right to be informed of the facts on which the liability depends, to the end that he may judge for himself whether or not it is his duty to pay it.[63]

§ 983. **What is sufficient intimation of dishonor.**— The mere statement that the bill or note is unpaid is not alone sufficient to intimate by "reasonable intendment" that the bill or note has been dishonored, for the holder may not have used due diligence in presenting it; and therefore something more must appear, ac-

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61. Hedger v. Steavenson, 2 M. & W. 799; Lewis v. Gompertz, 6 M. & W. 402; Byles on Bills (Sharswood's ed.), 413, note 9, and [*265], 416; Chitty on Bills [*466], 525; Edwards on Bills, 595.

62. Wilkinson v. Adams, 1 Ves. & B. 466, Lord Eldon; Hedger v. Steavenson, 2 M. & W. 799, 5 Dowl. 771, Parke, B.

63. Page v. Gilbert, 60 Me. 488 (1872), Walton, J.: "A notice to the indorser of a note, which merely informs him of the nonpayment of the note, and demands payment of him, without stating that payment has been demanded of the maker, or giving any legal excuse for not demanding it of him, is not sufficient to charge the indorser. The notice should state whether or not the note has been presented to the maker for payment; and if not, why not? The indorser has a right to be informed of those facts on which his liability depends, to the end that he may judge for himself whether or not it is his duty to pay the note. A notice which merely states that the note has not been paid, without stating whether or not it has been presented for payment, or giving any excuse for not presenting it, is not sufficient; for such a notice may be strictly true in every particular, and yet the indorser not be liable. When the official certificate of a notary public states that he 'duly' notified the indorser, it is sufficient *prima facie* to charge the indorser; because the notary could not properly say he had 'duly' notified him unless he had given him notice of a demand as well as of nonpayment of the note." Gilbert v. Dennis, 3 Metc. (Mass.) 495; Union Bank v. Humphreys, 48 Me. 172; Strange v. Price, 2 Perry & D. 278.

cording to the weight and number of authorities on the question,[64] though there is authority to the contrary, which deprecates overnicety, and declares such rulings to be severe technicalities.[65] But such a notice may suffice when the paper is payable at a bank, and the notice emanates from the bank.[66] Nor will it be sufficient to say simply that payment was demanded, unless it appear also that it was presented.[67] But the direct statement that the instru-

64. Phillips v. Gould, 8 Car. & P. 355 (34 Eng. C. L.); Strange v. Price, 10 Ad. & El. 125 (37 Eng. C. L.); Furze v. Sharwood, 2 Q. B. 388 (42 Eng. C. L.); Messenger v. Southey, 1 M. & G. 76 (39 Eng. C. L.); Boneton v. Welsh, 3 Bing. N. C. 688 (32 Eng. C. L.); Hartley v. Case, 4 B. & C. 339; Gilbert v. Dennis, 3 Metc. (Mass.) 495; Townsend v. Lorain Bank, 2 Ohio St. 355; Armstrong v. Thurston, 11 Md. 148; Graham v. Sangston, 1 Md. 60; Arnold v. Kinloch, 50 Barb. 44; Ething v. Schuylkill Bank, 2 Barr, 356; Sinclair v. Lynch, 1 Spears, 244; Clark v. Eldridge, 13 Metc. (Mass.) 96; Pinkham v. Macy, 9 Metc. (Mass.) 174; Lockwood v. Crawford, 18 Conn. 361. In Mills v. Bank of the United States, 11 Wheat. 431, cited in a previous note, it is said *obiter* by the Supreme Court that "the mere naked fact of nonpayment is sufficient." This dictum, as explained in Gilbert v. Dennis, 3 Metc. (Mass.) 495, is reconcilable with the text, and we concur fully in what is said by Shaw, C. J., in the latter case. Says he, speaking of the case of Mills v. Bank of the United States: "In the case then before the court, the notice contained a full and precise statement of the presentment, demand, and nonpayment by the maker. The objection with which the court was dealing was, that the notice did not specify the time and place of demand. The answer made was, that such particularity was unnecessary, and that it is sufficient that it states the fact of nonpayment. Applied to the facts of that case, it may be construed to mean nonpayment after due presentment. So when the learned judge speaks of the practice of commercial cities, he speaks of notice of the mere naked nonpayment, in contradistinction to stating in the notice the mode and place of demand. That such is the meaning may be inferred from the passage before cited, in which he speaks of the object of the notice, which is to inform the indorser that payment has been refused by the maker. Refusal implies nonpayment on demand, or under such circumstances as render a presentment and demand unnecessary. Indeed, in many cases, simple notice of nonpayment is notice of dishonor; as where the note is in terms, or by usage or special agreement, payable at a bank, a notice stating the date and terms of the note, showing that it has become due, and averring that it is unpaid, is equivalent to an averment that it is dishonored."

65. Cromer v. Platt, 37 Mich. 132. See 26 Am. Rep. 505, where it is shown that this decision is but slenderly supported by precedent. But in Paul v. Joel, 4 H. & N. 355 (1859), where to the statement that the bill was dishonored was added "payment is requested before 4 o'clock," notice was held sufficient. 2 Ames on Bills and Notes, 378.

66. See previous note, and Gilbert v. Dennis, 3 Metc. (Mass.) 495.

67. Musson v. Lake, 4 How. 262.

ment has been "dishonored" is sufficient, that word including the presentment and demand which were necessary;[68] and there are other words which, coupled with the statement of nonpayment, indicate sufficiently a dishonor. Thus: "Your bill is unpaid, noting 5s.;"[69] or, "is this day returned with charges;"[70] or, "noting expenses, etc.;"[71] or, "with charges or protested exchange."[72] The expression "returned unpaid" was held insufficient to indicate dishonor at one time;[73] but subsequently the opposite view prevailed.[74]

And likewise "protested"[75] is sufficient in the case of promissory notes and inland bills,[76] as well as of foreign bills.[77] Where the notice of the maker's nonpayment of an instalment states that the holder looks to the indorser for payment of the instalment and of the interest on the note, the surplusage does not vitiate it.[78]

§ 984. **Whether misstatement of notice will vitiate it.**— There is conflict of authority on the question whether or not the indorser is discharged by a misstatement in the notice of the time of presentment or protest, when in fact there had been no irregularity.

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68. Stocken v. Collin, 9 C. P. 653 (38 Eng. C. L.), 7 M. & W. 515; Woodthorpe v. Lawes, 2 M. & W. 109; Shelton v. Braithwaite, 7 M. & W. 436; Edmunds v. Cates, 2 Jur. 183; Lewis v. Gompertz, 6 M. & W. 400; King v. Bickley, 2 Q. B. 419; Rowland v. Sprinjett, 14 M. & W. 7 (7 Eng. C. L.); Smith v. Boulton, 1 Hurl. & W. 3.

69. Armstrong v. Christiana, 5 C. B. 687 (57 Eng. C. L.); Hedger v. Steavenson, 2 M. & W. 799, 5 Dowl. 771.

70. Grudgeon v. Smith, 6 Ad. & El. 499 (33 Eng. C. L.), 2 Nev. & P. 303; Everard v. Watson, 1 El. & Bl. 801.

71. Everard v. Watson, 1 El. & Bl. 801; Mellersh v. Rippen, 7 Exch. 578.

72. De Wolf v. Murray, 2 Sandf. 166.

73. Boulton v. Welsh, 3 Bing. N. C. 688.

74. Robson v. Curlewis, Car. & M. 378, 2 Q. B. 421.

75. Wheaton v. Wilmarth, 13 Metc. (Mass.) 422; Saltmarsh v. Tuthill, 13 Ala. 390; McFarland v. Pico, 8 Cal. 636; Eastman v. Turman, 24 Cal. 383. See also Burkham v. Trowbridge, 9 Mich. 209; Edwards on Bills, 295; First Nat. Bank v. Hatch, 78 Mo. 23, citing the text.

76. Mills v. Bank of the United States, 11 Wheat. 431; Bank of Alexandria v. Swann, 9 Pet. 33; Brewster v. Arnold, 1 Wis. 264; Kilgore v. Buckley, 14 Conn. 362; Smith v. Little, 10 N. H. 526; Howe v. Bradley, 19 Me. 31; Cook v. Litchfield, 5 Sandf. 330, 9 N. Y. 279; Youngs v. Lee, 12 N. Y. 551; Housatonic Bank v. Laflin, 5 Cush. 546; Beals v. Peck, 12 Barb. 445; Denegre v. Hiriat, 6 La. Ann. 100; Burgess v. Vreeland, 4 N. J. 71. *Contra*, Platt v. Drake, 1 Doug. 296, overruled by Burkham v. Trowbridge, 9 Mich. 209.

77. Crawford v. Branch Bank, 7 Ala. 205; Spies v. Newbury, 2 Doug. 495.

78. Fitchburg Mutual Fire Ins. Co. v. Davis, 121 Mass. 121.

Some cases hold that, if he were not misled or deceived, the notice is valid;[79] but others decide it to be invalid, on the ground that it, in fact, communicates to the party that he is discharged in stating presentment or protest at an improper time.[80] But it is obvious that the holder in such a case claims that the party is not discharged, and he is notified that he is held liable, and looked to for payment. He ought not to be misled by the mere circumstance of a mistaken date, which on its face would seem to be a mistake. And if, in fact, there was due presentment and protest in the proper time, it would be adopting a technicality quite opposed to the uniform liberal spirit of the law of notice to discharge the indorser on account of it.

§ **985. In the fourth place, as to the statement that the holder looks to the party to whom notice is sent for payment,** the express statement in the notice to this effect was, as it might seem, formerly held necessary;[81] but the prevailing rule at the present time is, that the mere fact of giving notice to the party implies that he is looked to for payment.[82]

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79. Ontario Bank v. Petrie, 3 Wend. 456; Crocker v. Getchell, 23 Me. 392; Byles on Bills (Sharswood's ed.) [*269], 417, note 1; Journey v. Pierce, 2 Houst. 176.

80. Routh v. Robertson, 11 Smedes & M. 362; Etting v. Schuylkill Bank, 2 Pa. St. 355; Ransom v. Mack, 2 Hill, 587; Townsend v. Lorain Bank, 2 Ohio St. 345; 1 Parsons on Notes and Bills, 476. In Reynolds v. Appleman, 41 Md. 615, this view seems to be approved, but it was held inapplicable to the case considered. In this case the notarial certificate was dated December 23d, and stated that the note "is delivered to me for protest, the same not being paid, payment thereof having been demanded and refused." The court said, through Bartel, C. J.: "This implies, in the absence of any statement to the contrary, that the demand was duly made at the maturity of the note," the note fell due and was duly presented on December 22d, as was proved by parol testimony. Edwards on Bills, 593.

81. Tindal v. Brown, 1 T. R. 169; Solarte v. Palmer, 7 Bing. 530 (20 Eng. C. L.).

82. Bank of Cape Fear v. Seawell, 2 Hawks, 560; Warren v. Gilman, 5 Shep. 360; Shrieve v. Duckham, 1 Litt. 194; Cowles v. Harts, 3 Conn. 517; Townsend v. Lorain Bank, 2 Ohio St. 345; Burgess v. Vreeland, 4 N. J. 71; Barstow v. Hiriart, 6 La. Ann. 98; Story on Promissory Notes, § 353; Townsend v. Dry Goods Co., 85 Mo. 508, citing the text; Furze v. Sharwood, 2 Q. B. 388 (42 Eng. C. L.); Chard v. Fox, 14 Q. B. 200 (68 Eng. C. L.); Metcalf v. Richardson, 20 Eng. L. & Eq. 301; Miers v. Brown, 11 M. & W. 372; Caunt v. Thompson, 7 C. B. 400 (62 Eng. C. L.); King v. Buckley, 2 Q. B. 419 (42 Eng. C. L.); Edwards on Bills, 598, 660.

On this subject it has been said by the United States Supreme Court:[83] "A suggestion has been made at the bar, that a letter to the indorser, stating the demand and dishonor of the note, is not sufficient, unless the party sending it also informs the indorser that he is looked to for payment. But when such notice is sent by the holder, or by his order, it necessarily implies such responsibility over. For what other purpose could it be sent? We know of no rule that requires any formal declaration to be made to this effect. It is sufficient, if it may be reasonably inferred from the nature of the notice."

§ **986. Whether notice must state fact of protest.**— When a protest is necessary in order to charge the drawer or indorser, the notice should state that the bill was protested, in order to show that his liability was fixed; but if, in point of fact, the bill was noted for protest, no statement as to protest in the notice is necessary.[84] And in one case, where the notice stated expressly that the bill had not been protested, it was held by the court, that it might mean no more than that the protest had not been extended, and it might still be understood that it had been noted.[85] Where the party receiving notice is abroad, it has been said that the notice should mention the protest, since he could not readily ascertain as to the fact by inquiry,[86] but this doctrine does not seem to have become engrafted into the principles of the law merchant.

It is now settled — though the contrary at one time was maintained — that it is not necessary that a copy of the protest of a foreign bill should accompany notice of its dishonor.[87] But information of the protest should be sent if the party to whom notice is transmitted resides abroad.[88]

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83. Bank of the United States v. Carneal, 2 Pet. 543.

84. *Ex parte* Lowenthal, L. R., 9 Ch. 591; 2 Ames on Bills and Notes, 452. *Contra* in Georgia; Continental Nat. Bank v. Folsom, 67 Ga. 624.

85. Brown v. Dunbar, Thompson on Bills, 332.

86. Lord Ellenborough in Rollins v. Gilson, 3 Camph. 334, 1 Maule & S. 288; Thompson on Bills, 334.

87. Goodman v. Harvey, 4 Ad. & El. 870 (31 Eng. C. L.); Wallace v. Agry, 4 Mason, 336; Story on Bills, § 302; *ante*, § 943.

88. See Rogers v. Stephens, 2 T. R. 713; Byles on Bills (Sharswood's ed.) [*270], 418.

SECTION III.

WHO MAY GIVE NOTICE OF DISHONOR.

§ **987.** The notice of dishonor should emanate from the holder of the instrument at the time of its dishonor, and should be communicated to all the parties whom he means to hold liable for its payment. But it is not absolutely necessary that it should come from him, for the holder is entitled to the benefit of notice given in due time by any party to the instrument who would be liable to him if he, the holder, had himself given him notice of dishonor.[89] Thus if the holder duly notifies the sixth indorser, and he the fifth, and he the fourth, and so on to the first, the latter will be liable to all the parties.[90] Where the holder has duly notified, or exercised due diligence to notify the several and successive indorsers, and an intermediate indorser who did not himself notify his predecessors, takes up the bill or note, there is no doubt that the notice sent them by the holder to whom he makes payment inures to his benefit, provided it actually reached them.[91] But it has been observed that it would seem to be unsettled whether the notice inured to the benefit of the intermediate indorser, when the holder's diligence in sending notice did not secure its actual reception.[92] In the single American case, deciding the question, which we have seen, it was held that the plaintiff could not avail himself of the diligence of the holder in such a case, and "that there was no authority for holding that an excuse for the omission to serve notice by the holder should extend to other parties for whom there

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89. Chapman v. Keene, 3 Ad. & El. 193, 4 Nev. & M. 607; Lysaght v. Bryant, 9 C. B. 46, 2 Car. & K. 1016; Jameson v. Swinton, 2 Campb. 373; Wilson v. Swabey, 1 Stark. 34; Stafford v. Yates, 18 Johns. 327; Bachellor v. Prest, 12 Pick. 406; Stanton v. Blossom, 14 Mass. 116; Bank of the United States v. Goddard, 5 Mason, 366; Triplett v. Hunt, 3 Dana, 126; Renshaw v. Triplett, 23 Mo. 213; Whitman v. Farmers' Bank, 8 Port. 258; Wilson v. Mitchell, 4 How. (Miss.) 272; Marr v. Johnson, 9 Yerg. 1; Abat v. Rion, 9 Mart. 465; Story on Promissory Notes, § 301; Story on Bills, § 304; 1 Parsons on Notes and Bills, 503, 504; [Tindal v. Brown, 1 T. R. 467; and *Ex parte* Barclay, 7 Ves. 597, are overruled]; Thompson on Bills, 357; Edwards on Bills, 626, 627; Swayze v. Britton, 17 Kan. 627; Douglass v. Bank, 97 Tenn. 133, 36 S. W. 874, citing text; Standard Sewing Machine Co. v. Smith, 1 Marv. (Del.) 330, 40 Atl. 1117.

90. Hilton v. Shepherd, 6 East, 14; Swayze v. Britton, 17 Kan. 627.

91. Stafford v. Yates, 18 Johns. 327.

92. 1 Parsons on Notes and Bills, 627.

is no such excuse." [93] But high authority has sustained the view that all the indorsers being liable to the holder, an intermediate indorser on paying him becomes substituted to his rights and is entitled to recover.[94] And Thompson considers the doctrine settled to this effect.[95]

§ 988. **It is certain that notice from a mere stranger** [96] **is insufficient,** and it is equally well established that a party to the bill who has been discharged by laches, and who could not in any event sue, cannot give notice for his own or another's benefit, he being then a mere stranger to the paper.[97]

The broad doctrine is laid down by some of the authorities that any party to the instrument may give notice;[98] but as we have already seen, this rule is certainly not without exception, for if the party be discharged he can no longer interfere with the rights of others. And the proper limitation to the rule seems to be that he must be a party whose liability is fixed; or one who, on the paper being returned to him when he pays it, will be entitled to reimbursement from some prior party.[99]

§ 989. The liability of the party must be fixed before he is himself competent to give notice, and that it may inure to the holder's benefit.[1] But it is not necessary that he should be himself aware at the time that his own liability has been duly fixed by dishonor

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93. Beale v. Parrish, 20 N. Y. 407, overruling 24 Barb. 243.

94. 1 Parsons on Notes and Bills, 627.

95. Thompson on Bills, 327.

96. Stanton v. Blossom, 14 Mass. 116; Chanoine v. Fowler, 3 Wend. 173; Juniata Bank v. Hale, 16 Serg. & R. 157; Brailsford v. Williams, 15 Md. 150; Stewart v. Kennett, 2 Campb. 177; Byles on Bills (Sharswood's ed.) [*278], 430; Story on Notes, § 301; Thompson on Bills, 355; Edwards on Bills, 626.

97. Harrison v. Ruscoe, 15 L. J. Exch. 110, 15 M. & W. 231; Turner v. Leech, 4 B. & Ald. 451; Rowe v. Tipper, 13 C. B. 249; Thompson on Bills, 358.

98. See 1 Parsons on Notes and Bills, 503; Wilson v. Swabey, 1 Stark. 34. In Chitty on Bills, chap. 10, pp. 524, 527, it is said: "It suffices if it be given after the bill was dishonored by any person who is a party to the bill, or who would, on the same being returned to him, and after paying it, be entitled to require reimbursement." And Story on Bills, § 304, adopts the principle in almost the identical language of Chitty.

99. In Bayley on Bills, it is said (pp. 254, 256): "The notice must come from the holder, or from some party entitled to call for payment or reimbursement." See also Chanoine v. Fowler, 3 Wend. 173.

1. Lysaght v. Bryant, 9 C. B. 46; Harrison v. Ruscoe, 15 M. & W. 231; Thompson on Bills (Wilson's ed. 1865), 357; Bayley on Bills, 254.

in proper form; for if the fact have been so, and the notice to him have been given, the requisites to his liability are there, and his own state of mind on the question cannot alter the situation.[2]

§ 990. Whether acceptor may give notice.— Whether or not the acceptor of a bill, who refuses or fails to pay it, may give the notice, has been a matter of difference. In respect to the early cases, which held that he could,[3] it has been said by some of the text-writers that they must have been cases in which the holder constituted the acceptor his agent for that purpose.[4] There are also cases which hold that the maker of a note may give notice.[5] But the cases which maintain the doctrine do not rest it on the ground of agency. It was, at one period, held in England that no one but the holder at the time could give a valid notice;[6] but the rule became re-established that the acceptor might do so, and now the principle is settling down to that effect. In reasserting the doctrine, Lord Denman, after referring to *Ex parte* Barclay, and Tindal v. Brown, quoted in the previous note, said:[7] "Notwithstanding these high authorities, it is clear, from Jameson v. Swinton, 2 Campb. 373; Wilson v. Swabey, 1 Stark N. P. C. 34; and also from the learned treatises on bills of exchange, that the contrary doctrine has prevailed in the profession, and we must presume a contrary practice in the commercial world. It is universally considered that the party entitled, as holder, to sue upon the bill, may avail himself of notice given in due time by any party to it. * * * We are now compelled to determine whether the case of Tindal v. Brown, as to this point, be good law. We think that it is not." This language of Lord Denman was approved in Maryland in a well-considered case, and Tuck, J., added:

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2. Jennings v. Roberts, 24 L. J. Q. B. 102; Thompson on Bills, 358.

3. Shaw v. Craft, Chitty on Bills, 333 (1793); Rosher v. Kiernan, 4 Campb. 87.

4. Byles on Bills (Sharswood's ed.) [*279], 431, 432; Bayley on Bills (5th ed.), 254; Thompson on Bills (Wilson's ed., 1865), 359; 1 Parsons on Notes and Bills, 505; Parke, B., in Harrison v. Ruscoe, 15 M. & W. 231; Sebree Deposit Bank v. Moreland, 96 Ky. 150, 28 S. W. 153, citing the text.

5. First Nat. Bank v. Ryerson, 23 Iowa, 508; Glasgow v. Pratte, 8 Mo. 336; Wade on Notice, § 713.

6. Tindal v. Brown, 1 T. R. 167; *Ex parte* Barclay, 7 Ves. 597; Stewart v. Kennett, 2 Campb. 177.

7. Chapman v. Keene, 3 Ad. & El. 193 (30 Eng. C. L. 69); Thompson on Bills, 356.

"We may consider the doctrine then announced established law."[8] It had been held, in Massachusetts, that a drawee who refuses acceptance cannot give a valid notice.[9]

Professor Parsons dissents from the views of the later authorities, and considers that notice must emanate from one who, if he were owner, could recover of some other party to the paper. But, as matter of authority, the doctrine seems now to be established, whatever be its merit. And as any established rule of mercantile conduct is better than continuous shifting, we suppose the courts will not be disposed to disturb, whether they find it necessary to adopt the idea of agency or otherwise. It rests upon usage, and is a principle of the law merchant, however unphilosophical it may seem.

§ **991. Notice by agent.**— Notice given by an agent is the same as if by the holder himself, and it may be either in the agent's name,[10] or in the name of any party entitled to give notice.[11] The notary to whom the bill or note has been given for presentment may, as the agent of the holder, give notice;[12] but it is no part of his official duty;[13] and a bank holding a bill or note for

8. Brailsford v. Williams, 15 Md. 157 (1859), Tuck, J., saying: "In Jameson v. Swinton, 2 Campb. 373, where the notice was not given by the holder of the bill, but by his immediate indorser, who had received notice, the court said, 'The drawer or indorser is liable to all subsequent indorsers, if he had due notice of the dishonor of the bill from any person who is a party to it. Such a notice must serve all the purposes for which the giving of notice is required. The drawer or indorser is authoritatively informed that the bill is dishonored; he is enabled to take it up, if he pleases, and may immediately proceed against the acceptor or prior indorser.'"

9. Stanton v. Blossom, 14 Mass. 116.

10. Woodthorpe v. Lawes, 2 M. & W. 109; Drexler v. McGlynn, 99 Cal. 143, 33 Pac. 773, text cited.

11. Rogerson v. Hare, 1 Jur. 71; Harrison v. Ruscoe, 15 M. & W. 231; Byles on Bills (Sharswood's ed.), 432; Benjamin's Chalmers' Digest, 182.

12. Smedes v. Utica Bank, 20 Johns. 372, 3 Cow. 662; Bank of Utica v. Smith, 18 Johns. 230; Safford v. Wyckoff, 1 Hill (N. Y.), 11; Cowperthwaite v. Sheffield, 1 Sandf. 416; Crawford v. Branch Bank, 7 Ala. 205; Shed v. Brett, 1 Pick. 401; Fulton v. McCracken, 18 Md. 528; Renick v. Robbins, 28 Mo. 339; Swayze v. Britton, 17 Kan. 629. In this connection it may be profitable to note that in Tennessee it has been decided that a notice of demand and nonpayment sent by the notary public to the indorser was insufficient as a notice, because signed by no one. See Bank v. Dibrell, 91 Tenn. 301, 18 S. W. 626. The opinion in this case cites 16 Cal. 375, for authority.

13. Burke v. McKay, 2 How. 66; Harris v. Robinson, 4 How. 336; Swayze v. Britton, 17 Kan. 625. See *ante*, chapter XXVIII, on Protest, § 960. It is

collection, or its officers or agents, should, as a matter of duty, give the notice necessary.[14] Any person, indeed, in whose hands the bill lawfully is, may give the notice as holder or agent, as the case may be, and, if as agent, a verbal authority from the holder is sufficient.[15]

§ 992. Banks and other agents for collection.— A bank or banker with whom a bill or note is deposited to present for acceptance or payment, or any agent to whom it is indorsed for collection, is to be regarded as a distinct holder for the purposes of notice, and has the same time to notify the principal, and the principal the prior parties, as if such bank or agent were the real owner[16] — but the mere servant acting as the principal would not be.[17] The same rule applies to the several branches of the same bank.[18]

Upon the same principle, where the holder of a bill employed an attorney to give notice to an indorser, and the attorney wrote to another professional man requesting him to ascertain the indorser's residence, and received an answer with information on the 16th of the month, which information he communicated to

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held in Tennessee that a notary failing to give notice is liable on his official bond, he having been instructed to give it, and it thus becoming under the Tennessee statute a part of his official duty. Wheeler v. State, 9 Heisk. 393; Insurance Co. v. Wilson, 29 W. Va. 548, citing the text.

14. Ogden v. Dobbin, 2 Hall, 112; Freeman's Bank v. Perkins, 7 Shep. 292; Bank of State of Missouri v. Vaughan, 36 Mo. 90.

15. Story on Bills, § 303; Byles on Bills (Sharswood's ed.), 432; Cowperthwaite v. Sheffield, 1 Sandf. 416; Douglass v. Bank, 97 Tenn. 133, 36 S. W. 874, citing text.

16. Friend v. Wilkinson, 9 Gratt. 31; Neal v. Wyatt, 3 Humphr. 125; Gindrat v. Mechanics' Bank, 7 Ala. 324; Hill v. Planters' Bank, 3 Humphr. 670; Crocker v. Getchell, 23 Me. 392; Sussex Bank v. Baldwin, 2 Harr. 487; Bank of the United States v. Goddard, 5 Mason, 366; Church v. Barlow, 9 Pick. 547; Colt v. Noble, 5 Mass. 167; Ogden v. Dobbin, 2 Hall, 112; Howard v. Ives, 1 Hill (N. Y.), 263; Butler v. Duval, 4 Yerg. 265; Worden v. Nourse, 36 Vt. 756; Bartlett v. Isbell, 31 Conn. 296; Mead v. Engs, 5 Cow. 303; Sheldon v. Benham, 4 Hill (N. Y.), 129; Eagle Bank v. Hathaway, 5 Metc. (Mass.) 213; Lawson v. Farmers' Bank, 1 Ohio St. 206; Langdale v. Trimmer, 15 East, 291; Daly v. Slater, 4 Car. & P. 200; Robson v. Bennett, 2 Taunt. 388; Scott v. Lifford, 9 East, 347; Byles on Bills (Sharswood's ed.) [*276], 428; Story on Bills (Bennett's ed.), 292; Benjamin's Chalmers' Digest, 186. So far overruling Haynes v. Birks, 2 Bos. & P. 599; Ashe v. Beasley & Co., 6 N. Dak. 191, 69 N. W. 188.

17. Bartlett v. Isbell, 31 Conn. 296.

18. Clode v. Bayley, 12 M. & W. 51.

his principal on the 17th, and on the 18th forwarded the letter containing notice of dishonor, it was held sufficient.[19]

The factor, or other agent or attorney, may not know which of the prior parties his principal may desire to hold bound to him; or he may not know where notice would find them, as he has no interest in the bill or note, or privity with the parties, and the rule placing such agents on the footing of a distinct holder is essential to the convenient collection and management of negotiable paper.

The name of the party should be upon the bill or note, and a drawee who has not accepted, and who therefore is an entire stranger to the bill, is incompetent to give notice.[20]

§ **993.** Sending the bill or note to a bank for collection implies authority to it to give notice, and in giving it, it may itself claim to be holder — or agent of the holder — or give it in the real holder's name.[21] Authority to collect a bill is authority to give notice.[22] A creditor holding the paper as collateral security [23] is a holder for the purposes of notice, and so also is he who accepts or pays *supra protest.*[24]

§ **994. If the holder be dead,** his personal representative should give notice, if there be one; but if none be appointed at the time of maturity, the indorser will not be discharged if notice be sent him in a reasonable time after an appointment is made.[25]

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19. In Firth v. Thrush, 8 B. & C. 387 (15 Eng. C. L.), 2 Man. & Ry. 259, Lord Tenterden said: "A banker who holds a bill for a customer is not bound to give notice of dishonor on the day on which the bill is dishonored. He has another day, and upon the same principle I think the attorney in this case was entitled by law to be allowed a day to consult his client."

20. See *post,* § 995; Chanoine v. Fowler, 3 Wend. 173; Brailsford v. Williams, 15 Md. 155; Stanton v. Blossom, 14 Mass. 116; Rosson v. Carrol, 90 Tenn. 90, 16 S. W. 66, quoting and approving text.

21. Worden v. Nourse, 36 Vt. 757; Woodthorpe v. Lawes, 2 M. & W. 109; Edwards on Bills, 629.

22. Worden v. Nourse, 36 Vt. 756.

23. Peacock v. Purcell, 14 C. B. (N. S.) 728 (108 Eng. C. L.).

24. Konig v. Bayard, 1 Pet. 262; Martin v. Ingersoll, 8 Pick. 1.

25. White v. Stoddard, 11 Gray, 38; 1 Parsons on Notes and Bills, 444, 559.

SECTION IV.

TO WHOM NOTICE OF DISHONOR SHOULD BE GIVEN.

§ **995.** Each indorser of a bill or note is entitled to notice, and so also is the drawer of a bill payable to a third party, as bills generally are.[26] The acceptor of a bill and the maker of a note are not entitled to notice, they being the primary debtors, nor are those who, from their irregular execution of the instrument, are adjudged joint makers or sureties, their contract being to pay in default of the principal, at all events.[27] Where there are several successive indorsers, the holder may, and ordinarily does, give notice to all, with a view to preserve his recourse upon all. But he is not bound to give notice to all, in order to bind those to whom he does give it. He may, if he please, give notice to any one or more of the indorsers, who are then made liable to him; and the indorser receiving notice must then notify antecedent indorsers in order to assure himself.[28] It is not, therefore, necessary for the notary to take any notice of the residence of the maker of the note, or make any inquiry as to the residence of any of the indorsers except the last. A different rule would obstruct business, and is not required.[29]

§ **995a. Indorsers for collection entitled to notice.**— The rule requiring notice to the indorsers of bills and notes extends to all indorsers, whether they are indorsers for value or mere agents for collection. A banking-house,[30] or other agent,[31] merely passing

26. Joseph v. Salomon, 19 Fla. 623; Sweet v. Swift, 65 Mich. 91; Bank v. Bradley, 117 N. C. 526, 23 S. E. 455, citing text; Northern v. Hawkins, 61 Mo. App. 9.

27. Fitch v. Citizens' Nat. Bank, 97 Ind. 212. See *ante*, § 707 *et seq.;* Hofheimer v. Losen, 24 Mo. App. 657; Hunnicutt v. Perot, 100 Ga. 312, 27 S. E. 787; Beissner, Admr. v. Weeks, 21 Tex. Civ. App. 14, 50 S. W. 138; Kennon v. Bailey, 15 Tex. Civ. App. 28, 38 S. W. 377; Guignon v. Union Tr. Co., 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186.

28. Cardwell v. Allen, 33 Gratt. 167; Wood v. Callaghan, 61 Mich. 402; Bank v. Bank, 49 Ohio St. 351, 30 N. E. 958; Boteler v. Dexter, 20 D. C. Rep. 26.

29. Wood v. Callaghan, 61 Mich. 402; Wamesit Bank v. Butterick, 11 Gray, 387; Eagle Bank v. Hathaway, 5 Metc. (Mass.) 212; Lawson v. Farmers' Bank, 1 Ohio St. 206; Warren v. Gilman, 17 Me. 360; Story on Bills, §§ 326, 331, 419, 426.

30. McNeal v. Wyatt, 3 Humphr. 125; Scott v. Lifford, 9 East, 347; Seaton v. Scovill, 18 Kan. 435; Lynn Nat. Bank v. Smith, 132 Mass. 227.

31. Butler v. Duval, 4 Yerg. 265. Persons v. Kruger, 45 App. Div. 184, 60

title to the bill or note by indorsement for purposes of collection, stands on the same footing as any other indorser in respect to notice. "In regard to notice, each branch of a bank is considered a separate establishment." [32]

It is not sufficient, in order to charge a prior indorser, to inclose notice for him to a subsequent one. Each successive indorser is entitled to notice, in order to charge him, and overdiligence in notifying one will not supply the defect as to diligence in respect to another.[33] The transferrer of a negotiable instrument by delivery without making himself a party is not entitled to notice.[34]

§ **995b. Accommodation drawer or indorser entitled to notice; but not so if accommodated.**— An accommodation drawer or indorser is as much entitled to notice as if the drawing or indorsing was done for value;[35] but if the drawer or indorser be himself the accommodated, instead of the accommodating party, he is under obligation to take up the bill or note, has no remedy on doing so against any other party; and consequently is without legal possibility of injury, and is not entitled to notice.[36]

§ **996. Indorsers of bills or notes payable on demand, or indorsed overdue, entitled to notice.**— Although a bill or note is payable on demand, or has been indorsed long after it was due, there must still be a demand, and notice of default, in order to charge the indorser, because a bill or note, though overdue, continues to be negotiable, and is in the nature of a new bill payable on demand.[37] This

N. Y. Supp. 1078, holds that a notice of protest of a draft may be served upon an agent of the payee and indorser, who has authority from him to transact all the business of indorsing and accepting notes and drafts and to negotiate paper, particularly where he has negotiated and secured the discount of the drafts in question.

32. Clode v. Bayley, 12 L. J. Exch. 17, 12 M. & W. 51; Thompson on Bills, 351; Edwards on Bills, 623.

33. Stix v. Mathews, 63 Mo. 371; Brown v. Ferguson, 4 Leigh, 37. See *post*, § 1045; Bank v. Bank, 49 Ohio St. 351, 30 N. E. 958.

34. Van Wort v. Wooley, 3 B. & C. 439.

35. Turner v. Samson, 2 Q. B. Div. 23, 19 Moak's Eng. Rep. 195; Thillman v. Gueble, 32 La. Ann. 260; Braley v. Buchanan, 21 Kan. 555.

36. *Post*, § 1085. And "if one, in position on paper, as an apparent indorser, though in fact a joint maker is not entitled to notice of dishonor." Bank of Jamaica v. Jefferson, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. Rep. 100; Hull v. Myers, 90 Ga. 674, 16 S. E. 653.

37. See vol. I, § 611; Thompson v. Williams, 14 Cal. 162; Beebe v. Brooks, 12 Cal. 308; Colt v. Barnard, 18 Pick. 260; Bishop v. Dexter, 2 Conn. 419; Berry v. Robinson, 9 Johns. 121; Dwight v. Emerson, 2 N. H. 159; Greeley v.

principle seems clearly correct, though it has been said that in such cases the party has a reasonable time within which to give notice,[38] and even that no notice at all is necessary.[39] In a recent case, where it was contended that the holder of a note, indorsed overdue, had a "reasonable time" to give notice, it was responded and held, that such "reasonable time" meant "immediate notice, which at farthest is the next day after default, where the parties reside in the same town."[40] Demand and notice to the indorser of overdue note must be made as if the note became due on the day of indorsement.[41] In California, it has been held that the contract of one who indorses a note after maturity, and as additional security to prevent legal proceedings against the payee and indorser, is that of a guarantor.[42]

Hunt, 21 Me. 455; Kirkpatrick v. McCullough, 3 Humphr. 171; Leavitt v. Putnam, 3 N. Y. 494; Adams v. Torbert, 6 Ala. 865; Lockwood v. Crawford, 18 Conn. 361; Atwood v. Hazelton, 3 Bailey, 457; McKinney v. Crawford, 8 Serg. & R. 351; Course v. Shackleford, 2 Nott & McC. 283; Branch Bank v. Gaffrey, 9 Ala. 153; 1 Parsons on Notes and Bills, 520; Hart v. Eastman, 7 Minn. 74; Jones v. Middleton, 29 Iowa, 188; Bemis v. McKenzie, 13 Fla. 557; Swartz v. Redfield, 13 Kan. 550; Shelby v. Judd, 24 Kan. 161; Sawyer v. Brownell, 13 R. I. 141; Graul v. Strutzel, 53 Iowa, 712; Bank of Red Oak v. Orris, 40 Iowa, 332; Pryor v. Bowman, 38 Iowa, 92; Blake v. McMillen, 33 Iowa, 150; McEwer v. Kirtland, 33 Iowa, 348; Fell v. Dial, 14 S. C. 247; Duffy v. O'Connor, 7 Baxt. 498. In Light v. Kingsbury, 50 Mo. 331, Adams, J., said: "This is a negotiable note (payable one day after date), indorsed after date. Such indorsement is equivalent to drawing a new bill at sight, and the same diligence in making demand and giving notice is required to charge the indorsers." "Though a note transferred after maturity comes disgraced to the indorsee" (as was said by Lord Ellenborough in Tinson v. Francis, 1 Campb. 19), and is in his hands subject to all equitable defenses attaching to it and existing between maker and payee at maturity, it is nevertheless negotiable, and to hold indorser, demand must be made on maker and notice of nonpayment given. Rosson v. Carroll, 90 Tenn. 90, 16 S. W. 66, citing and approving text; Landon v. Bryant, 69 Vt. 203.

38. Van Hoesen v. Van Alstyne, 3 Wend. 75.

39. Gray v. Bell, 3 Rich. 71, O'Neall, J.; 1 Parsons on Notes and Bills, 519, note *v*.

40. McKewer v. Kirtland, 33 Iowa, 352, approved in Graul v. Strutzel, 53 Iowa, 712.

41. Landon v. Bryant, 69 Vt. 203, 37 Atl. 297. See § 611; Verder v. Verder, 63 Vt. 38, 21 Atl. 611, holds that in Vermont a note payable on demand is made by statute overdue in sixty days.

42. Crooks v. Tully, 50 Cal. 255; Reeves v. Howe, 16 Cal. 152; Geiger v. Clark, 13 Cal. 579. But guarantor is entitled to notice of nonpayment.

§ **997. Fixed indorsers.**— Where the indorsement upon the bill or note was made before its maturity, and after the bill or note had been transferred with it upon it, and had been returned to the indorser; and he, after paying it, and after the liability of all parties had been fixed, and reissued it with their indorsements upon it, the general rule requiring demand of the maker, and notice to the indorser, where the indorsement was made after maturity, in order to charge the indorser, would not apply. For in such case the demand had been made, the notice given, and his liability determined before he reissued the instrument. Thus, where the indorser, who had taken up a bill at maturity, and upon which his own and prior indorser's liability had been fixed by demand and notice, placed it in the hands of an auctioneer, who sold it to the plaintiff, it was held, that all the parties were bound without any new demand and notice, because there was no new contract of indorsement. And as to the indorser who put it upon the market bearing his name, such act was a representation of liability, and he was estopped in good faith and sound morals from denying it.[43] The like rule would apply where the indorser who has paid it reissues an overdue note, bearing his name thereon, and himself persuades the indorsee to take it.[44] In general, the indorser who has paid and reissues a note will be bound as a fixed indorser, or as one entitled to notice according to intention.[45] When a note was reindorsed after maturity to a preindorser, who then reissued and reindorsed it, it was held that all the indorsers were liable to the holder.[46]

§ **998. Notice to the agent of the party** for the general conduct of his business is the same as if given to the principal in person.[47] But notice to the party's attorney or solicitor, unless he is specially authorized to receive it, is insufficient.[48] If an agent draw a bill

43. St. John v. Roberts, 31 N. Y. 441 (1865). See also Williams v. Matthews, 3 Cow. 252; Airy v. Nelson, 39 Ark. 47.

44. Libby v. Pierce, 47 N. H. 314.

45. Montgomery R. Co. v. Trebles, 44 Ala. 258. See *post*, § 1242.

46. Scott v. First Nat. Bank, 71 Ind. 467.

47. Cross v. Smith, 1 Maule & S. 545; Wilkins v. Commercial Bank, 6 How. (Miss.) 217; Fassin v. Hubbard, 55 N. Y. 471; Lake Shore Nat. Bank v. Colliery Co., 58 N. Y. S. C. 68, citing the text; Persons v. Kruger, 45 App. Div. 184, 60 N. Y. Supp. 1078. See § 995*a*.

48. Louisiana State Bank v. Ellery, 16 Mart. 87; Cross v. Smith, 1 Maule & S. 545.

in his own name, notice should be given to him, and if given to his principal it will be insufficient, he being no party to the paper.[49] If the paper be signed by a duly authorized agent in the principal's name, notice should be given to the principal, who is the party liable.[50] Whether or not the agent would be regarded as authorized to receive it, is questioned; and it has been decided that authority to indorse is not authority of itself to receive notice.[51] The mere fact that a party is the "financial agent" of his principal does not of itself constitute him an agent to receive notice.[52] An agent constituted before the breaking out of a war which severs him from his principal, with authority to receive notice of dishonor, may continue to act for that purpose; and notice served upon him will suffice to charge the indorser.[53] If a note be payable by instalments, demand and notice as to the last instalment binds the indorser as to that.[54]

§ **999. In cases of partnership,** notice must be given to the firm — but notice to any one partner is notice to the firm;[55] even though there has been a dissolution.[56] And it matters not that the firm was dissolved by war, and that one of the partners was separated from the other by a hostile line.[57] If an indorser be a member

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49. Grosvenor v. Stone, 8 Pick. 79.

50. Clay v. Oakley, 17 Mart. (La.) 137.

51. Valk v. Gaillard, 4 Strobh. 99; Wilcox v. Routh, 9 Smedes & M. 476.

52. New York, etc., Co. v. Selma Savings Bank, 51 Ala. 305.

53. Hubbard v. Matthews, 54 N. Y. 50.

54. Eastman v. Turman, 24 Cal. 383.

55. Bayley on Bills, 285; Story on Bills, §§ 299, 305; Story on Notes, § 368; Chitty on Bills, 355; Gowan v. Jackson, 20 Johns. 176; People's Bank v. Keech, 26 Md. 521; St. Louis Bank v. Altheimer, 91 Mo. 190; Hays v. Citizens' Sav. Bank, 101 Ky. 201, 40 S. W. 573; Citizens' Sav. Bank v. Hays, 96 Ky. 365, 29 S. W. 20; Barber v. Van Horn, 54 Kan. 33, 36 Pac. 1070.

56. Fourth Nat. Bank v. Henschuh, 52 Mo. 207; Hubbard v. Matthews, 54 N. Y. 50; Brown v. Turner, 15 Ala. (N. S.) 832; Coster v. Thomason, 19 Ala. (N. S.) 717. See *ante*, vol. I, § 592; Slocomb v. Lizardi, 21 La. Ann. 355.

57. In Hubbard v. Matthews, 54 N. Y. 50, Johnson, C., said: "It results from necessity if the liability of the absent partner in a firm dissolved by the event of war is to be continued at all in respect to engagements existing at the time when war breaks out, that he must be deemed to be represented by the representative of the firm remaining within the jurisdiction of the belligerent whose authority extends over the place of business of the firm, and that as in respect to property and rights there existing, so in respect to obligations and liabilities dated before the war, he must share the fortunes of the firm."

of the firm, the notice to the firm is sufficient.[58] The general rule, that notice to any partner is notice to the firm, is subject to this exception: that where one member resides at a distance, and another at the place of protest, notice must be given to the latter. At least, it has been so held.[59]

§ **999a. Joint indorsers.**— If there are joint indorsers, not partners, notice must be given to each of them, and notice to one only would not even bind him.[60] But, " if the drawer of a bill," said the Supreme Court of the United States, " be in truth the partner of the acceptor, either generally, or in the single adventure in which the bill made a part, in that event notice of dishonor of the bill by the holder to the drawer, need not be given. The knowledge of one partner is the knowledge of the other, and notice to the one, notice to the other." [61] If one of a firm die, notice to the survivor suffices.[62]

§ **1000. If the party entitled to notice be dead** at the time the bill or note becomes payable, and this is known to the holder, notice should be sent to his executor or administrator, if there be any, and it can be ascertained by reasonable inquiry who or where he is; and under such circumstances notice addressed to the de-

58. Rhett v. Poe, 2 How. 457. In the case of Presbrey v. Thomas, 1 App. D. C. 171, the opinion of the court indicates that not only must some knowledge of the transaction in the firm name be shown, but that there must be some evidence tending to show that the other members of the firm in some manner recognize the obligation as a firm debt.

59. Hume v. Watt, 5 Kan. 34; Adams Oil Co. v. Christmas & Hughes, 101 Ky. 564, 41 S. W. 545.

60. Bank of the United States v. Bierne, 1 Gratt. 234; Hubbard v. Matthews, 54 N. Y. 50; People's Bank v. Keech, 26 Md. 521; Willis v. Green, 5 Hill, 232; Shepard v. Hawley, 1 Conn. 368; Boyd v. Orton, 16 Wis. 495; Dabney v. Stidger, 4 Smedes & M. 749; State Bank v. Slaughter, 7 Blackf. 133; Union Bank v. Willis, 8 Metc. (Mass.) 504; Bank of Chenango v. Root, 4 Cow. 126; Miser v. Trooinger, 7 Ohio St. 238; Bealls v. Peck, 12 Barb. 245; Sayre v. Frick, 7 Watts & S. 383; Story on Bills, § 199; Wood v. Wood, 1 Harr. 429. *Contra*, Dodge v. Bank of Kentucky, 2 A. K. Marsh. 510; Higgins v. Morrison, 4 Dana, 100; Thompson on Bills, 361; Story on Notes, § 255, note 2. See *ante*, vol. I, § 594; Bowie v. Hume, 13 App. D. C. 286, citing with approval the text.

61. Rhett v. Poe, 2 How. 473; Los Angeles Nat. Bank v. Wallace, 101 Cal. 478, 36 Pac. 197; Hays v. Citizens' Sav. Bank, 101 Ky. 201, 40 S. W. 573.

62. Hubbard v. Matthews, 54 N. Y. 50; Slocomb v. Lizardi, 21 La. Ann. 355.

ceased by name would be insufficient.[63] Notice addressed to the "legal representative," in a case in which the death of the indorser was recent, and no personal representative had as yet qualified, has been deemed sufficient;[64] but it has been held that if addressed to "the estate," it would not, that term applying as well to the heir-at-law as to the executor or administrator.[65] And where a personal representative has qualified, and is known, or could be ascertained by due diligence, it would not be sufficient to address notice through the mail to "the administrator," "executor," or "personal representative," by official designation only, as it might lead to delay. The address should be to such party by name.[66] Notice to one of several executors or administrators is sufficient.[67]

It is said, however, that in all these cases reception of notice by the personal representative in a reasonable time will be sufficient — curing all defects in the sending.[68] Where two promissory notes fell due at several times, and the indorser of both being deceased at their maturity, notice was given to the executor named in his

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63. Oriental Bank v. Blake, 22 Pick. 206; Barnes v. Reynolds, 4 How. (Miss.) 114; Cayuga County Bank v. Bennett, 5 Hill, 236; 1 Parsons on Notes and Bills, 501, 502; Goodnow v. Warren, 122 Mass. 83; Dodson v. Taylor, 56 N. J. L. 11, 28 Atl. 316, citing text.

64. In Boyd's Admr. v. City Sav. Bank, 15 Gratt. 501, it appeared that Boyd, the indorser of the note, was dead when it became due and was protested, and had no personal representative. He resided in Lynchburg at the time of his death, and his family continued to reside there until after the protest of the note. Notice of dishonor was on the day of protest deposited by the notary in the post-office at Lynchburg, directed to "The Legal Representative of James M. Boyd, deceased, Lynchburg;" and this was all the notice given. The Court of Appeals held that the notice was sufficient, saying that the legal representative (upon his qualification) was as likely to receive notice through this channel as if it had been left at the late residence of the deceased indorser; and that the former was preferable, inasmuch as "the family of the deceased, at the time of the protest, might be in a state of deep affliction (occasioned by his recent death), when it would be painful both to them and the notary for him to have to visit them on a matter of business." Pillow v. Hardeman, 3 Humphr. 538; Planters' Bank v. White, 2 Humphr. 112. See *post*, § 1011.

65. Cayuga County Bank v. Bennett, 5 Hill, 236; Massachusetts Bank v. Oliver, 10 Cush. 557.

66. Smalley v. Wright, 40 N. J. L. 471.

67. Bealls v. Peck, 12 Barb. 245; Lewis v. Bakewell, 6 La. Ann. 359; Carolina Nat. Bank v. Wallace, 13 S. C. 347.

68. Cayuga County Bank v. Bennett, 5 Hill, 236; Maspero v. Pedesclaux, 22 La. Ann. 227; 1 Parsons on Notes and Bills, 502. See §§ 1003, 1050.

will, who had presented it for probate; before the maturity of the second note the executor had renounced the executorship, and an administrator had been appointed, but no public notice of the fact had been given — it was held that notice as to the first note was sufficient, but not as to the second.[69] In a case where no personal representative of a deceased indorser had been appointed, notice left at his residence with his son-in-law was deemed sufficient.[70] Notice sent to a person who was afterward appointed administrator of the deceased has been held insufficient, on the ground that he occupied no such relation to the estate at the time of its reception, that he was either honorably or in legal duty bound to do anything for its protection.[71]

§ **1001. If there be no personal representative,** notice sent to the family residence of the deceased will be sufficient;[72] and it is likewise sufficient if notice be addressed to the deceased when, without negligence, the holder is not aware of his death.[73] If notice is left at the family residence, no personal representative having been appointed, it will not be necessary, when one is appointed, to give him notice, the rights of the holder being fixed by his doing what the circumstances required when the paper fell due.[74]

§ **1002. If the party be bankrupt,** it is best to give notice to him, and to his assignee also. If there be as yet no assignee appointed,

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69. Goodnow v. Warren, 122 Mass. 79; Drexler v. McGlynn, 99 Cal. 143, 33 Pac. 773.

70. Weaver v. Pennsylvania, 27 La. Ann. 129.

71. Mathewson v. Stafford Bank, 45 N. H. 104. See Goodnow v. Warren, 122 Mass. 82.

72. Merchants' Bank v. Birch, 17 Johns. 25; Stewart v. Eden, 2 Cai. 121; Dodson v. Taylor, 56 N. J. L. 11, 28 Atl. 316, citing text. In Goodnow v. Warren, 122 Mass. 82, Devens, J., said: "It has been held that if notice be sent to the last residence, or last place of business of the deceased, it is sufficient to render his estate responsible, as it may be reasonably supposed that it will thus reach those interested in it." Linderman v. Guldin, 34 Pa. St. 54. In the case of Bank of Jefferson v. Darling, 91 Hun, 236, 36 N. Y. Supp. 1122, held, that two notices of dishonor signed by a notary, one addressed to "J. Darling" and the other "to the estate of J. Darling," both being inclosed in an envelope directed to "estate of J. Darling, Stoney Brook, L. I." (Darling being dead), was sufficient, and that reasonable diligence had been exercised.

73. Barnes v. Reynolds, 4 How. (Miss.) 114; Maspero v. Pedesclaux, 22 La. Ann. 227; Cosgrave v. Boyle, 6 Canada Sup. Ct. Rep. 178.

74. Merchants' Bank v. Birch, 17 Johns. 25.

notice to him is sufficient;[75] and perhaps it might be sufficient even if one had been appointed.[76] If given to the assignee alone, it would probably be sufficient.[77]

If the bankrupt has absconded, notice should be given his assignee, if any there be;[78] and if there be none, to any one representing his estate.[79]

SECTION V.

MODE AND FORMALITIES OF GIVING NOTICE WHEN THE PARTY GIVING AND THE PARTY TO RECEIVE IT RESIDE IN THE SAME PLACE.

§ 1003. Notice, however communicated, is sufficient if duly received. — If the party addressed receives the notice in due season, or can be properly inferred by the jury from the facts of the case that it was received, the mere manner of its transmission is wholly immaterial.[80] A personal service of notice is good wherever it may be made, provided it be done in proper time; at an improper place it is sufficient if it reaches the party for whom it was intended in due season;[81] and so likewise if it be sent by mail where the parties reside in the same place, it is good if it duly reaches the party addressed.[82]

The distinction between the different modes of giving notice is this: that where the holder and indorser reside in different places, the former, if he deposits the notice in the post-office in due season, has no further burden on him as to the actual receipt

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75. *Ex parte* Moline, 19 Ves. 216.

76. 1 Parsons on Notes and Bills, 500.

77. See Callahan v. Kentucky Bank, 82 Ky. 231, citing text. See also House v. Vinton Bank, 43 Ohio St. 354, disapproving Callahan v. Kentucky Bank, *supra;* American Nat. Bank v. Junk Bros., 94 Tenn. 624, 30 S. W. 753, citing text.

78. Rhode v. Proctor, 4 B. & C. 517, 6 Dowl. & R. 610.

79. Ibid.

80. Hyslop v. Jones, 3 McLean, 69; Dicken v. Hall, 87 Pa. St. 379; First Nat. Bank v. Wood, 51 Vt. 471; People's Bank v. Scalzo, 127 Mo. 164, 29 S. W. 1032, text cited.

81. Bank of United States v. Corcoran, 2 Pet. 121; Foster v. McDonald, 5 Ala. 376; Manchester Bank v. Fellows, 8 Fost. 302; Whiteford v. Burckmeyer, 1 Gill, 127; Bradley v. Davis, 26 Me. 45; Cabot Bank v. Warner, 10 Allen, 524; Shelburne Nat. Bank v. Townsley, 107 Mass. 444; Gilchrist v. Downell, 53 Mo. 591; First Nat. Bank v. Wood, 51 Vt. 473; Carolina Nat. Bank v. Wallace, 13 S. C. 347. See §§ 1000, 1050.

82. Ibid. Service by mail upon an indorser having an office in this (New York) State, but residing in another, is good. See People v. North River Bank, 62 Hun, 484, 17 N. Y. Supp. 200.

of it by the latter; but where both parties live in the same town, the sender of the notice is bound to show that it was actually received by the indorser in due season.[83]

§ 1004. Whether notice may be sent by telegraph.— The telegraph, as yet unemployed in transmitting notice of dishonor of commercial paper, might be made available and useful for that purpose;[84] but the proof of its due reception would be necessary, as communication by that channel does not stand on the same footing as that by mail.

If a system of postal telegraphy were established by the government (as is proposed), it would doubtless be placed in equal dignity with the mail service, and then become frequently, if not generally, the medium of communicating notice. Notice may also be sent by special messenger, as we shall see hereafter. We shall herein consider, (1) When notice must be personally served; and (2) How and where it must be personally served.

§ 1005. In the first place, notice, as a general rule, must be personally served when parties reside in same place.— When the parties reside in the same city or town, the party is, as a general rule, entitled to personal notice, verbal or written, or a written notice must be left at his dwelling-house or place of business. And notice by mail in such a case will be insufficient,[85] unless its reception in due time be proved.[86]

This at least is the rule in America, and may be regarded as the law in all of the States, except where it has been changed

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83. Cabot Bank v. Warner, 10 Allen, 522.

84. 1 Parsons on Notes and Bills, 487.

85. Bowling v. Harrison, 6 How. 248; Williams v. Bank of United States, 2 Pet. 96; Bussard v. Levering, 6 Wheat. 104; Nashville Bank v. Bennett, 1 Yerg. 166; Boyd v. City Savings Bank, 15 Gratt. 501; Pierce v. Pendar, 5 Metc. (Mass.) 352; Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177; John v. City Nat. Bank, 62 Ala. 529; Story on Bills, § 312; 1 Parsons on Notes and Bills, 482; Byles on Bills (Sharswood's ed.) [*272], 422; Vance v. Collins, 6 Cal. 535; Kock v. Bringer, 19 La. Ann. 183; Davis v. Gowen, 19 Me. 447; Bank of Commerce v. Chambers, 14 Mo. App. 156 (In such case, notice by mail is held sufficient in Canada under 37 Vict., chap. 47, § 1; Merchants' Bank v. McNutt, 11 Canada Sup. Ct. Rep. 126); Morton v. Cammack, McArth. & Mackay (D. C.) 22; Benedict v. Schmieg, 13 Wash. 476, 43 Pac. 374, 52 Am. St. Rep. 61; Carter *et al.* v. Odom, 121 Ala. 162, 25 So. 774.

86. Cabot Bank v. Warner, 10 Allen, 524; Insurance Co. v. Wilson, 29 W. Va. 547, citing the text; Phelps v. Stocking, 21 Nebr. 443; Thompson & Walkup Co. v. Appleby, 5 Kan. App. 680, 48 Pac. 933.

by statute, or some modification has been made by the courts in consequence of the growth of large cities.

§ 1005a. Exception when instrument protested at different place. — But if the instrument was protested by a notary at a place different from that of the parties' residence, the mail may then be used.[87] When the mail is the proper method by which notice may be transmitted, it may be deposited in a street letter-box authorized by act of Congress, and under control of the post-office department;[88] and delivery to the letter-carrier for deposit in the mail would be sufficient.[89] And the notice may be deposited in the post-office at the place of protest, or at the place of the indorser's residence, if in due season.[90]

Thus it has been held that where a bill was dishonored in Philadelphia, and notice sent to an indorser in Providence, the latter might give notice to a previous party residing in Providence, through the post-office.[91] And so where the notary, sending notice to one indorser, inclosed to him under the same envelope a notice for him to give to a prior indorser at the same place, it has been held that the notice for such prior party might be redeposited in the post-office, properly addressed, the first indorser being regarded as the agent of the notary or holder who might, if he had pleased, have sent the notice directly by mail.[92] And so where the notary, who protested the bill at Middletown, where it was payable, sent notice to the holder, who resided, as did also

87. Hartford Bank v. Stedman, 3 Conn. 489; Manchester Bank v. Fellows, 8 Fost. 302; Warren v. Gilman, 17 Me. 360; Greene v. Farley, 20 Ala. 322; Eagle Bank v. Hathaway, 5 Metc. (Mass.) 212; United States Nat. Bank v. Burton (Vt.), 2 New Eng. 206; Edmonston v. Gilbert, 3 Mack. 351.

88. Sasco Nat. Bank v. Shaw, 79 Me. 376.

89. Pearce v. Langfit, 101 Pa. St. 507; Johnson v. Brown, 154 Mass. 105, 27 N. E. 994. See § 1039, for gist of the decision.

90. Foster v. McDonald, 8 Ala. 376; Timms v. Delisle, 5 Blackf. 447. *Contra*, Pritchard v. Scott, 7 Mart. (La.) 491; Patrick v. Beasley, 6 How. (Miss.) 609; Greene v. Farley, 20 Ala. 322.

91. In Eagle Bank v. Hathaway, 5 Metc. (Mass.) 213, Shaw, C. J., said: "On the whole, as the transaction to be notified to the defendant took place in Philadelphia; as notice to him by mail from there would have been good; as the cashier was the conduit of conveyance, and not the party from whom the notice emanated; as the defendant, if he were looking for notice of the dishonor of this bill of exchange payable in Philadelphia, would naturally look to the post-office for that notice, we are of opinion that notice by the post-office under these circumstances must be deemed good."

92. Manchester Bank v. Fellows, 8 Fost. 313.

the indorser, at Hartford, and the holder there redeposited it in the post, it was held sufficient.[93]

§ **1006.** When, however, an indorser uses the post-office to communicate notice to a prior indorser in the same place as himself, he must expedite it by mail in time for it to reach him as early as if it had been addressed to him originally from the place of protest, and had not been withdrawn from the office at all. In Massachusetts, where it appeared that the note was protested in New York city on the 7th of July, 1866, and the notices were inclosed to the first indorser at Shelburne Falls, where they reached him in due course on the 10th inst.; and he redeposited the notice for his immediate prior indorser, who also received his letters through the Shelburne Falls office (though residing in the country), in the post-office there on the 11th inst.; it was held that due diligence had not been exercised, and the prior indorser was discharged.[94]

§ **1007.** Where the parties do not themselves reside at the same place, but the note is payable at the same place where the party to be notified resides, the like rule prevails as if the parties resided there. Thus, where a note was payable at Vicksburg, Mississippi, and the holder resided in Maryland, but the indorser resided in Vicksburg, the Supreme Court of the United States held that the indorser could not be notified through the post-office in Vicksburg, and sustained the charge of the lower court to the jury, "that to charge an indorser, if he lived in the town in which the note was made payable, the notice must be personal unless he had agreed to receive it elsewhere, or unless by custom

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93. Hartford Bank v. Stedman, 3 Conn. 489. To same effect, see Van Brunt v. Vaughan, 47 Iowa, 145.

94. In Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177, Ames, J., distinguished the case from that of Eagle Bank v. Hathaway, above cited, and said: "That case, however, differs from the one before us, in showing that the notification was left by the cashier at the post-office on the day of its reaching his hands, and that it must have reached the defendant as early as if it had been directed and sent to him by mail from Philadelphia; so that substantially he was notified by the notary in regular course of mail. But considered as an independent notice, emanating from an indorser who, by being himself properly notified, has become chargeable, and desires to notify his immediate indorser, and thereby to hold him, a notice by a drop-letter, given on the next day, finds little or no support in that case." See also 107 Mass. 444.

and usage of the bank at which the note is payable, the notice of nonpayment was left at the post-office." [95] But the opposite view has been taken in some cases.[96]

§ **1008. Exception when penny post is used.**—There is an exception to the general rule requiring personal service of notice when the parties reside in the same place, or rather a variation of the general rule, in large towns and cities where letter-carriers are employed in the postal service to deliver letters at the houses or places of business of parties who usually receive their letters through them. In such cases, if the notice be deposited in the post-office early enough in the day to go by the letter-carrier (or penny post, as this system is often called), on the same day to the party entitled to notice, it will be deemed sufficient. In such cases, the penny post, or letter-carrier, is treated as an agent for the purpose, because of the accustomed use of this agency as a medium of city communication. It was recently said in Pennsylvania, where notice was sent in this manner in the city of Harrisburg, by Read, J.: "Now that free delivery of letters is established and regulated by law so as to secure a certain delivery according to its address, it seems proper that this rule should be adopted in this State as called for by the improvements introduced into the post-offices by the general government." [97]

So in Maryland, where the carrier testified that he uniformly delivered letters for the indorser to him, and the penny post was regularly established, the same doctrine was held.[98]

§ **1009.** It must be proved, when the penny post is used, that the letter containing notice was deposited in the post at such a

95. Bowling v. Harrison, 6 How. 248. See also Bank v. Slaughter, 7 Blackf. 133.

96. Gindrat v. Mechanics' Bank, 7 Ala. 324; Greene v. Farley, 20 Ala. 324; Philipe v. Harberlee, 45 Ala. 597; Tyson v. Oliver, 43 Ala. 608.

97. Shoemaker v. Mechanics' Bank, 59 Pa. St. 83 (1868).

98. Walters v. Brown, 15 Md. 292 (1859). In Virginia it is now provided by statute that "in every city containing five thousand inhabitants or more, a notice of protest of any note, draft, and so forth, sent by mail to any party or parties residing therein, and liable thereto, shall be a legal service." See Acts of Assembly, 1876–1877, p. 28. In Greenwich Bank v. De Groot, 7 Hun, 211, the court, speaking of the New York statute, says: "That law requires the notice to be deposited in the post-office of the city or town where the paper may be payable or legally presented for payment or acceptance (chap. 466, Laws 1857, § 3). And these boxes, by a liberal construction of the terms of the statute, may be regarded as the post-office for that purpose."

time that, according to the course of the post, it would be delivered to the party to whom it is addressed on the day he was entitled to receive notice of dishonor;[99] and it has been said by high authority, that if there be no penny post that goes to the quarter where the drawer lives, the notice must be personal, or by special messenger sent to his dwelling-house, or place of business.[1] But if the party resides beyond the city limits, while the penny post might not be used, because unavailable, yet the regular post might be, according to the modern and the correct view, as it seems to us.

§ **1010.** In London and in Edinburgh, where the facilities of postal delivery have been long since perfected, the use of the post-office for communicating notice to parties in the city has been recognized and favored as the legitimate and proper method.[2] And the modern authorities show a disposition to extend and encourage it. It has been said that the requirement that notice should be sent otherwise than by post "has lost its reasonable force, and exists only by authority."[3]

§ **1011. Exception when party is recently deceased.**— Another exception to the rule requiring personal notice when the parties reside in the same place arises when the party entitled to notice has recently died, and no personal representative has been appointed. In such a case, where notice was deposited addressed "to the legal representative of J. M. B." (the deceased indorser), at the place of the indorser's late residence, where the holder also resided, it was held sufficient.[4]

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99. Smith v. Mullet, 3 Campb. 208; Dobree v. Eastwood, 3 Car. & P. 250; Walters v. Brown, 15 Md. 292.

1. 3 Kent Comm. 107.

2. 1 Parsons on Notes and Bills, 481; Thompson on Bills, 339.

3. 1 Am. Lead. Cas. 403; Redf. & Big. Lead. Cas. 381; 1 Parsons on Notes and Bills, 484; Eagle Bank v. Hathaway, 5 Metc. (Mass.) 212.

4. In Boyd's Admr. v. City Savings Bank, 15 Gratt. 501 (1860), Moncure, J., said: "Two modes of giving it naturally suggested themselves; one by sending it through the post-office, and the other by leaving it at the last residence of the indorser, where his family still resided in the same town; and the notary elected the former. Was it not a reasonable choice? Was it so unreasonable as to defeat the right of the holder against the estate of the indorser? No unnecessary restraint should be imposed on the circulation of negotiable paper. No difficult condition should be required to be performed to fix the liability of parties. What was the notary to do under the circumstances of this case? He could not deliver the notice to the personal

§ **1012. Exception when several post-offices in a town.**— So, likewise, where there are several distinct villages or post-offices in a town, between which there is a regular intercourse by mail, it may be employed for the conveyance of notice, notwithstanding the fact that the parties reside in the same general municipality.[5]

And where the indorser resided in the same city, but ten miles from the place of protest, it has been held allowable to use the post, there being at his place of residence an office at which it was not shown that he did not receive his mail.[6]

§ **1013. Effect of usage.**— The usage of a bank to deposit notice in the post-office, it has been held, would be binding upon those dealing with it.[7] But to be effectual such usage should be proved

representative himself, who was the person entitled to receive it, but who was not then known and had not qualified. All he could do was to put it in a train of being received by the personal representative in a reasonable time after his qualification. He might have left it at the last residence of the indorser, as the cases decide; but that would only have been a means of conveying it to the personal representative after his qualification. The notice is not to the family, but to the personal representative, who stands in the shoes of the indorser. Then, as a means of conveying it to the personal representative, is not the post-office at least as good a place of deposit as the last residence of the deceased?" * * * "The reason for requiring notice, in the case of a living indorser, to be left at his domicile or place of business rather than at the post-office, does not apply to the case of a deceased indorser who is without a representative. In the former case the law presumes that the indorser is always at his domicile or place of business, or has some person there to attend to his business; and a notice left there is considered to be at home, and as having in effect been personally served. In the latter case, no such presumption can be made. A notice left at the domicile of a deceased indorser for his representative, when one qualifies, is not at home, but is merely *in transitu*, and so is a notice left at the post-office for such representative. If notice given through the post-office would be just as effectual as notice left at the last residence of the indorser, there is one reason at least which would make the former preferable, and which was mentioned in the argument of the counsel for the defendant in error; and that is, the family of the deceased at the time of the protest might be in a state of deep affliction (occasioned by his recent death), when it would be painful both to them and the notary for him to have to visit them on a matter of business."

5. Shaylor v. Mix, 4 Allen, 351; Farmers' Bank v. Butler, 3 Litt. 498; Curtis v. State Bank, 6 Blackf. 312; Brindley v. Barr, 3 Harr. 419; Gist v. Lybrand, 3 Ohio, 307; Louisiana State Bank v. Rowell, 18 Mart. 506; Bell v. Hagerstown Bank, 7 Gill, 216.

6. Paton v. Lent, 4 Duer, 231.

7. Gindrat v. Mechanics' Bank, 7 Ala. 324; Chicopee Bank v. Eager, 9 Metc. (Mass.) 583; 1 Am. Lead. Cas. 403.

with certainty and clearness.[8] The true rule is implied by the decision of the Supreme Court hereinbefore quoted.[9] To be binding, the usage to employ the post-office to notify a party of the same place, must be clear, definite, and well known; and when this is the case the postal service should be deemed as appropriate a method of transmission as any other.[10]

§ **1014. As to who are to be regarded as of the same place.**— According to one class of cases all persons are to be regarded as of the same place who receive their mails through the same post-office; and although the party entitled to notice may in fact have his residence several miles distant in the country, those cases do not admit the post-office in the city or town where he gets his mail matter, and where the holder is to be used as a means of communicating notice. They base the decision upon the doctrine that the mail is to be used as a means of transmission only, and not as a place of deposit.[11]

Thus, in Tennessee, it was held that where notice of protest in Nashville, where the note was payable, was mailed there to the indorser, who resided seven and a half miles distant, was not sufficient, although he transacted his business at Nashville and received his mails there.[12] So in New York, where the indorser resided three or four miles from the post-office, and beyond the ordinary range of letter-carriers, but in the same city, and received his letters at the same office where notice was deposited, the same doctrine was announced, though the case did not present the question as to an indorser actually residing beyond the city limits in the country.[13] And so in Nebraska, where indorser resided about a mile outside of the city of Omaha, where

8. Thorn v. Rice, 15 Me. 263.

9. See *ante*, § 1007.

10. Bowling v. Harrison, 6 How. 248; Carolina Nat. Bank v. Wallace, 13 S. C. 347.

11. In Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177, it is said: "The post-office is not a place of deposit for notice to indorsers, except where the notice is to be transmitted by mail to another office." Farmers' Bank v. Battle, 4 Humphr. 86. See also Eagle Bank v. Hathaway, 5 Metc. (Mass.) 212; Ransom v. Mack, 2 Hill, 587; Ireland v. Kip, 10 Johns. 490, 11 Johns. 231; Louisiana State Bank v. Rowell, 6 Mart. 506; Barker v. Hall, Mart. & Y. 183; Patrick v. Beazley, 6 How. (Miss.) 609; Forbes v. Omaha Nat. Bank, 10 Nebr. 338; Brown v. Bank of Abingdon (Va.), 7 S. E. 357.

12. Barker v. Hall, Mart. & Y. 183.

13. Ireland v. Kip, 10 Johns. 490, 11 Johns. 231; Edwards on Bills, 602.

the paper was payable at a bank and received his letters at the Omaha post-office, which was the nearest to his residence, but had no place of business in the city, notice addressed to him by mail to Omaha was deemed insufficient.[14]

In Virginia, where the residence and place of business of the indorser were 208 yards from the post-office and 163 yards beyond the corporate line of the town, personal service of notice was held necessary, and its transmission by post inadmissible.[15]

§ 1015. But where the party has no regular place of business in the city or town where the holder resides or the instrument is payable, and resides some distance in the country, but receives his mails in the city or town, the mere fact that he would get the letter out of the same office it was put in, instead of a distant one, should not vitiate the method of communication, every reason of convenience and certainty which apply in one case applying with equal force in the other. To hold otherwise would require the holder to give personal notice to an indorser who did not reside in the same place as himself, or to send it by mail to a post-office where the indorser did not usually receive his letters.

The Supreme Court of the United States has adopted this view in preference to the more exacting view of the authorities referred to; and has held that where the plaintiff bank at which the note was payable was located in Georgetown, and the indorser, when the note fell due, resided two or three miles distant in the country, having removed after it was made from Washington city, but received his letters through the Georgetown post-office, notice deposited in the Georgetown post-office, addressed to him at that place, was sufficient.[16]

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14. Forbes v. Omaha Nat. Bank, 10 Nebr. 338.

15. Brown v. Bank of Abingdon, 85 Va. 96, 7 S. E. 357.

16. In the case of Bank of Columbia v. Lawrence, 1 Pet. 578, the court (Thompson, J.) said: "The indorser, who had removed to the country from Washington, as stated in the text, continued the owner of the house in Washington in which he had formerly lived, and which was in the occupation of his sister-in-law. He was accustomed to go there two or three times a week; and it appeared that he was employed in winding up his business there, and settling accounts; that his books were kept there; and his bank notices were sometimes left there; and also that his newspapers and foreign letters were sent there for him. His coming to Washington and employing himself as stated, was generally known to those having business with him." It was contended that notice should have been sent to Washington by the plaintiff's bank, located at Georgetown; but the court thought the method adopted the proper

The opposite view is severe and technical, and does not rest, that we perceive, upon any principle of convenience, utility, or

one; and Thompson, J., said: * * * "If it should be admitted that the defendant had what is usually called a place of business in the city of Washington, and that notice served there would have been good, it by no means follows that service at his place of residence in a different place would not be equally good. Parties may be, and frequently are, so situated that notice may well be given at either of several places. But the evidence does not show that the defendant had a place of business in the city of Washington, according to the usual commercial understanding of a place of business. There was no public notoriety of any description given to it as such. No open or public business carried on, but merely occasional employment there two or three times a week in a house occupied by another person, and the defendant only engaged in settling up his old business. In this view of the case, the inquiry is narrowed down to the single point, whether notice through the post-office at Georgetown was good, the defendant residing in the country two or three miles distant from that place, in the county of Alexandria. The general rule is that the party whose duty it is to give notice in such cases is bound to use due diligence in communicating such notice. But it is not required of him to see that the notice is brought home to the party. He may employ the usual and ordinary mode of conveyance; and whether the notice reaches the party or not, the holder has done all that the law requires of him. It seems at this day to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law. This is certainly best calculated to have fixed or uniform rules on the subject, and is highly important for the safety of holders of commercial paper. And these rules ought to be reasonable and founded in general convenience, and with a view to clog as little as possible, consistently with the safety of parties, the circulation of paper of this description; and the rules which have been settled on this subject have had in view these objects. Thus, when a party entitled to notice has in the same city or town a dwelling-house and counting-house or place of business within the compact part of such city or town, a notice delivered at either place is sufficient; and if his dwelling and place of business be within the district of a letter-carrier, a letter containing such notice, addressed to the party and left at the post-office, would also be sufficient. All these are usual and ordinary modes of communication, and such as afford reasonable ground for presuming that the notice will be brought home to the party without unreasonable delay. So when the holder and indorser live in different post towns, notice sent by the mail is sufficient, whether it reaches the indorser or not. And this for the same reason, that the mail being the usual channel of communication, a notice sent by it is evidence of due diligence. And for the sake of general convenience, it has been found necessary to enlarge this rule. And it is accordingly held that when the party to be affected by the notice resided in a different place from the holder, the notice may be sent by the mail to the post-office nearest to the party entitled to such notice. It has not been thought advisable, nor is it believed that it would comport with practical convenience, to fix any precise distance from the post-office within which the party must reside in order to

justice. And the authorities, which are numerous concurring in the opinion expressed by the United States Supreme Court, com-

make this a good service of the notice. Nor would we be understood as laying it down as a universal rule, that the notice must be sent to the post-office nearest to the residence of the party to whom it is addressed. If he was in the habit of receiving his letters through a more distant post-office, and that circumstance was known to the holder or party giving the notice, that might be the more proper channel of communication, because he would be most likely to receive it in that way; and it would be the ordinary mode of communicating information to him, and, therefore, evidence of due diligence. In cases of this description, where notice is sent by mail to a party living in the country, it is distance alone, or the usual course of receiving letters, which must determine sufficiency of the notice. The residence of the defendant, therefore, being in the county of Alexandria, cannot affect the question. It was in proof that the post-office in Georgetown was the one nearest his residence, and only two or three miles distant, and through which he usually received his letters. The letter containing the notice, it is true, was directed to him at Georgetown. But there is nothing showing that this occasioned any mistake or misapprehension with respect to the person intended, or any delay in receiving the notice. And as the letter was there to be delivered to the defendant, and not to be forwarded to any other post-office, the address was unimportant, and could mislead no one. No cases have fallen under the notice of the court which have suggested any limits to the distance from the post-office within which a party must reside in order to make the service of the notice in this manner good. Cases, however, have occurred where the distance was much greater than in the one now before the court, and the notice held sufficient. 16 Johns. 218. In cases where the party entitled to notice resides in the country, unless notice sent by mail is sufficient, a special messenger must be employed for the purpose of serving it. And we think that the present case is clearly one which does not impose upon the plaintiffs such duty. We do not mean to say that no such cases can arise, but they will seldom, if ever, occur; and, at all events, such a course ought not to be required of a holder, except under very special circumstances. Some countenance has lately been given to this practice in England in extraordinary cases; by allowing the holder to recover of the indorser the expense of serving notice by special messenger. The case of Pearson v. Crallan, 2 Smith, 404; Chitty on Bills, 222, note, is one of this description. But in that case, the court did not say that it was necessary to send a special messenger; and it was left to the jury to decide whether it was done wantonly or not. The holder is not bound to use the mail for the purpose of sending notice. He may employ a special messenger if he pleases; but no case has been found where the English courts have directly decided that he must. To compel the holder to incur such expense would be unreasonable, and the policy of adopting a rule that will throw such an increased charge upon commercial paper on the party bound to pay, is at least very questionable. We are, accordingly, of opinion that the notice of nonpayment was duly served upon the defendant, and that the court erred in refusing so to instruct the jury. Judgment reversed and *venire facias de novo* awarded."

mend themselves to approbation.[17] It has been justly said that the corporate limits of the city define the limits as to the requirement of personal notice.[18]

Where a prior indorser resided in Frankfort, Ky., and the bill was there protested and notice sent to the holder at Shelbyville, and then transmitted to the indorser at Frankfort, by mail, it was held insufficient under the Kentucky statute.[19]

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17. Walker v. Bank of Augusta, 3 Kel. 486; Bank of United States v. Norwood, 1 Harr. & J. 423; Gist v. Lybrand, 3 Ohio, 307; Carson v. Bank of Alabama, 4 Ala. 148; Jones v. Lewis, 8 Watts & S. 14; Timms v. Delisle, 5 Blackf. 447; Bell v. State Bank, 7 Blackf. 457; Foster v. Smeath, 2 Rich. 338; Walker v. Bank of Missouri, 8 Mo. 704; Barrett v. Evans, 28 Mo. 323; Bondurant v. Everett, 1 Metc. (Ky.) 658, decided in 1858 (overruling Farmers' Bank v. Butler, 3 Litt. 498, decided in 1823). In this case the bill was payable at Mount Sterling, Ky., and the drawer lived two or three miles from that place. It was protested and notices deposited in the post-office at Mount Sterling, addressed to the indorser at Cincinnati and to the drawer at Mount Sterling. The court held it sufficient, and, overruling the case above referred to, said: "A great change has occurred in the business and condition of the commercial world since 1823, when the case in 'Littel' was decided. Facilities for the transmission of intelligence from point to point have been increased; new and more convenient postal arrangements have been effected, and, in consequence thereof, conveyance of letters by private hand has been almost abandoned. Persons resident in the same town or city frequently communicate with each other through the post-office in such place, because it is now the legal duty of postmasters to deliver such letters, which was not the case in 1823. Almost every person residing near a post-office resorts there regularly for his letters, as is shown to have been the case with Bondurant here. And it is rendered reasonably certain that he must have received the notice deposited in the office by the notary at an earlier day than he could have obtained it if sent to Cincinnati and returned."

18. Barrett v. Evans, 28 Mo. 323.

19. In Todd v. Edwards, 7 Bush, 93, Peters, J., said: "As to the manner of giving notice of the dishonor of a bill, that subject is in many States of the Union regulated by special statute; but where there is no statutory regulation the rule seems to be that where the party to be charged resides in the same city or town where the bill is to be presented and demand made, notice must be personal, or left at his dwelling-house or place of business. Edwards on Bills and Notes, 456. By an act of the legislature in this State, approved January 16, 1864 (Myer's Supplement, 354), it is made the duty of notaries public, upon protesting bills of exchange, etc., to give or send notice of the dishonor of such paper to such parties thereto as are required by law to be notified, to fix their liability on such paper; and when the residence of any such parties is unknown to the notary public, he shall send the notices to the holder of such paper, and he shall state in his protest the names of the parties to whom he sent or gave such notices, and the time and the manner of giving

§ 1016. In the second place, how and where notice must be personally served.— If the notice is to be given to a party to whom it is not necessary or allowable to transmit it by mail, it should be sent to or given at his place of domicile or place of business, and delivery of notice at either will be sufficient,[20] even when they are in different towns.[21] When the party keeps a counting-room or other business place, and has a private residence also, it is usual to send notice to the place of business rather than to the dwelling, and if notice is so sent to his place of business during hours when he or some of his people might be reasonably expected there, it is sufficient; and if no one be there in the usual hours, and in the ordinary course of business, it is not necessary to leave a written notice, or to send to the house where he lives, or to make farther search for him, or inquiries about him, it being considered that he has dispensed with notice.[22] This has been doubted, and while the law is to this effect, in our judgment it might be safer to send the notice to the residence when no one is found at the place of business.[23] In a recent Alabama case the views of the text have been approved, and the doubts expressed were regarded as unfounded.[24] Where the notice was left posted in a conspicuous place in the office of the indorser, it was held sufficient.[25]

If the indorser holds out by his course of conduct in the transaction that a certain place is his place of business, it is sufficient if notice be sent there.[26]

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the same, and such statement in such protest shall be *prima facie* evidence that such notices were given or sent as therein stated by such notary."

20. Story on Bills, § 297; 3 Kent Comm. 106; 1 Parsons on Notes and Bills, 488, 489; Ireland v. Kip, 10 Johns. 491; Van Vechten v. Pruyn, 13 N. Y. 549; Bank of Columbia v. Lawrence, 1 Pet. 578; Williams v. Bank of United States, 2 Pet. 96; Sanderson v. Reinstadler, 31 Mo. 483; Nevins v. Bank, 10 Mich. 547; Grinman v. Walker, 9 Iowa, 426; St. Louis Bank v. Altheimer, 91 Mo. 190.

21. Bank of Geneva v. Howlett, 4 Wend. 328; Donner v. Remer, 21 Wend. 10.

22. Bayley on Bills, p. 176; Crosse v. Smith, 1 Maule & S. 545; Goldsmith v. Blane, 1 Maule & S. 554; Bancroft v. Hale, Holt, 476; Allen v. Edmundson, Car. & K. 547; Story on Bills, § 300; Byles on Bills (Sharswood's ed.) [*273], 423; Lord v. Appleton, 15 Me. 579; State Bank v. Hennen, 16 Mart. 226; Thompson on Bills, 337; *post*, § 1119.

23. 1 Parsons on Notes and Bills, 488.

24. John v. City Nat. Bank, 62 Ala. 529. See also John v. Selma Bank, 57 Ala. 96.

25. Hobbs v. Straine, 149 Mass. 213.

26. Berridge v. Fitzgerald, L. R., 4 Q. B. 641 (1869).

When the party has two or more places of business in the same town, the holder may send notice to either.[27]

§ 1017. Notice left with a clerk, or person in charge,[28] at the party's place of business in his absence, or at his place of business, without proof as to the person with whom it was left, is sufficient,[29] and proof that such person was not the party's agent has been held irrelevant, notice being left at the right place.[30] So leaving it with his private secretary at his public office is sufficient.[31]

If the party be not found at his dwelling, it is sufficient to leave notice with his wife,[32] or with any other person on his premises.[33] A verbal message left at the party's house with his wife has been held sufficient,[34] and the certificate of the notary, "left at his house at ———," would answer the requirements of the law.[35]

§ 1018. What place is deemed residence or place of business.— A room where a party is accustomed to resort, but where he carries on no trade or employment, is not his place of business;[36] and it has been held that the fact that the indorser occupied a room

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27. Phillips v. Alderson, 5 Humphr. 403; Commercial Bank v. Strong, 28 Vt. 316.

28. Mercantile Bank v. McCarthy, 7 Mo. App. 318; Edson v. Jacobs, 14 La. 494; Commercial Bank v. Gove, 15 La. 113.

29. Bank of Louisiana v. Mansaker, 15 La. 115; Mechanics' Banking Association v. Place, 4 Duer, 212; Isbell v. Lewis & Co., 98 Ala. 550, 13 So. 335. In New York, held that the evidence of a cashier of a bank at which the note was payable that he duly deposited the notice of protest in the proper post-office is not conclusive. See Kingsland Land Co. v. Newman, 1 App. Div. 1, 36 N. Y. Supp. 960; Weakly v. Bell, 9 Watts, 279; Cook v. Forker, 193 Pa. St. 461, 44 Atl. 560, 74 Am. St. Rep. 699, citing text.

30. Jacobs v. Town, 2 La. Ann. 964.

31. Merz v. Kaiser, 20 La. Ann. 377.

32. Blakely v. Grant, 6 Mass. 386; Fisher v. Evans, 5 Binn. 542.

33. Cromwell v. Hynson, 2 Esp. 511; Isbell v. Lewis & Co., 98 Ala. 550, 13 So. 335.

34. Housego v. Cowne, 2 M. & W. 348, in which Bollana, B., said: "A person not a merchant who draws a bill of exchange, undertakes to have some one at his house to answer any application that may be made respecting it when it becomes due."

35. Adams v. Wright, 15 Wis. 408, but it was held in this case that proof that notice was left with a boy in the yard, who said that he was the indorser's son, and who went toward the house, was insufficient.

36. Stephenson v. Primrose, 8 Port. 155.

in another's house for settling up his former business, and there kept his books of account, and received his correspondence, did not constitute it his place of business.[37] It will not be sufficient merely to leave notice in the building in which the party transacts business — it must be at his very place of business[38] — not to leave it at the store of the son of the indorser — the latter residing in the same building, but having his usual place of business elsewhere.[39] If the dwelling or chamber occupied by the indorser were closed, and he had left the place, it would be useless and unnecessary to proceed further.[40]

§ 1019. If the party lodge at a private boarding-house, it is to all intents and purposes his dwelling; and if notice be delivered there to the proprietor, or to a servant of the house, or to a fellow-boarder in the absence of the party himself, it is sufficient.[41] If the party lodge at a public house, and the notary, after inquiry, learns that he is not in, it will suffice to leave notice at his room, or at the door of his room;[42] and it seems that it will suffice to leave notice for a guest at a hotel with the barkeeper or other attendant.[43]

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37. Bank of Columbia v. Lawrence, 1 Pet. 578. But see Lamkin v. Edgerly (Mass.), 24 N. E. 49, where it was held that a room, to which notice was sent, having the indorser's name on a glass panel of the door of the room, and on the doorpost of the building, and where he paid his rent, was the "place of business" of such person within the meaning of chap. 139, §§ 8–9, of the Laws of Massachusetts.

38. Kleinman v. Boernstein, 32 Mo. 311.

39. Bank of United States v. Corcoran, 2 Pet. 121, in which case the court said: "The store of the son was as distinct and separate from the father as if they had been under different roofs. The former was entered from the street, and the latter from an alley or passage; and it does not appear that there was any inside communication between the two. * * * The service of the note was no more a compliance with the requisition of the law than if it had been delivered to the son in the street or elsewhere, or left at his dwelling-house."

40. Howe v. Bradley, 19 Me. 35.

41. Bank of United States v. Hatch, 6 Pet. 250, in which case the court said: "This is not like the case of a public inn, and a delivery to a mere stranger who happens to be there *in transitu*, and cannot be presumed to have any knowledge or intercourse with the party. Boarders at the same house may be presumed to meet daily, and to feel some interest in the concerns of each other, and to perform punctually such common duties of life as this." See also Stedman v. Gooch, 1 Esp. 4; McMurtrie v. Jones, 3 Wash. C. C. 206; Miles v. Hall, 12 Smedes & M. 332.

42. Howe v. Bradley, 19 Me. 31.

43. Bradley v. Davis, 26 Me. 45; Dana v. Kemble, 19 Pick. 112; Graham v. Sangston, 1 Md. 59.

But in all cases the guest should be inquired for first. If it do not appear that he was really at the hotel, or that the notary inquired for him, or left notice with some competent person for him, the defect would be fatal.[44] It would not suffice to leave notice with another guest at a hotel.[45]

SECTION VI.

MODE OF SERVING NOTICE WHEN THE PARTY GIVING AND THE PARTY TO RECEIVE IT RESIDE IN DIFFERENT PLACES.

§ **1020.** The usual mode of serving notice when the parties reside in different places is by mail. But in some cases a special messenger is employed. We shall consider the service by mail and by messenger consecutively: (1) How, when, and where notice may be transmitted by mail; and (2) When special messenger may be employed.

§ **1021. In the first place, how, when, and where notice may be transmitted by mail.**— When the parties reside in different places, or the party entitled to notice resides at a place other than the particular place at which the bill or note is payable, it will, in general, be sufficient for the holder to put notice of dishonor in the post-office, addressed to the party entitled thereto, within the proper time. This done, his duty is discharged, and it is not necessary that the notice should be received — the holder not being responsible for any miscarriage of the mail.[46] What constitutes due diligence in seeking the party entitled to demand and notice, or his postal address, is elsewhere considered;[47] as is also the case where

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44. Ashley v. Gunton, 15 Ark. 415.

45. Bank of United States v. Hatch, 6 Pet. 250.

46. Farmers' Bank v. Gurnell, 26 Gratt. 137; Bussard v. Levering, 6 Wheat. 102; Lindenberger v. Beall, 6 Wheat. 104; Munn v. Baldwin, 6 Mass. 316; Cabot Bank v. Warner, 10 Allen, 524; Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177; Miller v. Hackley, 5 Johns. 375; Ellis v. Commercial Bank, 7 How. (Miss.) 294; Friend v. Wilkinson, 9 Gratt. 31; Sanderson v. Judge, 2 H. Blackst. 509; Woodcock v. Houldsworth, 16 M. & W. 126; Phelps v. Stocking, 21 Nebr. 443; Wooly v. Lyon, 117 Ill. 244. As to what is a proper address and mailing of notice under the Wisconsin law, see Glicksman v. Earley (Wis.), 47 N. W. 272. Chitty on Bills, 658; Story on Promissory Notes, § 328; Story on Bills, § 300; 1 Parsons on Notes and Bills, 478; Byles on Bills (Sharswood's ed.) [*270], 418; Thompson on Bills, 338; Parker v. Gordon, 7 East, 385; Kuth v. Weston, 3 Esp. 54. See *post*, § 1068.

47. See §§ 1114, 1115 *et seq.*

two parties entitled to notice reside in the same place and the holder resides in a different place.[48]

§ **1021a.** The notice must be properly addressed to the party at a distance entitled to receive it; and if it be directed to "Darcy" as indorser, instead of "Darey," the correct name, it is negligence which discharges him.[49] A bank holding a note with the indorser's name ambiguously written should inform the notary who the indorser is.[50]

§ **1022. To what post-office notice should be directed when sent by mail.**— The notice should be directed to the post-office at, or nearest to, the party's place of residence, unless he is accustomed to receive his letters at another post-office, in which case it should be directed thereto.[51] If he live at one place and has his place of business another, notice may be sent to either;[52] and the place where the party actually resorts to for his letters is always the appropriate one, when known, for notice to be addressed to, whether or not the party lives there or has there his place of business.[53] If the place be that of his actual residence at the time, it need not be his domicile.[54] If sent to former address of insolvent firm, whose affairs are being settled by a trustee, it has been held sufficient.[55] And so if sent to former place of business, where the indorser's affairs were in the hands of an assignee, the holder knowing of the assignment but not knowing of the indorser's departure.[56]

§ **1023. Memorandum of address.**—The indorser has a right to direct to what postal address, or to what place, notice shall be sent, and it will always suffice to pursue his direction although he may

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48. See *ante*, § 1005*a*.

49. Darey v. Jones, 13 Vroom, 28.

50. Ibid.

51. Bank of Columbia v. Lawrence, 1 Pet. 582; Bank of Geneva v. Howlett, 4 Wend. 328; Mercer v. Lancaster, 5 Barr, 160; Jones v. Lewis, 8 Watts & S. 14; National Bank v. Cade, 73 Mich. 449; Northwestern Coal Co. v. Bowman, 69 Iowa, 103, citing text.

52. Bank of United States v. Carneal, 2 Pet. 549; Williams v. Bank of United States, 2 Pet. 96; Cuyler v. Nellis, 4 Wend. 398; Reid v. Payne, 16 Johns. 218; Montgomery County Bank v. Marsh, 7 N. Y. 481.

53. See *ante*, § 1021, note 46; 1 Parsons on Notes and Bills, 498, and cases cited.

54. Young v. Durgin, 15 Gray, 264.

55. Casco Nat. Bank v. Shaw, 79 Me. 376. See *ante*, § 1002.

56. Importers & Traders' Nat. Bank v. Shaw, 144 Mass. 424; Bank of America v. Shaw, 143 Mass. 291.

have a place of residence or business elsewhere.[57] Sometimes the place to which he desires notice to be sent is designated by memorandum on the instrument, as, for example, by writing the words "214 E. 18th Street,"[58] or by adding his address to his signature, as, for instance, "Memphis, Tenn.,"[59] or "Walnut Bend, Arkansas,"[60] or "13 Chambers Street, New York,"[61] or "W. Moors, Manchester,"[62] or "T. M. Barron, London,"[63] and he thereby impliedly directs notice to be sent to the place designated.[64]

§ **1024.** It is not sufficient to direct notice generally to a parish, county, or township within which there are a number of post-offices;[65] but it has been held that it was sufficient to direct notice to the party at the shire town of the county, although there was a post-office nearer to him which he was in the habit of using.[66] Where there are two post-offices in the town where the party resides, notice may be directed to the town generally, unless the holder knows, or should know, that he receives his letters at one of them, in which case notice should be directed there.[67] It has been held

57. Eastern Bank v. Brown, 17 Me. 356; Crowley v. Barry, 4 Gill, 194; Bell v. Hagerstown Bank, 7 Gill, 216; Bank of Columbia v. Magruder, 6 Harr. & J. 172; Carter v. Union Bank, 7 Humphr. 548; Tyson v. Oliver, 43 Ala. 455; Dicken v. Hall, 87 Pa. St. 379.

58. Bartlett v. Robinson 39 N. Y. 187. See also Davis v. Bank of Tennessee, 4 Sneed, 390.

59. Carter v. Union Bank, 7 Humphr. 548.

60. Peters v. Hobbs, 25 Ark. 67.

61. Morris v. Husson, 4 Sandf. 93.

62. Mann v. Moors, Ryan & M. 149.

63. Burmester v. Barron, 17 Q. B. 828.

64. See also Baker v. Morris, 25 Barb. 138; Davis v. Bank of Tennessee, 4 Sneed, 390; Farmers' Bank v. Battle, 4 Humphr. 86.

65. Beenel v. Tournillon, 6 Rob. (La.) 500.

66. Weakly v. Bell, 9 Watts, 273; Story on Bills, § 297; 1 Parsons on Notes and Bills, 497. In Bank of United States v. Lane, 3 Hawks, 453, the notice was sent to the shire town to the indorser, who was the high sheriff then in attendance at court; and it was held sufficient, although neither his residence nor post-office was at that place.

67. Morton v. Wescott, 8 Cush. 425; Cabot Bank v. Russell, 4 Gray, 167; Burlingame v. Foster, 128 Mass. 125; Bank of Manchester v. Slason, 13 Vt. 334; Downer v. Remer, 21 Wend. 10. In Saco Nat. Bank v. Sanborn, 63 Me. 340 (1873), the indorser lived at the time he became indorser at the town of Baldwin. There was no post-office of that name, but there were three post-offices in the town named North, East, and West Baldwin, respectively. Notice addressed to Baldwin was deemed sufficient, the indorser having responded to a previous notice so sent without intimation that it was not properly directed.

that in London delivery of a letter to a bellman in the street is not equivalent to a deposit in the post-office,[68] but this was doubted.[69] And it has been held not essential to the validity of the notice that it be addressed to the post-office at which the indorser gets his mail, if in the usual course of the mail it will be sent to and delivered from such office.[70]

§ 1025. If the party live in one place and have his place of business at another, the holder of a bill or note protested at a third place should send notice to the place at which he usually receives his letters;[71] but if the holder does not know that he usually receives at the place where he is engaged in business, it will be sufficient to send it to the place where he lives.[72] But when a bill or note is protested at the place where the party entitled to notice has a place of residence, notice should not be sent away from there to another place where he transacts business.[73] In New York, the indorser of a note, who had a known residence in the village where the note was protested, and who was usually at home three days in the week, was held to be discharged, the notice having been sent by mail to another city, where his place of business was, where he spent four days of the week, and received his letters and papers, there being no evidence that the notice actually reached him in due time, so as to render it equivalent to personal service.[74]

When the party has his residence part of the year at one place and part at another, notice may be sent to either,[75] at least when the holder does not know, or is not to be charged with knowledge that he is accustomed to receive his letters at one of them.[76] But in the case of a temporary sojourn, as for the summer at a water-

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68. Hawkins v. Rutt, Peake's N. P. C. 186.

69. In Skilbeck v. Carbett, 14 L. J. Q. B. 339, 7 Q. B. 846 (53 Eng. C. L.), Lord Denman says: "A bellman is an ambulatory post-office." See Byles on Bills [*270], 419.

70. Bank of Commerce v. Chambers, 14 Mo. App. 159.

71. Montgomery County Bank v. Marsh, 7 N. Y. 481; Reed v. Payne, 16 Johns. 218; Bank of Geneva v. Howlett, 4 Wend. 328; Van Vechten v. Pruyn, 13 N. Y. 549.

72. Seneca County Bank v. Neass, 2 N. Y. 442, 5 Den. 329.

73. Story on Bills (Bennett's ed.), § 297.

74. Van Vechten v. Pruyn, 13 N. Y. 549, Comstock, J.

75. Exchange, etc. v. Boyce, 3 Rob. (La.) 307.

76. The notice should be sent where it is most likely to reach the party, as said in Chouteau v. Webster, 6 Metc. (Mass.) 1.

ing place, country place, or village, the notice should be sent to the place of the party's permanent residence.[77]

§ **1026. When a party about to be absent** directs notice to be sent to him at a place distant from his residence, so that its transmission thither, and thence to the prior parties, will occupy more time than if the notice had passed through the ordinary place of residence, a notice to him at the substituted and more distant place will not only be a good notice against him, but as well against all prior parties.[78]

But when the party goes to a place distant from his residence for the purpose of a business negotiation which will occupy a few weeks, it would be insufficient to send notice there without instructions to do so.[79]

§ **1027. In the case of parties residing temporarily in a certain place** — members of Congress or of a State legislature residing at their respective capitals, while the bodies to which they belong are in session, for instance — it is sufficient and proper that notice should be sent to them at such place, or left there at their place of residence;[80] but after the adjournment of the session the rule would no longer apply, and notice should be sent to the party's permanent place of residence.[81] And while Congress is in session it will not

77. Runyon v. Mountfort, Busbee, 371; Stewart v. Eden, 2 Cai. 121.

78. Shelton v. Braithwaite, 8 M. & W. 252; Byles on Bills (Sharswood's ed.) [*272], 422.

79. Walker v. Stetson, 14 Ohio St. 89.

80. Chouteau v. Webster, 6 Metc. (Mass.) 1; Graham v. Sangston, 1 Md. 59; Marr v. Johnson, 9 Yerg. 1. *Contra*, Walker v. Tunstall, 3 How. (Miss.) 259, 2 Smedes & M. 638; Bank of Commerce v. Chambers, 14 Mo. App. 156.

81. Bayley's Admr. v. Chubb, 16 Gratt. 284. In this case it was held that where notice was left at the dwelling-house of a member of Congress in Washington, after the adjournment of Congress, and after he had left the city, and it appeared that he kept up his domicile in the district he represented, and it was his habit to leave Washington directly after Congress adjourned, it was insufficient. Daniel, J., who delivered the opinion of the court, distinguished this case from that of P. Chouteau v. Daniel Webster, 6 Metc. (Mass.) 1, in which a notice sent to Mr. Webster while he was a Senator, and the Senate was in session, was held sufficient; so he said: "In the case of Graham v. Sangston, 1 Md. 59, the indorser at the time of the maturity of the bill was a member of the General Assembly of Maryland, then in session, and boarded at a hotel in Annapolis, and the notary gave notice by leaving the notice at the room of the indorser at the hotel; but whether the indorser was in Annapolis on the day that the notice was given did not appear; nor was there any proof in respect to the general domicile of

be sufficient to deposit notice for the member in the post-office of the Senate or House of Representatives, as it should be served personally by a party in the same place at his residence, or where he might personally be.[82]

It has been held that even when the indorser who was a member of Congress was known to be in Washington, notice sent to his residence in his district was sufficient.[83] It has also been held that a temporary residence in a place is sufficient for the purposes of notice, although the person entitled to notice has a permanent residence elsewhere.[84]

§ 1028. Several post-offices where party receives letters.— Where there are two [85] or three [86] post-offices at which the indorser is in the habit of receiving his letters, notice may be sent to either; and where he lives at equi-distance from two post-offices, notice addressed to one will suffice, although he was accustomed to receive his letters at the other.[87] Where the party lives in the United States, it is especially important in sending notices by mail to put the full address, town and State, as there are many cities in which the same name is applicable to towns and cities in different States. An omission to name the State, where there is more than one place

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the indorser. The notice was held sufficient." The judge referred also to Walker v. Tunstall, reported in 3 How. (Miss.) 259, and in 2 Smedes & M. 638, as opposed to Chouteau v. Webster, and the result of which decision is, that "notice sent to a member of Congress who has no known place of residence, is good if directed to Washington, whilst Congress is in session, and he is there engaged in the discharge of his official duties; but that such notice is not sufficient if he has a known place of residence, except upon a failure of the notary to ascertain the residence after having used due diligence to ascertain it." "And," he added, "it seems to me that the rule declared in Chouteau v. Webster is the more reasonable one; but I do not feel disposed to extend it still further than any case has gone yet, and make it embrace a notice sent to a member of Congress at Washington after the adjournment of Congress, and after the member had in fact left the city. The presumptions which upheld the notice during the session of Congress seem to me to have nothing to sustain or justify them after that body has adjourned. The presumption is then the other way."

82. Hill v. Norvell, 3 McLean, 583.

83. Marr v. Johnston, 9 Yerg. 1.

84. Young v. Durgin, 15 Gray, 264; Chouteau v. Webster, 6 Metc. (Mass.) 1; Wachusetts Nat. Bank v. Fairbrother (Mass.), 19 N. E. 347.

85. Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177; Bank of Louisiana v. Tournillon, 9 La. Ann. 132.

86. Bank of the United States v. Carneal, 2 Pet. 543.

87. Rand v. Reynolds, 2 Gratt. 171; Follain v. Dupre, 11 Rob. (La.) 454.

bearing the name of the town, would be fatal if the notice were not duly received at the right place.[88]

§ **1029. Address of parties in large cities.**—It has been held in England not sufficient to address the notice to a person at a large town, as, for instance, to "W. Haynes, Bristol,"[89] without specifying in what part of it he resides, because there might be in so large a town many persons to whom so general an address might apply, the surname alone being given without any special designation that might identify him. But unless the name were very common — John Smith, for instance — an address to a large city, giving the full christian name as well as the surname, would doubtless be regarded as sufficient. And in Massachusetts, where notice was addressed to "Mrs. Susan Collins, Boston," it was held sufficient to charge her as indorser, it not appearing that there was any other person of the same name. But Metcalf, J., said: "If notice in this case had been directed to 'Mrs. Collins, Boston,' without her first name, we should probably have held it to be insufficient even without the authority of Walter v. Haynes. And we incline to the opinion that such a direction would be insufficient *prima facie,* though the town to which it should be sent was not a large one. For we know that there are in small towns in this State numerous persons of the same surname."[90]

§ **1029a.** When, however, the address of the notice corresponds with the address which has been placed by the party upon the bill as an indication, as, for instance, "W. Moors, Manchester,"[91] or "T. M. Barron, London," it would be sufficient to follow it. At least a jury might infer due notice.[92]

If the party hold himself out as a resident in a certain place he is estopped from afterward denying it, and notice sent there is sufficient;[93] but if a party about to absent himself informs the

88. Beckwith v. Smith, 22 Me. 125.

89. Walter v. Haynes, Ryan & M. 149.

90. True v. Collins, 3 Allen, 440; Morse v. Chamberlin, 144 Mass. 408. But where it appeared on the note that the indorser was a married woman, that there were three persons of her husband's name living in New York, the place of her residence, and that her name was not in the directory, a notice simply addressed to her by name at New York was held insufficient. Riggs v. Hatch, 16 Fed. 840.

91. Mann v. Moors, Ryan & M. 249. See *ante,* § 1023.

92. Burmester v. Barron, 17 Q. B. 878. See also Clarke v. Sharpe, 3 M. & W. 166.

93. Lewiston Falls Bank v. Leonard, 43 Me. 144.

holder where he is going, notice should be sent to the place mentioned.[94]

If no one be found at the party's place of residence, a notice put in the keyhole is sufficient.[95]

§ **1030. The place of date of a bill** is not conclusive evidence that the drawer resides there, and is, therefore, an unsafe guide to the party sending notice; much less can it be relied upon as indicating the place of residence of an indorser. But it is *prima facie* evidence that the drawer resides there, and unless met with proof to the contrary, notice sent to the drawer at the place of date of the bill would be sufficient. In England it has been held that sending notice to the drawer addressed to London, where the bill was dated, sufficed, although the residence of the acceptor was stated in the acceptance, and by inquiry of him it would have been ascertained that the drawer resided in Chelsea, and he never got the letter.[96] But in the United States a stricter rule has been generally applied; and if it is shown that the drawer did not reside at the place of date, and did not duly receive the notice, it has been held that he will be discharged unless the holder proves that he had been unable to ascertain his place of residence after due diligence in inquiring had been used.[97] The same rule would, *a fortiori,* apply to the case of an indorser.

In Alabama, the Supreme Court has gone so far as to hold that the fact that the bill purports on its face to have been made at a certain place, is not alone sufficient evidence of the residence or post-office of the drawer.[98] Clearly, we should say, the date is *prima facie* evidence of the drawer's residence or post-office. And even when it is proved not to be so in fact, unless the holder could be shown to have had knowledge that it was not so in fact, the English rule, which allows him to follow the intimations of the instrument, seems to us the more just and reasonable.[99]

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94. Hodges v. Galt, 8 Pick. 251.

95. Stewart v. Eden, 2 Cai. 121.

96. Burmester v. Barron, 17 Q. B. 828. See also Clarke v. Sharpe, 3 M. & W. 166; Thompson on Bills (Wilson's ed.), 353.

97. Lowery v. Scott, 24 Wend. 858; Barnwell v. Mitchell, 3 Conn. 101; Fisher v. Evans, 5 Binn. 541; Foard v. Johnson, 2 Ala. 565; Pierce v. Strathers, 27 Pa. St. 249; Hill v. Varrell, 3 Greenl. 233; Robinson v. Hamilton, 4 Stew. & P. 91. See Mason v. Pritchard, 9 Heisk. 792.

98. Sprague v. Tyson, 44 Ala. 340 (1870); Tyson v. Oliver, 43 Ala. 458 (1869). See cases cited in chapter on Protest.

99. See chapter XX, on Presentment for Payment, section V, vol. I, § 639.

§ **1031.** It has been said in some cases that the place of date is also *prima facie* evidence of the residence of the indorser of a bill or note; but this is straining the presumption too far.[1] It is but slight at best, even in the case of the drawer.[2] But, coupled with other circumstances, the date of the bill might be evidence of the place of residence of the indorser. They should, however, be strong and persuasive,[3] for there is no *prima facie* presumption that an indorser resides at the place of date,[4] or at the place of payment.[5]

§ **1032. Removal of party entitled to notice.**— If at the time the bill or note is drawn or indorsed the party resides at a certain place, the holder may, as a general rule, presume that he resides there at its maturity, and send notice accordingly,[6] and the presumption of continued residence is all the stronger when the paper

1. Sasscer v. Whitely, 10 Md. 98; Moodie v. Morrall, 3 Const. (S. C.) 367; Branch Bank v. Pierce, 3 Ala. 321.

2. Lowery v. Scott, 24 Wend. 358. In this case the bill was dated Michigan City, Indiana, but the drawer resided at Waterford, New York. Notice was sent to Michigan City, Indiana, and it not appearing that inquiry had been made to ascertain the drawer's residence, it was held insufficient. Bronson, J., said: "In the case of an indorser, it clearly would not be sufficient to send notice to the place where the bill is dated, without showing something more. But it is said that will do in the case of a drawer. Although there might be a slight presumption that the drawer resides at the place where the bill purports to have been made, it cannot be very strong, for it is matter of common experience that men draw bills when absent from home, on business or for pleasure, and date them at the place where they are drawn. As the plaintiffs are indorsees, and not original parties to the bill, it is not to be presumed that they knew where the drawer resided. But I think they were bound to make some inquiry on the subject at the place where the payment was demanded."

3. In Wood v. Corl, 4 Metc. (Mass.) 203, the note was dated at Buffalo, and the notary testified that it was reported that the indorser lived there. Notice to indorser sent to Buffalo was held sufficient. In Page v. Prentice, 5 B. Mon. 7, the bill was dated at Louisville, and notice sent so directed to the indorser was held sufficient, it appearing that process had been served on him in the county in which Louisville is located.

4. Lowery v. Scott, *supra*.

5. Gilchrist v. Donnell, 53 Mo. 591.

6. Knott v. Venable, 42 Ala. 186; Harris v. Memphis Bank, 4 Humphr. 519; Farmers' Bank v. Harris, 2 Humphr. 311; Dunlap v. Thompson, 5 Yerg. 67; Bank of Utica v. Phillips, 3 Wend. 408; Saco Nat. Bank v. Sanborn, 63 Me. 340; Importers & Traders' Bank v. Shaw (Mass.), 11 N. Eng. Rep. 669. But *quære*, see First Nat. Bank v. Wood, 51 Vt. 473.

was discounted there at the time it was executed.[7] Where the removal was under circumstances of peculiar notoriety, it was held, in a Tennessee case, insufficient to send notice to the prior place of residence;[8] and in Virginia it has been recently said by the Supreme Court of Appeals, through Staples, J.: "Where the holder and indorser reside near each other in a small city like Alexandria, the jury may presume from the proximity of the parties, and the frequency of their communication, and the circumstances of notoriety attending the removal, that the holder was apprised of the change of domicile"[9] — which ruling vitiated notice left at the prior residence of the indorser.

In a New York case, where the indorser of a note payable one year after date resided at Rochester at the time of, and for ten years prior to, the indorsement, and continued to reside there until six months before it fell due, and the plaintiff was informed by the indorser's relatives that she continued to reside there, notice addressed to Rochester was held sufficient. And Earl, Commissioner, said: "I think it would not be unreasonable to hold that in all cases, no matter how long the paper has to run, a notice of protest addressed to the indorser at the place where he resided when he made the indorsement should be sufficient to charge him, although he may have changed his residence. The holder should be permitted to act in good faith upon the presumption of his continued residence unless he has received information of his change of residence.[10] This rule is wise and just, and is fairly de-

7. Ward v. Perrin, 54 Barb. 89.

8. Planters' Bank v. Bradford, 4 Humphr. 39.

9. McVeigh v. Allen, 29 Gratt. 596 (1877), citing Harris v. Memphis Bank, 4 Humphr. 519; Farmers' & M. Bank v. Harris, 2 Humphr. 311; Bank of Utica v. Phillips, 3 Wend. 408.

10. Requa v. Collins, 51 N. Y. 148 (1872), Earl, C., continued: "In Bank of Utica v. Davidson, 5 Wend. 588, a note was presented for discount by the agent of the maker, who informed the clerk of the bank that the indorsers resided in Bainbridge, and the clerk made a memorandum of this fact. When the note became due it was protested, and a notice of protest was directed to the defendant, one of the indorsers, at Bainbridge, no further inquiries as to his residence having been made. It turned out that the defendant had, a short time before he indorsed the note, removed from Bainbridge, a distance of twelve or fourteen miles, to Masonville, in another county. The notice was held sufficient to charge the defendant, upon the ground that due diligence had been used. In Bank of Utica v. Bender, 21 Wend. 643, the drawer took to the bank a bill of exchange, indorsed by the defendant, which was dated at Chittenango, and there wrote under the name of the defendant 'Chittenango,'

ducible from the authorities, though it would seem to have been limited in a previous New York case to paper having the usual time of bankable paper to run.[11]

§ 1033. In the second place, when special messenger may be employed.— The holder is not bound to send notice by mail; and he may, if he pleases, in all cases send it by a special messenger.[12] In such cases it will be sufficient if the notice reaches the party entitled thereto on the same day that it would have reached him in due course of mail, although later, if within business hours;[13] but if it arrives the day after, and the delay is not explained and excused, it will be fatal.[14] And the holder is responsible if his messenger do not deliver the notice within the necessary time, and the party is discharged,[15] unless there were no public means of communication, and the holder exercised reasonable care in selecting his messenger.[16]

"It is difficult to lay down a precise rule as to the extent of delay in the arrival of a private conveyance which will nullify the no-

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to indicate his place of residence. This memorandum by the drawer, of course, had no greater effect than if he had at the time given the parol information that the indorser resided at Chittenango. He in fact resided at Manlius, and had resided there for twenty years. The bill was protested for the nonpayment, and notice of protest mailed to Chittenango, without any further inquiry as to the indorser's residence. It was held that the notice was sufficient, and that the defendant was charged. In Ward v. Perrin, 54 Barb. 89, the action was against the indorser of a note payable four months from date. At the time when the indorsement was made, and for about two months thereafter, the indorser resided in Rochester. About two months before the note fell due he removed from Rochester to Bergen. The note was protested, and notice of protest was mailed to the defendant at Rochester. The court held, that the holders of the note were not bound to make any further inquiries, and that they could act upon the information as to the indorser's residence which they received when they discounted the note; that they had the right, when the note matured, to assume that the indorser continued to reside in Rochester, and to act accordingly in taking the requisite steps to charge him, unless they knew that in the meantime he had changed his residence."

11. Bank of Utica v. Phillips, 3 Wend. 408.

12. Bank of Columbia v. Lawrence, 1 Pet. 578; Parsons v. Crallan, 2 J. P. Smith, 404; Doobree v. Eastwood, 3 Car. & P. 250 (14 Eng. C. L.); Jarvis v. St. Croix Mfg. Co., 23 Me. 287; Story on Bills, § 295.

13. Bancroft v. Hall, Holt, 476; Story on Bills, § 295.

14. Jarvis v. St. Croix Mfg. Co., 23 Me. 287; Darbishire v. Parker, 6 East, 6; Byles on Bills (Sharswood's ed.) [*271, 272], 421.

15. Van Vechten v. Pruyn, 13 N. Y. 549; Cassidy v. Kreamer, (Pa.) 13 Atl. 744, citing the text.

16. 1 Parsons on Notes and Bills, 479.

tice, although such delay as prevents the person getting notice, even for one post, from sending advice to his correspondent, will probably be fatal. It would likewise appear that in such a case the holder must prove the safe arrival of the letter. But when a person, instead of sending notice directly by post, writes to a correspondent on the spot to give notice, and that correspondent goes to the defendant's warehouse for this purpose, sooner than a letter could have reached him by post, but is prevented by finding the warehouse shut during business hours, the defendant cannot plead the lateness of the notice." [17]

§ 1034. It has been held in some cases that where the party entitled to notice resides at a point remote from any post-office, the holder must send notice by a special messenger.[18] But it seems to us that it could not be reasonably expected of the holder to send notice to a party exiled from communication with the world; or reasonable to presume that the party did not at convenient periods inquire at the nearest post-office — and that sending the notice to such post-office is all that should be required.[19]

" One who becomes a party to a commercial instrument should be considered as rendering himself subject to commercial law and usage," is the very just observation of the annotators of the American Leading Cases on this question.[20] And the language of the court in a case just quoted, if a little stilted, embodies the true wisdom of the subject, as it seems to us. Ford, J., said: [21] " If persons residing far from a post-town, aside from the common walks of gregarious commerce, will give their names in guaranty of commercial paper, it is better that they should be held to inquire for letters at the nearest post-office about the time such paper comes to maturity, than that the holder should be compelled to send a special messenger one hundred and fifty miles to serve personal notice, or that an established system of notice, sufficiently complex already, should be forced to give way to the introduction of novel exceptions, imposing burdensome, expensive, and hazardous duties on all men of business, merely out of favor to eccentric

17. Thompson on Bills, 340; Bancroft v. Hall, Holt, 476.

18. Fish v. Jackman, 19 Me. 467; Farmers' Bank v. Butler, 3 Litt. 498; Bedford v. Hickman, 1 Yerg. 166.

19. State Bank v. Ayres, 2 Halst. 130; Story on Bills, § 297.

20. 1 Am. Lead. Cas. 403.

21. State Bank v. Ayres, 2 Halst. 130.

residences." When the messenger was necessary, or most convenient, his reasonable expenses are chargeable to the party receiving notice.[22]

SECTION VII.

TIME WITHIN WHICH NOTICE MAY AND MUST BE GIVEN.

§ **1035. In the first place, as to the time within which notice may be given.**— It is quite clear that notice of dishonor implies the dishonor as taking place before the notice. Knowledge by anticipation that the instrument will be dishonored does not affect the rule, and if notice be given beforehand it is premature and ineffectual.[23]

The language of the earlier authorities was, that notice of dishonor should be given "within a reasonable time" after the dishonor had occurred, and the like expression is still sometimes met with;[24] but the period allowed the holder is now so definitely limited and fixed that this phrase is entirely too loose and general to convey a correct idea of the requirements of the law.[25]

§ **1036. As to the time of the day of dishonor** at which the holder may give notice, it is well settled that as soon as the demand is made, and the dishonor has occurred, the holder need not wait until the close of business hours to send notice.[26] Mr. Chitty

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22. Pearson v. Crallan, 2 J. P. Smith, 404 (King's Bench).

23. Jackson v. Richards, 2 Cai. 343; Chitty on Bills [*482], 544.

24. Story on Bills, § 285; 1 Parsons on Notes and Bills, 507; Chitty on Bills, chap. 8, p. 366. There was formerly a statute in Virginia which allowed eighteen months as a reasonable time within which to give notice of protest of a bill of exchange. It was considered in Stott v. Alexander, 1 Wash. 335 (1794), in which case the bill was protested in September, 1787, and notice given in June, 1788, and the court, by its president, Edmond Pendleton, said: "No facts being stated to take this case out of the general rule before mentioned, and established by the act of the Assembly, we are of opinion that the notice is reasonable." This statute was repealed in 1792, and is quoted as a curious relic. Both in England and Scotland formerly there was no fixed time within which it was necessary to give notice; the new rule is as certain as a statute. See Thompson on Bills, 346; Patillo v. Alexander, 96 Ga. 60, 22 S. E. 646, citing text.

25. 1 Parsons on Notes and Bills, 507; Deininger v. Miller, 7 App. Div. 409, 40 N. Y. Supp. 195, citing the text; Apple v. Lesser, 93 Ga. 749, 21 S. E. 171, citing text.

26. Bank of Alexandria v. Swan, 9 Pet. 33; Lenox v. Roberts, 2 Wheat. 373; Coleman v. Carpenter, 9 Barr, 178; Price v. Young, 1 McCord, 339. In *Ex*

has well expressed the law on this subject: "It has been doubted whether, in the case of an inland bill or promissory note payable after date or sight, or on a particular event, the holder can legally give notice of the nonpayment on the day when it falls due, or whether the drawee or maker is not entitled to the whole of that day to pay it in, without any reference to banking hours, and whether it can be considered as dishonored until the whole of that day has elapsed.[27] But though in general, when a payment is to be made on a day certain, the party is not in default until the expiration of it, the law merchant considers the contract of an acceptor of a bill, or maker of a note, to have been to pay on demand at any part of that day, and therefore it seems clear that notice of nonpayment may be given on the last day of grace, whenever, after due presentment and demand, the drawee makes an unqualified refusal to pay at all.[28] And in a more recent case it was held that notice of dishonor may be given on the same day that the bill falls due, although there may not have been an absolute refusal, but a mere neglect to pay on presentment.[29] If the house at which the bill is payable be shut up, and no one there, it is the same as a refusal.[30] It should seem that in these cases of notice of dishonor, given on the day on which the bill is payable, the notice will be good or bad, as the acceptor may or may not afterward pay the bill; if he does not afterward pay it [on that day], the notice is good; and if he does, it of course comes to nothing." [31]

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parte Moline, 19 Ves. 216, a demand on the acceptor at 11 A. M., and notice sent immediately, warranted proof of debt against the drawer, who had become bankrupt. Lord Eldon said: "I do not recollect any decision that if an acceptor declares at 11 o'clock in the morning that he will not pay, notice of that to the drawer is not good. If the law does not impose on the holder the duty of inquiring again before 5 o'clock, it would be extraordinary that this information to the drawer of an answer precluding any hope of obtaining anything by calling again, should not have effect." Story on Bills, § 290; Byles on Bills (Sharswood's ed.) [*276], 428; Thompson on Bills, 348; Edwards on Bills, 615, 622.

27. Leftly v. Mills, 4 T. R. 170; Haynes v. Birks, 3 Bos. & P. 602; Colket v. Freeman, 2 T. R. 59; Hartley v. Case, 1 Car. & P. 555, 4 B. & C. 339.

28. Burbridge v. Manners, 2 Campb. 195; Hartley v. Case, 1 Car. & P. 556; *Ex parte* Moline, 19 Ves. 216; King v. Crowell, 61 Me. 244.

29. Clowes v. Chaldecott, 7 L. J. K. B. 147.

30. Hine v. Allely, 4 B. & Ad. 624, 1 Nev. & M. 433.

31. Chitty on Bills (13th Am. ed.) [*482], 544; Hartley v. Case, 1 Car. & P. 556, Abbott, C. J.

§ **1037. Notice on very day of dishonor not obligatory.**— It is also certain that the holder is not obliged to give notice immediately on the very day of the dishonor,[32] although he has the option to do so if he pleases; and in point of fact it is usual for the holder or notary to prepare and send notice forthwith after dishonor. It is difficult to express a precise rule which will apply to all cases, and to fix definitely within what time after the day of dishonor the notice must be sent; and it is to be determined by reference to the residence of the parties, the means and frequency of communication, and the time of departure of the mails or other conveyance by which notice may be transmitted. Notice left with an indorser on Sunday has been held sufficient, the following Monday being in time to serve it.[33]

§ **1038. In the second place, as to the time within which notice may be given, when the holder and the party entitled to notice reside in the same place:** the settled rule is that the holder has until the expiration of the following day to give notice; and he is not confined within the business hours of the day to give the notice at the party's dwelling.[34] He may give it there at any time before the hours of rest; but if he gives it at the place of business, it must be done during the hours of business.[35]

§ **1039. In the third place, as to the time within which notice must be given when the parties reside in different places,** and there is mail communication between them, the rule laid down by the United States Supreme Court is, that the notice should be deposited in the post in time to be sent by the mail of the day after dishonor, provided such mail is not closed before early and

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32. Darbishire v. Parker, 6 East, 8, 2 Smith, 195; Tindall v. Brown, 1 T. R. 168; Burbridge v. Manners, 3 Campb. 193; Russell v. Langstaffe, Doug. 515; Muilman v. D'Eguino, 2 H. Blackst. 565; Phelps v. Stocking, 21 Nebr. 444, citing the text; Chitty on Bills [*482], 544.

33. Carlisle Deposit Bank v. Rheem, 10 Phila. 462.

34. Jameson v. Swinton, 2 Taunt. 224; Bayley on Bills, 176; Deininger v. Miller, 7 App. Div. 409, 40 N. Y. Supp. 195, citing the text; Whiting v. City Bank, 77 N. Y. 363; Standard Sewing Machine Co. v. Smith, 1 Marv. 330, 40 Atl. 1117.

35. Adams v. Wright, 14 Wis. 408; Cayuga County Bank v. Hunt, 2 Hill (N. Y.), 635; Crosse v. Smith, 1 Maule & S. 545; Garnett v. Woodcock, 6 Maule & S. 44; Parker v. Gordon, 7 East, 385; Allen v. Edmundson, 2 Car. & K. 547; Story on Bills, § 290.

convenient business hours of that day; in which case it must be sent by the next mail thereafter.[36]

In other words, the notice must be sent by the first mail which leaves after the day of dishonor is past, and does not close before early and convenient business hours of the day succeeding the day of dishonor; the design of the law being to afford the holder an opportunity to mail the notice on the day succeeding that of dishonor.

This rule is sanctioned by numerous and eminent authorities, either expressly or by implication, and, it seems to us, adopts the only principle which may be safely followed in all cases.[37]

§ **1040.** Chancellor Kent has expressed the opinion that it would be sufficient to mail the notice at any time on the day after dishonor,[38] but this is a greater relaxation than the leading cases recognize, and is going further than necessary to extend a liberal time to the holder.[39] In many cases it is said that notice must be sent by the mail of the next day after dishonor; but most of these cases, as observed by Professor Parsons, were cases which

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36. Fullerton v. Bank of the United States, 1 Pet. 605; Bank of Alexandria v. Swann, 9 Pet. 33; Lenox v. Roberts, 2 Wheat. 373; United States v. Barker, 12 Wheat. 559, 4 Wash. 465. These cases do not state the rule as broadly laid down in the text, but they are not inconsistent with it, as explained in the case of Lawson v. Farmers' Bank, 1 Ohio St. 206 — a most learned and instructive case on the subject of notice. Johnson v. Brown, 154 Mass. 105, 27 N. E. 994, holds that "A notice of the nonpayment of a promissory note, addressed to the indorser and deposited in a *post-office box* in the street, is duly mailed to him." Western Wheeled Scraper Co. v. Sadilek, 50 Nebr. 105, 69 N. W. 765, 61 Am. St. Rep. 550, citing text.

37. Farmers' Bank v. Duvall, 7 Gill & J. 78; Lawson v. Farmers' Bank, 1 Ohio St. 206; Carter v. Burley, 9 N. H. 558; Sussex Bank v. Baldwin, 2 Harr. 487; Wemple v. Dangerfield, 2 Smedes & M. 445; Downs v. Planters' Bank, 1 Smedes & M. 261; Mitchell v. Cross, 2 R. I. 437; Burgess v. Vreeland, 4 N. J. 71; Howard v. Ives, 1 Hill (N. Y.), 263; Hartford Bank v. Stedman, 3 Conn. 489; Chick v. Pillsbury, 24 Me. 458; Eagle Bank v. Chapin, 3 Pick. 180; Manchester Bank v. Fellows, 8 Fost. 302; 1 Parsons on Notes and Bills, 511; Redf. & Big. Lead. Cas. 393, 1 Am. Lead. Cas. 390; Story on Bills, § 288; Darbishire v. Parker, 6 East, 3; Haynes v. Birks, 3 Bos. & P. 599; Saunderson v. Saunderson, 20 Fla. 304; Insurance Co. v. Wilson, 29 W. Va. 546, citing the text; Rosson v. Carroll, 90 Tenn. 90, 16 S. W. 66, quoting text with approval; Bank v. Bradley, 117 N. C. 526, 23 S. E. 455, citing the text; Apple v. Lesser, 93 Ga. 749, 21 S. E. 171, citing text; Corbin v. Planters' Nat. Bank, 87 Va. 666, 13 S. E. 98, 24 Am. St. Rep. 673, citing text.

38. 3 Kent Comm. 106, note *e*.

39. 1 Parsons on Notes and Bills, 508, 509.

held that notice so sent is sufficient, which is undoubtedly true.[40] "By the next practicable mail," after the day of dishonor, is the language adopted by a number of authorities;[41] but they are not altogether concurrent in the definition of the phrase, and the rule of the text seems less susceptible than any other of misinterpretation, or of working injustice to any of the parties.

Chitty considers that "when the parties do not reside in the same place, and the notice is to be sent by the general post, then the holder or party to give the notice must take care to forward notice by the post of the next day after the dishonor, or after he received notice of such dishonor, whether that post sets off from the place where he is early or late.[42] Story regards the rule as "not so strict as it is laid down by Mr. Chitty," and adds: "It would be more correct to say that the holder is entitled to one whole day to prepare his notice, and that, therefore, it will be sufficient if he sends it by the next post that goes after twenty-four hours from the time of the dishonor. Thus, suppose the dishonor is at four o'clock P. M. on Monday, and the post leaves on Tuesday at nine or ten o'clock, it seems to me that the holder need not send by that post, but may safely wait and put the notice into the post-office early enough to go by the post on Wednesday morning at the same hour. I have seen no late case which imports a different doctrine; on the contrary, they appear to me to sustain it. But as I do not know of any direct authority which positively so decides, this remark is merely propounded for the consideration of the learned reader." [43] The rule stated by the text seems to us the best. It is as liberal as is necessary for the holder. It prevents undue delay as to the party to be notified, and it is sustained by direct and high authority.

§ **1041. Reasonable hour of day for mailing notice.**— What hour of the next day after dishonor may be considered as reasonably early and convenient within the meaning of this rule must depend upon the habits of the business community in each place, and no precise hour can be arbitrarily named. If the mail closes

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40. 1 Parsons on Notes and Bills, 510, 511.

41. Kaskell v. Boardman, 8 Allen, 40, in which case Bigelow, C. J., said: "The rule is that notice should go by the next practicable post after the holder received notice of dishonor of the note." Story on Bills, § 382.

42. Chitty on Bills [*486], 548.

43. Story on Bills (Bennett's ed.), 326, § 290, note 1; Apple v. Lesser, 93 Ga. 749, 21 S. E. 171, citing text.

before early business hours of the day after dishonor, whether it be during the night before,[44] or at three,[45] four,[46] five,[47] or six,[48] o'clock A. M. thereof, the notice need not, under the rule, be sent thereby. Seven o'clock seems debatable,[49] at least the hour is not clearly within early business hours, unless at some particular localities, and sunrise is certainly too soon.[50]

Of course, three P. M. would be too late;[51] and it has been held that where the mail closes at half-past ten A. M. notice should have been sent by it;[52] so where it closed at ten A. M.,[53] and likewise where it closed at ten minutes past nine A. M.[54] But in another locality, half-past nine A. M. was thought unreasonably early;[55] while in another still, it has been held that proof that the notice was deposited in the post at nine A. M. was insufficient.[56]

So that the notice goes by some mail of the day after dishonor, it is not material by which mail of that day, and that a mail left earlier than that by which notice was conveyed makes no difference,[57] the law taking no notice of fractions of a day. Certainly it must go by the mail of the next day (if it leave not too early, as we have said); or if there be no mail next day, it must go by the next mail thereafter.[58]

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44. See *ante*, § 1039; Geill v. Jeremy, 1 Moody & M. 61.

45. Mitchell v. Cross, 2 R. I. 437.

46. Wemple v. Dangerfield, 2 Smedes & M. 445.

47. West v. Brown, 6 Ohio St. 542.

48. Chick v. Pillsbury, 24 Me. 458; Davis v. Hanly, 7 Eng. (Ark.) 645.

49. In Stephenson v. Dickson, 24 Pa. St. 148, 7 o'clock was held not an unreasonably early hour; but in Commercial Bank v. King, 3 Rob. (La.) 243, it was held certainly sufficient to show that notice was deposited in the post at 7 o'clock.

50. Deminds v. Kirkman, 1 Smedes & M. 644.

51. Seventh Ward Bank v. Hanrick, 2 Story, 416.

52. United States v. Barker, 4 Wash. C. C. 464, 12 Wheat. 559.

53. Haskell v. Boardman, 8 Allen, 38.

54. Lawson v. Farmers' Bank, 1 Ohio St. 206.

55. Burgess v. Vreeland, 4 N. J. 71. In New York, half-past 9 A. M. was regarded as too early, the party who was chargeable with giving notice being "an aged man, and a lawyer out of practice twenty-five years." Smith v. Poillon, 23 Hun, 632. (It seems queer to consider age as a circumstance regulating the duty and obligation of the holder.) In England half-past 9 was held too early. Hawkes v. Salter, 4 Bing. 715 (13 Eng. C. L.); Byles on Bills [*274], 426.

56. Downs v. Planters' Bank, 1 Smedes & M. 261.

57. Lindo v. Unsworth, 2 Campb. 602; Martin v. Ingersoll, 8 Pick. 1.

58. Deblieux v. Bullard, 1 Rob. (La.) 66. In this case it was said it might be given on Sunday.

§ **1042. Illegible writing of party.**—If the party to whom notice is to be given have himself, by his mode of drawing or indorsing, thrown difficulty in the way of the holder, the time allowed the latter will be extended, as, for instance, where the drawer wrote his name so badly that the holder mistook the spelling of it, and the letter containing the notice consequently miscarried.[59]

§ **1043. Days not computed.**— Christmas day, Sunday,[60] the Fourth of July,[61] or any day of public thanksgiving,[62] or of religious festival,[63] (upon which a man is forbidden by his religion to transact secular affairs), is counted out of computation of time within which notice must be given. But notice is not invalid because given on the Fourth of July or other holiday;[64] and although notice need not be forwarded until the day after dishonor or of its reception, still it is not irregular or improper to do so if the party chooses, the time being allowed for his convenience.[65] If notice is received on Sunday, it need not be forwarded until the Tuesday following, as he is not bound to open the letter containing it or to recognize it until Monday;[66] and if received on Saturday it need not be forwarded until Monday.[67]

§ **1044. Each holder has a day to give notice to his predecessor on the paper.**— The party receiving the notice may desire to communicate it to parties antecedent to him, and others before him likewise to transmit it to those antecedent to them. In such cases the general rule also is, that each successive party who receives

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59. Hewitt v. Thompson, 1 Moody & R. 543.

60. Byles on Bills (Sharswood's ed.) [*277], 429; Chitty on Bills (13th Am. ed.) [*488], 551, 552; 1 Parsons on Notes and Bills, 515. See chapter XX, section IV, §§ 627, 628, vol. 1.

61. Cuyler v. Stevens, 4 Wend. 566.

62. Byles on Bills (Sharswood's ed.) [*277], 429.

63. Lindo v. Unsworth, 2 Campb. 602; Martin v. Ingersoll, 8 Pick. 1.

64. Deblieux v. Bullard, 1 Rob. (La.) 66. In this case it was said it might be given on Sunday.

65. Bussard v. Levering, 6 Wheat. 102; Lindenberger v. Beall, 6 Wheat. 104; Curry v. Bank of Mobile, 8 Port. 360; McClane v. Fitch, 4 B. Mon. 599; Coleman v. Carpenter, 9 Pa. St. 178; Haslett v. Ehrick, 1 Nott & McC. 116; Corp v. McComb, 1 Johns. Cas. 328; Smith v. Little, 10 N. H. 526; Lawson v. Farmers' Bank, 1 Ohio St. 206.

66. Bayley on Bills, 172; Bray v. Hadwen, 5 Maule, 68; 1 Parsons on Notes and Bills, 515; Wright v. Shawcross, 2 B. & Ald. 501, note; Haynes v. Birks, 3 Bos. & P. 599; Chitty on Bills (13th Am. ed.) [*488], 551.

67. Howard v. Ives, 1 Hill, 263; Friend v. Wilkinson, 9 Gratt. 31.

notice of dishonor is entitled to a full day to transmit it to any antecedent party who is chargeable over to him upon payment of the bill or note.[68] So that, if a party receives notice on one day, he is not bound to forward it to a prior indorser until the next day, and not then if the mail leaves before early business hours. Thus, an indorser who received notice at eight or half-past eight in the morning, has been held not bound to send it to a prior party by a mail leaving at twelve o'clock the same day, Lord Ellenborough saying: "It has been laid down, I believe, since the case of Darbishire v. Parker, as a rule of practice, that each party, into whose hands a dishonored bill may pass, should be allowed one entire day for the purpose of giving notice; a different rule would subject every party to the inconvenience of giving an account of all his other engagements, in order to prove that he could not reasonably be expected to send notice by the same day's post which brought it." [69]

Upon receiving notice of dishonor, the indorser should — if there be prior parties whom he wishes to hold liable — immediately notify not only the one immediately antecedent to him, but all of them; for otherwise, by the negligence of his previous indorser, or of some one of the successive indorsers, he may lose recourse against some or all of them but the one notified by him.

§ 1045. Overdiligence of one party does not supply negligence of another.— The overdiligence of one party to a bill or note in giving notice cannot supply the lack of diligence in another; and though the drawer or indorser sought to be charged received the notice as early as he would have been entitled to it had it passed in due course through the intermediate parties, yet the holder, in order to bind him, must show due diligence in each and every one of such intermediate parties.[70] "If," said Tucker, P., in

68. Jameson v. Swinton, 2 Taunt. 224; Geill v. Jeremy, 1 Moody & M. 61; Rowe v. Tipper, 13 C. B. 249; Lawson v. Farmers' Bank, 1 Ohio St. 206. See 1 Parsons on Notes and Bills, 513, and cases cited; Story on Bills, § 291; Byles on Bills (Sharswood's ed.) [*277], 430; Thompson on Bills, 348; Smith on Mercantile Law, 149; Simpson v. Turney, 5 Humphr. 419; Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177, 107 Mass. 444; Seaton v. Scovill, 18 Kan. 435; Standard Sewing Machine Co. v. Smith, 1 Marv. 330, 40 Atl. 1117; Corbin v. Planters' Nat. Bank, 87 Va. 666, 13 S. E. 98, 24 Am. St. Rep. 673, citing text.

69. Bray v. Hadwen, 5 Maule & S. 68.

70. Brown v. Ferguson, 4 Leigh, 37; Simpson v. Turney, 5 Humphr. 419; Smith v. Roach, 7 B. Mon. 17; Whitman v. Farmers' Bank, 8 Port. 257; Stix

Brown v. Ferguson, 4 Leigh, 37, "there be a defect in any link of the chain of notices, it is fatal to the holder's demand. We cannot eke out the underdiligence of one party by the overdiligence of another; * * * for as the recourse of any immediate indorser against those who lie behind him arises from his own liability to pay the bill to whom he passed it, the laches which takes away his liability takes away theirs also." Nor can any party by waiving his own discharge and paying the bill or note, waive the discharge of antecedent parties.[71] Moreover, the holder giving notice to the first, or any prior party, must give it to him in a day, as well as to the last indorser.[72]

But if the holder of a dishonored promissory note, under cover to whom a notice to an indorser of its protest is seasonably sent by mail by the notary, from another post-town where the note was payable, replaces it in the post-office without unreasonable delay, properly addressed to the indorser, it is immaterial to the sufficiency of the notice to bind the indorser, that in the ordinary course of the mails he might have received it sooner if it had been mailed to him directly by the notary.[73]

§ 1046. Transmission of notice over seas.—In the case of a foreign bill protested in one of the United States, and the party entitled to notice resides in some other nationality beyond the seas, it is sufficient to send notice by the first regular ship; and it is no objection that if sent by a chance ship it would reach him sooner.[74] It should be sent by the ship going to the port at which

v. Mathews, 63 Mo. 371; Etting v. Schuylkill Bank, 2 Barr, 355; Fitchburg Bank v. Perley, 2 Allen, 433; American Life Ins. Co. v. Emerson, 4 Smedes & M. 177; Carter v. Burley, 9 N. H. 558; Mitchell v. Cross, 2 R. I. 439; Manchester Bank v. Fellows, 8 Fost. 302; Kennedy v. Geddes, 8 Port. 263; Rowe v. Tipper, 13 C. B. 249 (76 Eng. C. L.); 1 Parsons on Notes and Bills, 514; Story on Bills, § 294; Thompson on Bills, 348, 349; Turner v. Leach, 4 B. & Ald. 451.

71. Turner v. Leach, 4 B. & Ald. 451 (6 Eng. C. L.).

72. Dobree v. Eastwood, 3 Car. & P. 250; Rowe v. Tipper, 18 C. B. 249 (76 Eng. C. L.). See Thompson on Bills, 349; Huntley v. Sanderson, 1 Cromp. & M. 466.

73. Shelburne Falls Nat. Bank v. Townsley, 101 Mass. 444.

74. Muilman v. D'Eguino, 2 H. Bl. 565; Darbishire v. Parker, 6 East, 3. In Stainback v. Bank of Virginia, 11 Gratt. 260, a bill drawn by a house in Petersburg, Va., on a house in London, was protested for nonacceptance on April 5, 1843. The next Cunard steamer sailed from Liverpool for the United States on the 19th, and notice of dishonor was sent by it. At that time the Cunard line carried the mail between the two countries under a contract

the party resides, or to some neighboring or convenient port according to the usual course of transportation of letters of business, if a reasonable time before its departure is left for writing and forwarding the notice.[75]

"If, with the ports of the country where the bills are protested, the communication is irregular, or at different seasons by different routes or ways of conveyance, that should be adopted to send the notice, which may reasonably be presumed to be the most certain and expeditious, under all the circumstances."[76]

If the party delay sending notice until after a regular ship to the place where notice is addressed has departed, sending it by the next ship will be too late, unless the delay be excused by circumstances.[77]

SECTION VIII.

THE ALLEGATION AND PROOF OF NOTICE.

§ **1047. First, as to the allegation of notice.**—Byles states that "it was formerly considered doubtful[78] whether such facts as dispense with presentment, protest, or notice of dishonor could or could not be given in evidence, in support of the common allegations of presentment, protest, or notice in the declaration." But that "it is now, however, clear that facts dispensing with presentment or notice, such as absence of effects in the drawee's hands, or a countermand of payment by the drawer, must be specially alleged in the declaration, and that proof of those facts is inadequate to the support of a positive averment of presentment, protest, or notice."[79] He adds: "But if it should distinctly ap-

with the British Government, and it was the usual mode of transmitting letters. There were, however, regular lines of sailing packets between London and Liverpool and the United States, for which letter-bags were made up at the London post-office, and such packets sailed from London, or Liverpool, on the 7th, 10th, and 17th of April, 1843. But it was probable that the steamer of the 19th would arrive before any of them. The notice was held duly transmitted, Samuels, J., saying that any other course would have sacrificed the object of the law. Byles on Bills (Sharswood's ed.) [*272], 421; Bayley on Bills, 179.

75. Story on Bills, § 286; 1 Parsons on Notes and Bills, 485, note.

76. Story on Bills, § 286.

77. Lenox v. Leverett, 10 Mass. 1.

78. Citing Cory v. Scott, 3 B. & Ald. 619; Bayley on Bills (5th ed.), 406.

79. Byles on Bills [*409], 595, 596, and [*293], 453, citing Bourgh v. Legge, 5 M. & W. 418. See Terry v. Parker, 6 Ad. & El. 502, Nev. & P. 752; Carter v. Flower, 16 M. & W. 749.

pear in evidence that there has been a neglect to present, and that the defendant, being aware of the omission, afterward promised to pay, so that the promise is used as a waiver, it is conceived that the declaration must still be special. It may be otherwise, when there has been a neglect to give notice of dishonor, and a promise to pay, with notice of the omission, has been afterward made before action brought, for then the defendant has, in the words of the declaration, had notice of the dishonor, which notice, under the circumstances, may be deemed as against him due notice. But the law on this subject does not appear to be very clearly settled.[80] It seems, however, that notice too late in the usual course, but reasonable and sufficient under the special circumstances, may be proved under the ordinary allegation.[81]

§ **1048. In the United States, the authorities** on this subject are not entirely harmonious; but the view of Mr. Greenleaf is that circumstances of excuse or dispensation with presentment, protest, and notice, may be shown under an averment of due presentment, protest, and notice, "the evidence being regarded not strictly as matter in excuse, but as proof of a qualified presentment and demand, or of acts which, in their legal effect and by the custom of merchants, are equivalent thereto."[82] This we think is the better view, and it is sustained by decisions of the highest respectability. In Massachusetts it is settled by a series of decisions that in an action by the indorsee against the indorser of a note, evidence of a waiver of demand, protest, and notice is sufficient in support of an averment of demand, protest, and notice,[83] and in other States the same view has been adopted.[84] Edwards

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80. Citing, see Brownell v. Bonney, 1 Q. B. 39, 3 Man. & R. 359, Dans. & L. 151; Firth v. Thrush, 8 B. & C. 387; Baldwin v. Richardson, 1 B. & C. 245, 2 Dowl. & R. 285.

81. Citing Carter v. Flower, 16 M. & W. 749.

82. 2 Greenleaf on Evidence, § 197.

83. Armstrong v. Chadwick, 127 Mass. 756; Harrison v. Bailey, 99 Mass. 620; Taunton Bank v. Richardson, 5 Pick. 436, 444; Jones v. Fales, 4 Mass. 245; City Bank v. Cutter, 3 Pick. 414; North Bank v. Abbott, 13 Pick. 465; Kent v. Warner, 12 Allen, 561. This, however, has been there regarded as an exception "to an established and most salutary rule of evidence," and held not applicable to other executory agreements in Colt v. Miller, 10 Cush. 51.

84. Tobey v. Berly, 26 Ill. 426; Norton v. Lewis, 2 Conn. 478 (waiver before maturity); Camp v. Bates, 11 Conn. 488, 493 (waiver after maturity); Windham Bank v. Norton, 22 Conn. 214, 219; Kennen v. McRea, 7 Port. 176, 186.

states on English authority that a waiver of notice before dishonor cannot be proved under an allegation of due notice;[85] but this is not the prevailing rule in the United States.[86]

§ **1049. Rule in the United States.**—So it may be regarded as established in the United States, that evidence of due diligence in the holder to obtain payment, and to make protest and give notice, is admissible under the general averment of due demand, protest, and notice.[87] Thus, where the maker of a note could not be found at his store, and a demand was made on his clerk, it was not thought necessary to aver this fact specifically, but that it might be shown under an allegation of due demand upon the maker. So where the drawer of a check stopped payment, and due notice was averred, it was held that the averment might be disregarded as surplusage, and the defendant was held bound.[88]

§ **1050. Second, as to proof of notice.**— The burden of proving that notice was duly given so as to charge the drawer of a bill, or the indorser of a bill or note, rests upon the plaintiff. And this burden he may bear in two ways: First, by proving due and legal diligence used in giving notice to the party entitled thereto, in which case the legal presumption of its due receipt will attach and obviate the necessity of further evidence.[89] Or, second, by proving that notice was actually received in due time, in which case it matters not what means of communication was employed.[90]

See also Spann v. Balzell, 1 Fla. 302; Shirley v. Fellows, 9 Port. 300; McVeigh v. Bank of Old Dominion, 26 Gratt. 799, Moncure, P.; Redf. & Big. Lead. Cas. 417; 2 Smith's Lead. Cas. 74.

85. Edwards on Bills, 636.

86. Norton v. Lewis, 2 Conn. 478.

87. Stewart v. Eden, 2 Cai. 127; Williams v. Matthews, 3 Cow. 262; Ogden v. Conley, 2 Johns. 274. See also Saunderson v. Judge, 2 H. Bl. 510. *Contra*, Curtis v. State Bank, 6 Blackf. 314. In England the rule is different. Allen v. Edmundson, 17 L. J. (N. S.), C. L. 291 (1848), 2 Exch. 719.

88. Purchase v. Mattison, 6 Duer, 592. See also Jacks v. Darrin, 3 E. D. Smith, 558 (Professor Parsons in vol. II, Notes and Bills, p. 72, quotes these cases by mistake for the opposite doctrine).

89. Lambert v. Ghiselin, 9 How. 552; Saco Nat. Bank v. Sanborn, 63 Me. 340; Shed v. Brett, 1 Pick. 401, the court saying: "An averment of notice will be sufficiently proved by showing that the steps necessary to give the notice have been taken; if subsequently received, it will relate to the time when it was sent; if never received, the fact of having put it in the proper train is enough." Bettis v. Schreiber, 31 Minn. 332, citing the text.

90. Dickens v. Beal, 10 Pet. 572; First Nat. Bank v. Wood, 51 Vt. 471. See §§ 1000, 1003. An admission in writing by the indorsers of the due present-

Presumptions of due notice may also be created by proof of promise to pay, or part payment, in the manner elsewhere considered.[91] An admission or acknowledgment of notice is presumptive evidence of notice.[92]

§ **1051.** The plaintiff must distinctly show that notice was given on the proper day; it will not suffice to show that it was given on one of two days, because the latter would be too late.[93] But when

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ment of note for payment, and of the nonpayment thereof, is sufficient evidence of the fact that the note was duly presented, was dishonored, and that notice of dishonor was duly sent to the indorsers. Chapman v. Ogden, 37 App. Div. 355, 56 N. Y. Supp. 73.

91. See chapter XXXV.

92. Todd v. Neal's Admr., 49 Ala. 266; Donegan v. Wood, 49 Ala. 242.

93. Lawson v. Sherwood, 1 Stark. 314 (2 Eng. C. L.). In Friend v. Wilkinson & Hunt, 9 Gratt. 31, two bills payable in Cincinnati were protested for nonpayment, on February 1, 1850, and notice was due to the Bank of Virginia, at Charleston, Kanawha county, Va., which had transmitted it for collection. Judge Allen, who rendered the opinion of the court, said: "A notice of protest dated at Cincinnati on the 1st day of February, 1850, was sent by mail to the cashier of the Bank of Virginia at Charleston, Kanawha county, Va., and was received on the night of the 7th of February, inclosed in a letter postmarked Cincinnati, Ohio, and was handed to Friend, the indorser, on the next day. It was further proved that a letter would arrive at Charleston in four or five days after it was mailed in Cincinnati, if it came by the direct route. If sent by another route, a letter might be ten or twelve days on the way; or that it might be, and letters sometimes were, delayed at Chilicothe, Ohio, by the regulations in regard to the departure of the mail on the regular route from Cincinnati. Upon this proof the question arises whether Friend had due notice of the dishonor of the bill. The Bank of Virginia, at Charleston, Kanawha, is to be treated as a distinct holder, the bill having been placed there for presentment and collection; and notice was given by it in due time after it was received from Cincinnati. The party not residing in or near the city of Cincinnati, a notice sent by the mail of the next day, or the next practicable mail, would be sufficient, and the burden of proving a reasonable notice is on the plaintiff. It is, where notice is required, a condition precedent to his right to recover, and he must show a strict performance. In this case it does not appear whether there was a daily mail between Cincinnati and Charleston or not; nor when the notice was put in the post-office to be mailed. It is dated on the 1st and was received on the night of the 7th of February; and the proof is that a letter would arrive at Charleston in four or five days after it was mailed at Cincinnati if it came by the direct route. The notice, therefore, might have been placed in the office and mailed on the morning of the 4th, and have arrived after night on the 7th, according to this evidence. Being protested on the 1st, it should have been placed in the office to be sent by the mail of the next day, unless that was Sunday, and if so, by the mail of the 3d of February, if there was

it is shown that the notice was on the proper day deposited in the post-office, properly addressed in respect to name and post-office, no further proof is necessary, as due diligence will then have been exercised.[94] If notice be given by letter, its contents may be shown without a notice to produce the letter.[95] If it were given by one of two duplicate notices, evidence may be given of sending one, and then the other offered to the jury without notice to produce the one sent.[96] A finding that a notice the contents of which are unknown was served is not equivalent to finding that notice of protest, much less that sufficient notice of protest, was served.[97]

§ 1052. Postmark as evidence.— A postmark is *prima facie*,[98] but not conclusive,[99] evidence that notice was mailed on the day designated; and when one puts a letter in the mail on the day that it ought to be received he must show that it was posted in

such mail, or if not, by the next practicable mail; and it was incumbent on the plaintiff below to show the time it was so placed in the office to be mailed. * * * The notice may have been put in the office to be mailed on the 2d, and not have been received until the night of the 7th; if so, it would have been sufficient; but it might have been put in the office and mailed on the 3d or 4th and received at the same time; if so, it was too late, unless that was the first mail after the dishonor of the bill. And these were matters which the plaintiff was bound to prove, and probably could have done so by an examination of the notary." Rosson v. Carroll, 90 Tenn. 90, 16 S. W. 66, quoting with approval the text; Malott v. Jewett, 1 Kan. App. 14, 41 Pac. 674; German Security Bank v. McGarry, 106 Ala. 633, 17 So. 704.

94. Bussard v. Levering, 6 Wheat. 102; Dickens v. Beal, 10 Pet. 572; Shed v. Brett, 1 Pick. 401; Briggs v. Hervey, 130 Mass. 186.

95. Eagle Bank v. Chapin, 3 Pick. 180; Lindenberger v. Beall, 6 Wheat. 104; Leavitt v. Simes, 3 N. H. 14; Kine v. Beaumont, 3 B. & B. 288, 7 J. B. Moore, 112; Roberts v. Bradshaw, 1 Stark. 28, overruling earlier cases; 2 Parsons on Notes and Bills, 490, note.

96. Ackland v. Pearce, 3 Campb. 599; Roberts v. Bradshaw, 1 Stark. 28; 2 Parsons on Notes and Bills, 491.

97. In Couch v. Sherrill, 17 Kan. 622, Brewer, J., said: "There is no presumption in favor of the action of the notary as official action, because it is no part of his official duty as notary to serve notice. If he serve any notice it is as agent of the holder, and not as notary. Hence, the finding as to notice is to be treated as though notice had been served by the holder. Now what notice was served? * * * It does not even appear to have been notice of protest."

98. Early v. Preston, 1 Pat. & H. 228; Crawford v. Branch Bank, 1 Ala. 205; New Haven County Bank v. Mitchell, 15 Conn. 206; Arcangelow v. Thompson, 2 Campb. 620; Rex v. Plumer, Russ. & R. 264; Langdon v. Hulls, 5 Esp. 156; Fletcher v. Braddyll, 3 Stark. 64.

99. Stocken v. Collin, 7 M. & W. 545, 9 Car. & P. 653 (38 Eng. C. L.).

time to be received on that day.[1] Genuineness of the postmark may be proved by any witness, whether a post-office employee or not.[2]

§ **1053. When there are a number of parties entitled to notice** it is sufficient in order to hold any one of them bound, to show that notice reached him in such a time as it would occupy for the intermediate parties to transmit it to him in due course of the mails, allowing each one his day.[3] But the courts cannot take judicial cognizance of the course of the mails, and that must be shown by the plaintiff.[4] It would be better for him also to show that he gave notice in due season to his immediate indorser.[5] When the plaintiff has shown that notice reached the remote party within the time which would regularly be consumed, it will be for him to show a defective link in the chain of notices, if any there be.

§ **1054.** When the mail is the proper channel for the communication of notice, it is not necessary to show the distinct fact that the particular letter containing the notice was put in the mail, by ocular evidence thereof. Proof that notice was put with letters for the post-office by one clerk, and that the letters of that day were deposited by another clerk, would be sufficient.[6] And it would likewise be sufficient to show that it was put with letters customarily made up in the usual course of business for the postman, and that he invariably carried all the letters found upon the table.[7] But it has been held that proof that a letter was put on the table with others, and that it was the regular course of business for the porter to take them to the post-office, would not be sufficient — at least unless it were proved that the porter always

1. Fowler v. Henden, 4 Tyrw. 1002; Byles on Bills (Sharswood's ed.) [*275], 427.

2. Woodcock v. Houldsworth, 16 M. & W. 124; Fletcher v. Braddyll, 3 Stark. 64.

3. Jones v. Wardell, 6 W. & S. 399; Etting v. Schuylkill Bank, 2 Pa. St. 345; Marsh v. Maxwell, 2 Campb. 210.

4. Friend v. Wilkinson, 9 Gratt. 31; Carter v. Burley, 9 N. H. 558; Early v. Preston, 2 Pat. & H. 228.

5. 1 Parsons on Notes and Bills, 518.

6. Commercial Bank v. Strong, 28 Vt. 316.

7. Skilbeck v. Garbett, 7 Q. B. 846. See Brailsford v. Williams, 15 Md. 150; Flack v. Green, 3 Gill & J. 474; Miller v. Hackles, 5 Johns. 375; Knickerbocker Life Ins. Co. v. Pendleton, 115 U. S. 346; Persons v. Kruger, 45 App. Div. 184, 60 N. Y. Supp. 1078, citing text.

carried the letters so prepared, which, without any distinct remembrance as to that particular one, the court intimated would be satisfactory.[8]

Delivering the notice to the assistant postmaster in an adjoining room would suffice, that being the usage of the place;[9] but a clerk's statement that notice was put in, he not remembering whether by himself or another, would not.[10] Delivery to a mail-carrier is sufficient.[11] So, also, depositing the notice in a letter-box put up by the government.[12]

§ **1055. The protest of a foreign bill** is, by the law merchant, evidence of its presentment and dishonor; but except where it is so provided by statute, it is not evidence in respect to notice; and where a statute does not authorize the admission of the certificate of protest as evidence of notice, it is usual to take the notary's deposition to prove it, or that of some other witness, or to call the notary or witness to testify *ore tenus* at the trial.[13]

Statutory enactments have very generally changed this doctrine of the law merchant, and though sustained by authority, a distinguished author has denied it.[14]

If the notary has kept no record of the notice, his oral testimony is competent to prove the contents.[15]

§ **1056.** Where a notary testified that it was usual for him to send notices of dishonor on the evening of the day of protest, and he had no doubt it was duly done in this instance, it was held sufficient evidence of notice.[16] But where a notary testified as to a

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8. Hetherington v. Kemp, 4 Campb. 193; Byles on Bills (Sharswood's ed.), 420; Swampscott Machine Co. v. Rice, 159 Mass. 404, 34 N. E. 520.

9. Mount Vernon Bank v. Holden, 2 R. I. 467.

10. Hawkes v. Salter, 1 Moore & P. 750.

11. Pearce v. Langfit, 101 Pa. St. 507; *ante*, § 1005*a*.

12. Casco Nat. Bank v. Shaw, 79 Me. 376; Wood v. Callaghan, 61 Mich. 402; *ante*, § 1005*a*.

13. See chapter XXVIII, on Protest, section V, § 960 *et seq.;* Harrison v. Robinson, 4 How. 336; Lambert v. Ghiselin, 9 How. 532; Dickens v. Beal, 10 Pet. 582; Miller v. Hackley, 5 Johns. 384; Lloyd v. McGair, 3 Barr, 482; Walker v. Turner, 3 Gratt. 536.

14. 2 Parsons on Notes and Bills, 498. See chapter XXVIII, on Protest, section IV.

15. Terbell v. Jones, 15 Wis. 253.

16. Miller v. Hackley, 5 Johns. 375. See also Carson v. Bank of the State, 4 Ala. 148; Persons v. Kruger, 45 App. Div. 184, 60 N. Y. Supp. 1078, citing text.

similar habit, and presumed notice was given, but had no distinct recollection, it was held otherwise.[17] A clerk's conclusion from circumstances which he remembered, though he did not recollect having delivered notice, that he had done so, was thought sufficient in another case.[18] It was likewise held in Maine, that where the notary testified he had prepared notice and given it to S. to deliver, and S. had no recollection of that particular notice, but it was his habit to deliver notice, generally, the usage operated sufficient evidence of notice.[19]

§ **1057. When the notary who gave the notice is dead,** the entries respecting it in his books are good secondary evidence,[20] even where protest is not required by law, as in the case of a note or an inland bill.[21] But the entry can prove no more than what it states; and if it omits to state the residence of the indorser, the post-office to which notice was addressed, or any other material fact, it cannot be inferred.[22] The notary's register would be no evidence after his death if the entries were made by a clerk still living, and although he be absent and out of reach,[23] but if such clerk were deceased it would be.[24] Entries made by officials deceased at the time of trial are in general admissible, and the principle has been held to apply to the case of deceased messengers and bookkeepers,[25] cashiers of banks,[26] and clerks,[27] as well as to notaries.[28] "The

17. Hoff v. Baldwin, 12 Mart. 699. See also Bullard v. Wilson, 17 Mart. 196. In New York held, that memorandum at the foot of the notary's certificate, to wit: "Notice mailed to Dennis Ryan (an indorser), St. Paul, Minn.," is sufficient evidence that proper notice of protest was given in the absence of a sworn denial of the receipt of the notice by the indorser. See McLean v. Ryan, 36 App. Div. 281. [This decision is based upon section 923 of the Code of Civil Procedure, and can hardly be regarded as the general law.]

18. New Haven County Bank v. Mitchell, 15 Conn. 206.

19. Union Bank v. Stone, 50 Me. 595.

20. Robins v. Pinckard, 5 Smedes & M. 51.

21. Nicholls v. Webb, 8 Wheat. 326; Butler v. Webb, 2 Wend. 369. See chapter XXVIII, on Protest, section IV.

22. Farmers' Bank v. Duval, 7 Gill & J. 78; Halliday v. Martinet, 20 Johns. 168; Insurance Co. v. Wilson, 29 W. Va. 566, citing the text.

23. Wilbur v. Selden, 6 Cow. 162.

24. Gawtry v. Doane, 51 N. Y. 90.

25. Welsh v. Barratt, 15 Mass. 380.

26. Nichols v. Goldsmith, 7 Wend. 160.

27. Ocean Nat. Bank v. Carll, 10 Hun, 241.

28. Halliday v. Martinet, 20 Johns. 168; Nicholls v. Webb, 8 Wheat. 326; Nichols v. Goldsmith, 7 Wend. 160; Homes v. Smith, 16 Me. 181; Price v. Torrington, 1 Salk. 285.

rule is," says Bronson, J., "that entries and memoranda made in the usual course of business by notaries, clerks, and other persons, may be received in evidence after the death of the persons who made them." [29]

§ 1058. When diligence is question of law, and when of fact.— When the facts are ascertained, it is simply a question of law for the court to determine whether or not reasonable diligence has been exercised;[30] but when the facts are disputed, it is a question for the jury upon hypothetical instructions of the court.[31]

§ 1058a. Diligence suffices.— When due diligence has been exercised, and notice sent accordingly, the holder is not obliged to give any further notice, although he afterward discovers that the notice was sent to the wrong place. Such is the doctrine of the United States Supreme Court, which has said on this subject, where the holder, after due inquiry, sent notice: "The liability of the indorser was fixed by the notice sent to Nottingham. The plaintiffs had acquired a right of action against him by this notice, and might have brought their suit against him the next day. Could that right be divested by the information which was subsequently given to them? We think not, and that all of the cases in relation to this subject imply the contrary." [32] In New York a contrary view has been taken, but without apparent confidence,[33] and it would be more reasonable to regard the holder as having complied with his obligation when he had acted with due diligence to ascertain the indorser's whereabouts.

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29. Brewster v. Doane, 2 Hill, 537.

30. Bank of Columbia v. Lawrence, 1 Pet. 578; Harris v. Robinson, 4 How. 336; Walker v. Stetson, 14 Ohio St. 89; Belden v. Lamb, 17 Conn. 442; Wheeler v. Field, 6 Metc. (Mass.) 290; Bank of Utica v. Bender, 21 Wend. 643; Rhett v. Poe, 2 How. 457; Edwards on Bills, 648; Lane v. Bank of West Tennessee, 9 Heisk. 419.

31. See chapter XVII, on Presentment for Acceptance, section III, § 466, vol. I; and chapter XX, on Presentment for Payment, section III, § 612, vol. I.

32. Lambert v. Ghiselin, 9 How. 552.

33. Beale v. Parish. 20 N. Y. 407, overruling 24 Barb. 243.

CHAPTER XXX.

CIRCUMSTANCES OF A GENERAL NATURE WHICH EXCUSE WANT OF PRESENTMENT, PROTEST, AND NOTICE.

§ **1059.** The circumstances of a general nature which excuse the holder when there has been a failure on his part to make due presentment of the bill or note to the drawee, acceptor, or maker, or to convey due notice of dishonor to the drawer or indorser, may be classified as follows:

(1) The breaking out of a war between the country of the holder and that of the party to whom presentment should be made or notice given.

(2) Public and positive prohibitions of commercial intercourse between the countries of the holder and that of the party to whom presentment should be made or notice given.

(3) The occupation of the country where the parties live, or where the bill or note is payable, by a public enemy, or by military forces, which obstructs or suspends commercial intercourse.

(4) Political disturbances amounting to a virtual interruption and obstruction of the ordinary negotiations of trade.

(5) The prevalence of a malignant epidemic disease, which suspends the ordinary operations of business.

(6) Overwhelming calamity, or unavoidable accident, which obstructs the usual channels of communication.

These circumstances are of a character not affecting the individual peculiarly, but having such a general influence upon the country or the community as to impede and prevent the ordinary pursuits of business, or obstruct the methods of communication, and they are recognized, almost, if not quite, universally, as exonerating those who come under their operation from the performance of the obligations in respect to negotiable instruments with which they interfere. The classification of those circumstances which we have adopted is, with some alterations which confine them strictly within the description of "general circumstances," substantially that which is found in the work of Story on Prom-

issory Notes, and which has been sanctioned by more recent writers, and by a number of adjudicated cases.[1]

SECTION I.

WAR, INTERDICTION OF INTERCOURSE, AND OCCUPATION OF COUNTRY BY PUBLIC ENEMY.

§ **1060. In the first place, as to breaking out of war.**— A declaration of war between the country where the holder is domiciled and that where the party to whom presentment should be made or notice given is domiciled, or the breaking out of hostilities between such countries, operates as an interdiction of all commercial intercourse; and all communication between the subjects of the belligerents, or parties on opposite sides of the belligerent line, is prohibited. This is a general principle of the law of nations, recognized and applied to all kinds of transactions;[2] and it constitutes a clear and admitted justification of the omission to make due presentment of the bill or note or to give notice, during the continuance of hostilities or the suspension and prohibition of intercourse.[3] Indeed, war is not only an excuse for not giving notice, but entirely precludes the reason and necessity of it; and if notice be put in the post-office, addressed to a party on the other side of the hostile line, it would be an utterly void act, unless it was proved that there was a general usage of the postal department to preserve letters deposited and forward them to their destination on

1. Story on Notes, §§ 205, 257, 356. See also Story on Bills, §§ 234, 327; 1 Parsons on Notes and Bills, 460; Edwards on Bills, 492; House v. Adams, 48 Pa. St. 261; Apperson v. Union Bank, 4 Coldw. 445 (as to notice).

2. United States v. Grossmeyer, 9 Wall. 75; The William Bagaley, 5 Wall. 377; Alexander's Cotton, 2 Wall. 404; Scholefield v. Eichelberger, 7 Pet. 586; Woods v. Wilder, 43 N. Y. 164; Wheaton on International Law, § 317; 1 Kent Comm. 67.

3. Patience v. Townley, 2 J. P. Smith, 224 (King's Bench, 1806); House v. Adams, 48 Pa. St. 261; Morgan v. Bank of Louisville, 6 Bush, 82; Berry v. Southern Bank, 2 Duv. 379; Bell v. Hall's Exrs., 2 Duv. 288; Apperson v. Union Bank, 4 Coldw. 445; Norris v. Despard, 38 Md. 491; James v. Wade, 21 La. Ann. 548 (1869) (there being suspension of mail service and commercial intercourse); Durden v. Smith, 44 Miss. 548; Shaw v. Neal, 19 La. Ann. 156; Billgerry v. Branch, 19 Gratt. 393; Farmers' Bank v. Gunnell, 26 Gratt. 138; Bynum v. Apperson, 9 Heisk. 632; Harden v. Boyce, 59 Barb. 427; Story on Notes, § 263; Story on Bills, § 234; Thompson on Bills (Wilson's ed.), 289.

the reopening of intercourse.[4] The rule applies to protest and all of the proceedings usual at maturity of the note.[5]

§ **1061. Confederate war cases.**— In respect to the late conflict between the United States and the Confederate States, it has been held that, although a state of hostility existed and the war had become flagrant; nevertheless, that as commercial intercourse was not interdicted until August 16, 1861, by proclamation of President Lincoln, contracts between persons in the Union and in the seceded States were not until that time illegal.[6] The fact that Congress had authorized such proclamation on the 13th of July, 1861, has not been considered to alter the case; and where a bill drawn in Missouri on New Orleans was protested on July 17, 1861, it was held that the condition of the country was no excuse for failure to give notice [7] to parties in Missouri, that State being within the Federal, and New Orleans in the Confederate, lines.

§ **1062.** But these decisions are utterly at variance with the current of authorities and with the principle on which they rest. War declared or flagrant, operates, as said by Chancellor Kent, an interdiction "to all communication, to all locomotive intercourse, to a state of utter seclusion to any intercourse but one of open hostility, to any meeting but in actual combat." [8] The policy of the rule is to close all relations between the antagonists but antagonism, and no express prohibition is necessary to put it in force. In Virginia, where it appeared that, after indorsing several negotiable notes, the indorser, who resided in Alexandria,

4. Harden v. Boyce, 59 Barb. 427; Shaw v. Neal, 19 La. Ann. 156; James v. Wade, 21 La. Ann. 548; Billgerry v. Branch, 19 Gratt. 393; Farmers' Bank v. Gunnell, 26 Gratt. 132; McVeigh v. Bank of Old Dominion, 26 Gratt. 785. See *ante*, chapter VIII, section II, §§ 216, 222, vol. I.

5. McVeigh v. Bank of Old Dominion, 26 Gratt. 838; Alexandria Sav. Inst. v. McVeigh, 84 Va. 41.

6. Leathers v. Commercial Ins. Co., 2 Bush, 296.

7. In Union Nat. Bank v. Marr's Admr., 6 Bush, 615, Hardin, J., said: "Notwithstanding the disturbed condition of the country which we know judicially to have existed when the bill was protested, it does not appear that at that time there was such obstruction of intercommunication between the Southern and border States as to prevent the transmission and delivery of notice of dishonor of the bill."

8. Griswold v. Waddington, 19 Johns. 438. See *ante*, chapter VIII, section II, § 216 *et seq.*, vol. I; and also Billgerry v. Branch, 19 Gratt. 393; McVeigh v. Bank of Old Dominion, 26 Gratt. 785. See Maslin's Exrs. v. Hiett, 37 W. Va. 15, 16 S. E. 437.

left the city, which had been, in the meantime, permanently occupied by the United States forces, and went to Richmond, where he remained until the end of the Confederate war; that he left a white servant at his residence in Alexandria, and his usual place of business was the bank at which the notes were discounted, and of which he was president; and that at the maturity of the notes they were protested; — it was held that notices of dishonor left at his house with the servant in charge, and at his place of business at the bank, were insufficient, and no other notices having been given, that he was discharged from all liability.[9]

§ **1063. In the second place, as to public interdiction of commerce and intercourse.**— The interdiction of intercourse between the countries of the holder and that of the party to whom presentment should be made, would operate as a direct prohibition upon the holder, as much so as a declaration or open state of war, and it would violate every principle of comity and justice to subject him to a forfeiture of any right which he could only pursue in violation of law; and this is, therefore, a universally recognized excuse for not making a due presentment.[10] The same principle applies as to notice.

§ **1064. In the third place, as to occupation of country by public enemy, or military disturbances.**— Where the occupation of the country by the public enemy is of such a character as to sever the parties from each other by a hostile line, the same principle applies as if they were in fact domiciled in the different countries; for that portion of territory which becomes in the temporary occupation of the enemy is, during such occupation, deemed the enemy's country. But there may be cases in which both parties are thrown within the enemy's lines, or left within the lines of their own country, in which intercourse between them is rendered dangerous or impracticable by military movements; or by a general disturbance and interruption of business communication arising out of them. Under such circumstances, the obstacles which will excuse the want of due presentment and notice need not be of such a degree or extent as to render travel and intercourse impossible. It is enough if they be of the degree and character which deter men of ordinary prudence, energy, and courage, from encounter-

9. McVeigh v. Bank of Old Dominion, 26 Gratt. 785.

10. Story on Notes, §§ 257, 263; 1 Parsons on Notes and Bills, 461.

ing them in the prosecution of business in respect to which they owe an active and earnest duty, and feel an active and earnest interest.[11] The circumstance that the place was in immediate danger of occupation by the enemy, or of becoming the scene of a battle, *flagrante bello,* would suffice as an excuse.[12] In a Virginia case the circumstances of a recent occupation of a town by the enemy's forces were thought insufficient to excuse a failure of protest and notice four days after their departure.[13]

SECTION II.

POLITICAL DISTURBANCE, EPIDEMIC DISEASE, AND OVERWHELMING CALAMITY OR ACCIDENT.

§ **1065. In the fourth place, as to political disturbances,** which virtually interrupt and obstruct the ordinary negotiations of trade, it is recognized that such disturbances constitute a sufficient excuse for want of presentment or notice, upon the same principle that controls in cases where it is prevented by calamities, military operations, or interdictions of commerce.[14] We should say that the case of a riot or insurrection in which a city was taken possession of by the outlaws, or the closing of houses and suspension of business became necessary to the protection of property or life, would present a striking instance of such a disturbance. But the mere condition of political and military troubles in a country, producing an alarming and unsettled state of affairs, would be insufficient.[15]

§ **1066. In the fifth place, as to the prevalence of a malignant disease.**— The prevalence of a malignant, contagious, or infectious disease, such as the cholera, yellow fever, the plague, or smallpox, which has become so extensive as to suspend all commercial business and intercourse, or to render it very hazardous to enter into the infected district, is recognized by the text-writers as a sufficient excuse for not doing any act which would require an entry into such district.[16] And every consideration of public policy and of humanity must sanction this rule. To require com-

11. Polk v. Spinks, 5 Coldw. 431.

12. Story on Notes, § 261. See Blair & Hoge v. Wilson, 28 Gratt. 172.

13. Tardy v. Boyd, 26 Gratt. 632.

14. Story on Notes, § 261. See Blair & Hoge v. Wilson, 28 Gratt. 172.

15. Apperson v. Union Bank, 4 Coldw. 446.

16. 1 Parsons on Notes and Bills, 460, 531; Edwards on Bills, 492; Story on Bills, § 308; Story on Notes, § 260.

munication with the infected district is to widen the avenue for the extension of the disease, and to require the holder to imperil his life for such a purpose would be a cruel imposition. In New York it has been accordingly held that the prevalence of a contagious malignant fever in the place of residence of the parties, which occasioned a stoppage of business, was a sufficient excuse for not giving notice until November of a protest made in September;[17] and the decision seems to us entirely worthy of approval.[18] In that State the subject is now regulated by statute.

§ **1067. In the sixth place, as to overwhelming calamity and unavoidable accident.**— We have to consider those circumstances of overwhelming calamity, or inevitable accident which suddenly intervene, and, without any default on the holder's part, render it impossible or impracticable for him to make due presentment or to give due notice. The principle contained in the maxim of the civil law, *impossibilium nulla obligatio est,* is equally applicable to the law of bills and notes, which requires only reasonable diligence on the part of the holder to fix the liability of drawer and indorsers; and it does not countenance a forfeiture of his rights when overruling causes constrain him. And, therefore, although there is but meager illustration of the doctrine in the cases touching negotiable instruments, we find it universally asserted that the holder is exonerated when a calamity or accident of the kind described prevents him.[19]

Among the circumstances of this class may be enumerated freshets which carry away bridges and destroy the means of communication; violent snow-storms which render the roads impassable; tornadoes and earthquakes which paralyze all affairs for the time being, or render intercourse impracticable.

§ **1068. Accident or casualty.**— According to the strict principles of the common law, contracts to do particular things, and at par-

17. Tunno v. Lague, 2 Johns. Cas. 1. In Tennessee, however, where it is provided that protest shall be made and notice given within fifteen days after the epidemic is declared to be at an end, it was held that protest made and notice given at maturity during the epidemic, was, nevertheless, sufficient, though the parties entitled to notice had fled the city to escape the plague. Hanauer v. Anderson, 16 Lea, 340.

18. But see Roosevelt v. Woodhull, 2 Anth. (N. Y.) 50.

19. Chitty on Bills (13th Am. ed.) [*451], 509; Edwards on Bills, 492; Thompson on Bills (Wilson's ed.), 280, 368; Story on Notes, § 258; Story on Bills, §§ 283, 286, 308, 327, 365; Hilton v. Shepherd, 6 East, 16 (respecting notice); Windham Bank v. Norton, 22 Conn. 213.

ticular times, are absolute in their nature; and as a general rule accident or casualty would not excuse their nonperformance. But by the law merchant, it must be remembered, that although due demand and notice are conditions precedent to the liability of drawers and indorsers, the contract of the holder is only that he will exercise due diligence to make such demand and give such notice; and this implies an exception in favor of those unavoidable accidents which prevent it.[20]

§ **1068a. Miscarriage or delay in transmission by mail.**— Upon this principle, if the holder confide the bill or note to the public mail, as a means of transmitting it for presentment, and without negligence on his part, he could not justly be liable for any delay arising out of any accident, miscarriage, or default in the postal service.[21] And as has been said, speaking of a bill, " such mode of transmission is in accordance with the general commercial usage and law in the case of paper of this description. Indeed, it is recommended by the books as the most proper mode of transmission, as being the least hazardous, and therefore preferable to a special or private conveyance. And accordingly it was held in the case quoted, where the bill had been deposited in the post-office in time for due presentment in due course of mail, and by mistake of the postal clerk in misdirecting the package, it did not duly reach its destination, that the delay did not discharge the indorser.[22] But if the holder has been himself in fault in causing the delay in transmission by the mail, or blame is imputable to him in the misdirection of the bill, he will not be excused for failure in prompt presentment.[23]

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20. Lord Ellenborough, in Patience v. Townly, 2 J. P. Smith, 223; Windham Bank v. Norton, 22 Conn. 213.

21. Windham Bank v. Norton, 22 Conn. 213. See *ante*, § 1021.

22. Windham Bank v. Norton, 22 Conn. 213, Storrs, J. To same effect, see Pier v. Heinrichsoffen, 67 Mo. 163, in which case holder of note payable in a distant city sent it to a bank there for collection. The letter was returned by the postmaster marked, " bank failed." Holder at once mailed it to another agent in the city, who immediately caused presentment and protest, but it was several days after maturity. Held, that indorsers were not discharged.

23. Schofield v. Bayard, 3 Wend. 488. In this case the holders of a bill, payable in London, by mistake of their own, sent it to Liverpool for presentment. Their agents sent it back by mail in time to reach the holders, and be by them sent to London, if it had reached them in due season. But by a mistake of the post-office it did not reach the holders in time to be reforwarded by them in due season. The court held that the fault was in the holders, and

§ 1069. Accident or calamity must be preventive of diligence.— It should distinctly appear when an accident, or calamity, or operation of superior force is brought forward as an excuse for non-presentment, that it has the effect to prevent its being duly made. The mere fact that a violent storm occurred at the time, unless it also appeared that it obstructed communication, would not suffice.[24] But if there were a general calamity involving a community, it might be different. Doubtless the conflagrations, suddenly laying large portions of Boston and Chicago in ruins, will give rise to questions of this kind. When communities are visited by such overwhelming and appalling calamities as these, all thoughts of business must give way to considerations of self-preservation and humanity; and should cases involving their effect be presented to the courts, it would be safe to predict that this doctrine of excuses will find a liberal application. The excuse of inevitable accident or calamity will apply as well to protest when it is thereby prevented, and if it is made as soon afterward as it reasonably can be, that will suffice.[25]

§ 1070. When impediment ceases, duty to make demand or give notice revives.— These excuses — war, military or political disturbance, interdiction of commerce, prevalence of disease, overwhelming accidents, et cetera — do not justify a total dispensation of demand and notice, but only excuse the delay which these circumstances may occasion. As soon as the impediment ceases, the duty revives; and if demand and notice be not speedily made, the holder is in default, and drawers and indorsers are discharged.[26] Thus, where the holder of a bill in New York delayed,

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that failure of due presentment could not be excused, Savage, C. J., saying: "This presents no impossibility if due diligence had been used. The plaintiffs should not have sent the bill to Liverpool at all. It is true that, after the letter containing it had been left at Liverpool, it could not have reached London in due season; but it was the fault of the plaintiffs to have parted with the bill in the manner they did. Instead of sending it to Liverpool they should have sent it to London, and then it would have been in season, and probably would have been paid."

24. Edwards on Bills, 493; Merchants' State Bank v. State Bank of Philips, 94 Wis. 444, 69 N. W. 170.

25. Story on Bills, § 283.

26. Farmers' Bank v. Gunnell, 26 Gratt. 132; Tarby v. Boyd, 26 Gratt. 631; McVeigh v. Bank of Old Dominion, 26 Gratt. 785; Bynum v. Apperson, 9 Heisk. 632; Lane v. Bank of W. T., 9 Heisk. 419; Billgerry v. Branch, 19 Gratt. 393; Apperson v. Union Bank, 4 Coldw. 445; Morgan v. Bank of Louisville,

for several months after restoration of commercial intercourse between New York and New Orleans (the former being in the United States, and the latter in the Confederate States during the war of secession), to present the bill to the acceptor in New Orleans for payment, it was held that the drawer was discharged.[27] In Maryland, it was said by Stewart, J.: "There must be the earliest possible presentment when impediment ceased." [28]

§ **1071.** In Pennsylvania,[29] it appeared that two bills which were drawn (and indorsed) in Pennsylvania upon a house in New Orleans, were duly protested on the 11th and 29th of July, 1861, respectively, in that city. Communication was suspended between New Orleans and Pittsburg, where the parties entitled to notice resided, until July 1, 1862, when the first mail was received at the latter place. Under these circumstances, and there being considerable intervals between the mails, notice received at Pittsburg July 11, 1862, was considered within reasonable time, and held sufficient. But in Kentucky,[30] where there was a delay of over five months in forwarding notice after the reopening of communication, which had been suspended, it was said it could not be "deemed reasonable nor accounted for by the then political condition of the country."

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4 Bush, 82; House v. Adams, 48 Pa. St. 266; James v. Wade, 21 La. Ann. 548; Peters v. Hobbs, 25 Ark. 67; Durden v. Smith, 44 Miss. 552; Dunbar v. Tyler, 44 Miss. 10; Shaw v. Neal, 19 La. Ann. 156.

27. Durden v. Smith, 44 Miss. 552. See Dunbar v. Tyler, 44 Miss. 10.

28. Norris v. Despard, 38 Md. 491.

29. House v. Adams, 48 Pa. St. 266.

30. Morgan v. Bank of Louisville, 4 Bush, 82.

CHAPTER XXXI.

SPECIAL CIRCUMSTANCES OF EXCUSE WHICH SHOW AN ORIGINAL ABSENCE OF RIGHT TO REQUIRE PRESENTMENT, PROTEST, OR NOTICE.

§ **1072.** Besides the circumstances of a general nature which excuse delay of absence of presentment, protest, or notice, there are some of a special nature which have the like effect. These special circumstances may be classified as follows: I. Circumstances showing an original absence of right to require these steps to be taken. II. Circumstances arising from special acts of waiver. III. Circumstances which show an inability on the part of the holder to make due presentment or protest, or give notice. IV. Special circumstances arising from the conduct of the party. V. Special waivers by promises to pay and part payments after maturity. These circumstances, thus classified, and ramifying into many details, will be now separately considered.

SECTION I.

DRAWING WITHOUT RIGHT TO DO SO, OR REASONABLE GROUND TO EXPECT THAT BILL WILL BE HONORED.

§ **1073.** In the *first* place, when the drawer has drawn the bill without the right to do so, or without any reasonable ground to expect that the drawee would honor it, the omission of the holder to make a due presentment of it for acceptance or payment (no acceptance intervening), or to give the drawer due notice of its dishonor by the drawee, will be excused.[1] This doctrine rests upon the ground that the drawer has committed fraud or folly in undertaking that the drawee would honor his bill, when he had no right or reasonable ground to expect it; and that he can suffer no loss or injury from the failure of the holder to make a presentment to the drawee, which would naturally be fruitless, or to give him, the drawer, notice of a dishonor which he must have known by anticipation.

1. Chitty on Bills (13th Am. ed.) [*436], 490; Story on Bills, §§ 280, 375; Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283, citing text.

This excuse applies alike to presentment, protest, and notice, for the reason that all the steps ordinarily taken to fix the drawer's liability are predicated upon the assumption that he has drawn the bill in good faith, and after proper provision for its payment, and when such is not the case he is absolutely liable. The authorities to this effect are overwhelming in number as they are clear in principle;[2] but there are a few cases which hold that it does not apply to presentment, for the reason that the drawee might have accepted or paid for the honor of the drawer.[3]

So any fraud relating to the instrument committed by the drawer will excuse want of due diligence, presentment, or notice. Thus, if having obtained a draft or check, he should sell it for value, and, before its presentment, should obtain a duplicate and sell it for an additional sum, or draw out the money upon it, he would be absolutely liable on the first draft or check.[4]

§ 1074. **As to lack of funds.**—It was held in an early English case, which has been much quoted, that when the drawer had no funds in the hands of the drawee, no notice would be necessary to charge him, for the reason, as assigned by one judge, that drawing a bill in such a case is a fraud, and, as assigned by another, that no injury could result to the drawer.[5] And the rule is often laid down in the language that the want of funds excuses the holder from giving notice;[6] the statement of it in this form arising from the fact that, when the bill has been improvidently drawn, it turns out that there were no funds to meet it. But the converse proposition is not true, that, whenever there are no funds provided to meet the bill, the drawer was improvident in drawing it. The drawee may have promised to accept or pay for the drawer's accommodation, or have come under an obligation, founded on legal consideration, to do so. And the true criterion of the right to require due demand and notice is, not whether the drawer had funds in the drawee's hands, but whether or not the drawer had a right to expect or require that the drawee would honor his bill.[7] When-

2. 1 Parsons on Notes and Bills, 530, note *m;* Story on Bills, § 280.

3. Cruger v. Armstrong, 3 Johns. Cas. 5, Radcliffe, J.; English v. Wall, 12 Rob. (La.) 132.

4. Moody v. Mack, 43 Mo. 212.

5. Beckerdike v. Bollman, 1 T. R. 405 (1786); Donnell v. Savings Bank, 80 Mo. 172, citing the text; Compton v. Blair, 46 Mich. 1.

6. Edwards on Bills, 640; Lawrence v. Hammond, 4 App. D. C. 467.

7. Life Ins. Co. v. Pendleton, 112 U. S. 708; French v. Bank of Columbia,

ever such right exists, the drawer is discharged if there be not due demand and notice, and not otherwise. In Maryland, the defendant drew a bill of exchange against a cargo of wheat, and indorsed and delivered to plaintiffs the bill of exchange, and also the bill of lading of the cargo, as collateral security for the acceptance and payment of the bill of exchange, authorizing them, in case they thought it necessary, to sell the cargo and apply the proceeds to payment of the bill. The drawees declined to accept, on the ground that they were not bound to do so under the agreement with the drawers, unless they were put in possession of the bill of lading. The court held that presentment and notice of nonacceptance were excused, as the drawers had not complied with their contract with the drawees, had intercepted the means of payment, and had no reasonable ground to expect acceptance of the bill.[8]

§ 1075. Drawer with funds strictly entitled to presentment and notice.— If the drawer have funds in the drawee's hands he will be entitled to strict presentment and notice, even though the drawee represent, when the bill is drawn, that he will not be able to provide for it, and that the drawer must make provision to meet it,[9] or although requested not to draw on him, and believing

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10 Pet. 572; French v. Bank of Columbia, 4 Cranch, 141; Hopkirk v. Page, 2 Brock. 20; Miser v. Trovinger, 7 Ohio St. 281; McRae v. Rhodes, 22 Ark. 315; Schuchardt v. Hall, 36 Md. 600; Louisiana State Bank v. Buhler, 22 La. Ann. 83; Farmers' Bank v. Vanmeter, 4 Rand. 553; Claridge v. Dalton, 4 Maule & S. 226; Golladay v. Bank of Union, 2 Head, 557; Oliver v. Bank of Tennessee, 11 Humphr. 74; Kimball v. Bryan, 56 Iowa, 632; Edwards on Bills, 640; Welch v. B. C. Taylor Mfg. Co., 82 Ill. 581, Dickey, J.: "It is sufficient that the drawers in good faith supposed the drawee was their debtor to that amount." But see Foard v. Womack, 2 Ala. 368; and Tarver v. Nance, 5 Ala. 712.

8. Schuchardt v. Hall, 36 Md. 590.

9. Prideaux v. Collier, 2 Stark. 57; Clegg v. Cotton, 3 Bos. & P. 259; Staples v. Okines, 1 Esp. 332. In this case the acceptor was indebted to the drawer at the time the bill was drawn, but then informed the latter that he would not be able to provide for the bill. It was understood between them that the drawer was to provide for the bill when due. Notice to the drawer was held necessary. Lord Kenyon said: "The law was general, only exempting the party from the necessity of giving notice where the drawee had no effects; and as here the drawee was indebted to the defendant, on whom the bill was drawn, and so, in fact, had effects in hand, and if he had had effects in hand when the bill became due, would have taken it up, he was of opinion that notice was necessary." Story on Bills, § 375.

him insolvent as stated.[10] And it will be no excuse for want of presentment or notice that the drawee is his creditor for a larger amount than he is his debtor.[11] The want of injury to the drawer is never now admitted as an excuse for want of demand or notice.[12]

If the funds of the drawer be attached or otherwise intercepted in the drawee's hands, after the bill is drawn, it would not affect the drawer's right to demand and notice.[13]

§ 1076. Want of funds no excuse when drawer has right to draw. — Among the circumstances under which the drawer has a right to expect that his bill will be honored, and consequently to require strict presentment and notice, may be named: When he draws before a consignment which he has made comes to hand, and in anticipation of it;[14] or upon a consignment insufficient by reason of depreciation in value, or other loss;[15] or when there is a fluctuating balance or running account between him and the drawee;[16] or when the drawee is accustomed, in the course of trade, to honor the drawer's bills under similar circumstances, or without regard to the state of their accounts;[17] or where a third party has promised to provide the drawee with funds;[18] or the drawee has authorized the drawing of the bill,[19] though not so if the terms of the bill exceeded the authority.[20]

§ 1077. Want of funds no excuse when party would be entitled to sue another.— And it may be stated that want of funds is no excuse for want of demand or notice, whenever the drawer or indorser, as the case might be, would be entitled, upon taking up the

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10. Cedar Falls Co. v. Wallace, 83 N. C. 229.

11. Blackham v. Doren, 2 Campb. N. P. C. 503; Bailey on Bills, 195.

12. See *post*, chapter XXXVI, section I, § 1170.

13. Stanton v. Blossom, 14 Mass. 116.

14. Dickens v. Beal, 10 Pet. 572; Grosvenor v. Stone, 8 Pick. 79; Orear v. McDonald, 9 Gill, 350.

15. Robinson v. Ames, 20 Johns. 146; Williams v. Brashear, 19 La. 370; Rucker v. Hiller, 16 East, 53; Robins v. Gibson, 3 Campb. 384.

16. Blackham v. Doren, 2 Campb. 503; Hammond v. Dufrene, 3 Campb. 145.

17. Adams v. Darby, 28 Mo. 162; Dickens v. Beal, 10 Pet. 572; Dunbar v. Tyler, 44 Miss. 1.

18. Dickens v. Beal, 10 Pet. 572; French v. Bank of Columbia, 4 Cranch, 141; Lafitte v. Slatter, 6 Bing. 623, 4 Moore & P. 457.

19. Walwyn v. St. Quintin, 1 Bos. & P. 652; Austin v. Rodman, 1 Hawks, 194; Orear v. McDonald, 9 Gill, 350; Dickens v. Beal, 10 Pet. 572; Hopkirk v. Page, 2 Brock. 20; Oliver v. Bank of Tennessee, 11 Humphr. 74.

20. Claridge v. Dalton, 4 Maule & S. 226.

bill, to sue either the acceptor or any other party for the amount due.[21] Thus, if the bill were drawn for the acceptor's accommodation,[22] or for the accommodation of the payee, or of a subsequent indorsee,[23] the drawer is entitled to strict presentment and notice.

So the drawer is entitled to notice when he has placed securities in the hands of the drawee, with the reasonable expectation that the drawee would accept, or pay on the credit thereof, or provide funds out of them for payment.[24] But not where he has supplied the drawee with property on a credit, and the credit would not expire until after maturity of the bill.[25]

§ **1078. As to the time at which the reasonable expectation that the bill will be honored must exist,** the rule on the subject is differently stated by different authorities. Mr. Chitty considers that if there were effects in the drawee's hands at any time between the drawing of the bill and its presentment and dishonor, the drawer should have notice;[26] while, on the other hand, it is said that notice is unnecessary when at the time of the drawing there were no effects to meet the bill.[27]

But the *bona fide* expectation of the drawer based upon his relations with the drawee, and the provision he has made, or intends to make, and does make, are, it seems to us, the circumstances to be regarded. If he has no funds in the drawee's hands when he draws, and yet provides them before presentment, he should have notice.[28] It he had funds when he drew, but withdrew them be-

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21. Chitty on Bills (13th Am. ed.) [*438], 493, 494; Edwards on Bills, 644.

22. *Ex parte* Heath, 2 Ves. & B. 240. See Shirley v. Fellows, 9 Port. 300.

23. Cory v. Scott, 3 B. & Ald. 619; Whitfield v. Savage, 2 Bos. & P. 277; Norton v. Pickering, 8 B. & C. 610; Brown v. Maffey, 15 East, 216. It was held at one time (in Walwyn v. St. Quintin, 1 Bos. & P. 652), that if the drawer had no effects in the drawee's hands he would not be entitled to notice although the payee had; but in Norton v. Pickering the decision was overruled.

24. Spooner v. Gardiner, Ry. & Mood. 84; *Ex parte* Heath, 2 Ves. & B. 240; Chitty on Bills [*446–447]; Campbell v. Pettingill, 7 Greenl. 126.

25. Claridge v. Dalton, 4 Maule & S. 226.

26. Chitty on Bills (13th Am. ed.) [*444], 500.

27. French v. Bank of Columbia, 10 Pet. 572.

28. Where the proceeds of a cargo were in the broker's hands, and he was to put the drawee in funds, the drawer was held entitled to notice. Robins v. Gibson, 3 Campb. 334. So where the drawer after acceptance and before maturity sent funds to the acceptor, having none when he drew in his hands. In Hammond v. Dufresne, 3 Campb. 145, Lord Ellenborough, C. J., said: "I

fore presentment, he forfeits the right to it.[29] If the drawer has any arrangement, by which, at the time the bill is presented, he has a right to expect it to be honored, we should say he should have demand and notice.[30] For it would be presumed that such arrangement was contemplated when he drew.

§ **1079. Where there is a running open account** between the parties, the drawer is entitled to require presentment and notice, although the balance due him may be less than the amount of the bill;[31] and it is very frequently said that where there are any funds, however insufficient, in the drawee's hands, failure of the holder in either particular is not excused.[32] But here the true criterion, as in all other cases, is, had the holder a right to expect that his bill would be honored? And this is to be ascertained by regard to all the circumstances of the case. Where transactions have ceased, and the drawer knows that he has but a small balance to his credit, he would not be justified in expecting payment of a bill of a large amount; and if, under such circumstances, he were to draw a bill for a large amount, he would be chargeable without presentment, protest, or notice.

§ **1080.** Thus, where the drawee had a balance of 16*s.* 11*d* in his hands in favor of the drawer, and the latter drew upon him

think the drawer has a right to notice of the dishonor of a bill, if he has effects in the hands of the acceptor at any time before it comes due." Orear v. McDonald, 9 Gill, 350; Eichelberger v. Finley, 7 Harr. & J. 381.

29. See *post*, § 1081.

30. See 1 Parsons on Notes and Bills, 548.

31. Thackray v. Blackett, 3 Campb. 164; Legge v. Thorpe, 12 East, 171; Chitty on Bills (13th Am. ed.) [*444].

32. Lacoste v. Harper, 3 La. Ann. 385. The bill was for $2,777, and the amount of funds $883. Slidell, J., said: "We are not aware of any authority extending the exemption of the necessity of notice where the drawee had funds in his hands at the maturity of the bill. Even if the funds be insufficient to cover the bill, the drawer is entitled to notice." See also Sutcliffe v. McDowell, 2 Nott & McC. 251; Wollenleber v. Ketterlinus, 17 Pa. St. 389. In Hill v. Norris, 2 Stew. & P. 114, Lipscomb, J., said: "I admit, that if there were circumstances to satisfy the jury that the drawer committed a fraud in drawing on the drawee, and that he knew his bill would be dishonored, there would be much force in the argument that he ought not to be permitted to take shelter from the consequences of his fraud by intrenching behind a very small amount of assets that might be in the hands of the drawee. But I must again repeat, that I have not known a case, where there was any amount of funds in the hands of the drawee, that it has been ruled that the drawer was not entitled to notice."

for £246 3*s.* 7*d,* without having any prospect of more funds in his hands than the balance mentioned, or right to expect that the bill would be honored, he was held bound without notice. And Chief Justice Marshall said:[33] "The sound sense and justice of the exception is, that where a drawer knows he has no right to draw, and has the strongest reasons to believe his bill will not be paid, the motives for requiring notice of its dishonor do not exist, and his case comes within the reason of the exception. Where all transactions between the parties have ceased, and there is nothing to justify a draft but a balance of one penny, it would be sporting with our understanding to tell us, that a creditor for this balance, who should draw for a thousand pounds, would be in a situation substantially different from what he would be, were he debtor in the same sum." In another case where the draft was for $96, and only $38 balance was in the drawee's hands, no notice was held necessary.[34] And the doctrines here stated have the authority of Story[35] as well as Marshall. There is more difficulty in determining its application to the facts, than in discerning the true principle.

§ **1081. If the drawer withdraws the funds** which he had in the drawee's hands when he drew the bill, or intercepts funds which he had provided to meet the bill;[36] or if he privately directs the drawer not to honor it;[37] or otherwise prevents the due acceptance or payment of his draft, he commits a fraud upon the holder of the bill, and forfeits his right to require demand and notice. But the withdrawal of funds will not operate as a forfeiture of the right to require demand and notice, if other arrangements be made between the drawer and drawee, by which the latter is justly expected to honor the bill.[38] So if the drawer fail to comply with

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33. Hopkirk v. Page, 2 Brock. C. C. 20, 34.

34. Blankenship v. Rogers, 10 Ind. 33. See also ——— v. Stanton, 1 Hayw. 271.

35. Matter of Brown, 2 Story, 502, 520.

36. Dickens v. Beal, 10 Pet. 572; Rhett v. Poe, 2 How. 457; Valk v. Simmons, 4 Mason, 113; Conroy v. Warren, 3 Johns. Cas. 259; Murray v. Judah, 6 Cow. 484; Rucker v. Hiller, 3 Campb. 217; Chitty on Bills (13th Am. ed.) [*441], 496.

37. Sutcliffe v. McDowell, 2 Nott & McC. 251. Mr. Chitty puts a query (Chitty on Bills, 484), and Story says: "Perhaps (Story on Bills, § 375) this is the rule. We think there can be no doubt about it."

38. Orr v. McGinniss, 7 East, 359.

conditions precedent to his right to draw, he cannot insist on demand and notice, for he himself is in fault.[39] And although there may be open accounts between the drawer and drawee, yet if they are in litigation, and the drawer knows it, he would not be justified in drawing, and could not be entitled to demand and notice.[40] If the drawer of a bill is discharged by laches, in failure to give him notice of dishonor, no subsequent appropriation of his funds in the drawee's hands to its payment is authorized, and the drawee so appropriating them will not be exonerated from liability to the drawer.[41]

§ **1082. Effect of acceptance on the question.**— When the bill has been accepted, the acceptance is, *prima facie,* an admission of funds by the acceptor, and renders him absolutely liable to a third party. It is also to some extent evidence that the drawer had a right to expect that the acceptor would pay the bill, even when it is shown that he had not been provided with funds;[42] and it seems to have been held conclusive in favor of the drawer's right to require presentment for payment and notice, although without funds.[43] But acceptance does not alter the general rule on the subject, and when it is shown that the drawer had no right to expect payment of the bill by the acceptor, the holder is excused for not making presentment,[44] or giving notice.[45] And proof that the acceptor was not in funds is *prima facie* evidence that there was no right to expect payment.[46] The fact that the acceptor has told the drawer before the maturity of the bill that he could not provide for it, and the drawer must, and that the acceptor has given the drawer money for that purpose, will not excuse want of due presentment and notice;[47] nor will the fact that the drawer, in apprehension of the dishonor of the bill, has lodged other money of the acceptor in the hands of the indorser, upon an undertaking

39. Wollenleber v. Ketterlinus, 17 Pa. St. 389; Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283, citing text.

40. Dollfus v. Frosch, 1 Den. 367.

41. Smith v. Rowland, 18 Ala. 367.

42. Orear v. McDonald, 9 Gill, 350; Hill v. Norris, 2 Stew. & P. 114; Campbell v. Pettengill, 7 Greenl. 126.

43. Pons v. Kelly, 2 Hayw. 45; Richie v. McCoy, 13 Smedes & M. 541.

44. Kinsley v. Robinson, 21 Pick. 327; Mobley v. Clark, 28 Barb. 390.

45. Hoffman v. Smith, 1 Cai. 157; Allen v. King, 4 McLean, 128.

46. See *post,* § 1084.

47. Baker v. Birch, 3 Campb. 107.

by the indorser to return it if he should be exonerated from payment of the bill.[48]

§ 1083. The rule as to indorsers of bills drawn without funds.— Ordinarily the indorser of a bill drawn without funds does not stand upon the same footing as the drawer, and although the drawer is not, he is, entitled to insist on strict demand and notice.[49] He is presumed to know nothing of the accounts or arrangements existing between the drawer and drawee; and if he has indorsed the bill for the accommodation of the drawer, or for another indorser, or a third person,[50] his liability is not fixed save by regular demand and notice. But there may be circumstances under which the indorser is no more entitled to insist upon diligence than the drawer. Thus, where he indorses for accommodation of the drawer, knowing the character of the bill, and neither of them expects that it will be honored, he comes within the reason of the principle which excuses the holder from giving the drawer notice, and it is equally unnecessary to charge him.[51] And in any case where the indorser participates in the fraud the rule applies.

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48. Clegg v. Cotton, 3 Bos. & P. 239; Story on Bills, § 376; Am. Nat. Bank v. Junk Bros., 94 Tenn. 624, 30 S. W. 753, citing the text; Citizens' Nat. Bank, etc. v. Third Nat. Bank, etc., 19 Ind. App. 69, 49 N. E. 171, citing text.

49. Wilkes v. Jacks, Peake, 202; Ramdullolday v. Darieux, 4 Wash. C. C. 61; Ralston v. Bullitts, 3 Bibb, 261; Scarborough v. Harris, 1 Bay, 177; Byles on Bills [*288], 443.

50. Warder v. Tucker, 7 Mass. 449; Rea v. Dorrance, 18 Me. 137 (presentment too late); Carter v. Flower, 16 M. & W. 743; Brown v. Maffy, 15 East, 216.

51. French v. Bank of Columbia, 4 Cranch (S. C.), 141. In Farmers' Bank v. Vanmeter, 4 Rand. 553, Green, J., said: "The modern doctrine is perfectly well settled that the law implies an injury from a want of due notice; and this presumption is so strong that in order to repel it proof is required to show that it was impossible for the party to suffer any damage or inconvenience. Thus, in the case of a drawer, if the bill be drawn without funds in the hands of the drawee, and the drawer had no reason to expect that the bill would be accepted, this is considered as a case in which it is shown that no possible prejudice can result to the drawer from want of notice, since he knew when he drew the bill that it would devolve upon him to take it up, as well without as with notice of its dishonor; and having no reason to expect the bill to be accepted, it cannot be supposed that he would make any arrangements for putting funds in the hands of the drawee to take it up. But if the drawer without funds in the hands of the drawee has any just ground to believe that the bill will be accepted, he ought to have notice; for in that case it is to be presumed that he will so arrange his funds as to place the

The indorser of a note for accommodation of the maker or other party, is in general entitled to require strict demand and notice.[52]

In Virginia it has been said: "With the exception of the cases in which it can be shown that they could not by possibility suffer an injury by the failure to give them notice, the drawer and indorser have in all cases a right to strict notice, unless they waive that right or forfeit it by their own fraud. I do not find this ground of fraud very distinctly laid down as a reason for dispensing with the necessity of notice. But there are many cases in which it appears to have been the sole ground of the judgment, and in which the principle is distinctly alluded to.[53] * * * Every drawer of a bill virtually represents to all dealing for it, that it is drawn upon sufficient funds. The holder deals upon the faith that he shall have the additional security of the drawer; and if he fails in this he is disappointed by the fraud of the

means of paying the bill at maturity in the hands of the drawee. Such arrangements, if unnecessary and fruitless, would be prejudicial to the party; and to enable him to avoid this mischief, immediate notice should be given. The case of an indorser is still stronger than that of a drawer; for he has in general a right to resort to the drawer for indemnity, and to enable him to assert this right with the greatest possible effect, he ought to have immediate notice. But even as to an indorser a case may occur in which it may be shown to be impossible for him to suffer any inconvenience from the want of notice. As in the case of a note indorsed by the payee for the accommodation of the drawer, who should place in the hands of the indorser sufficient funds to discharge it. The latter would not be entitled to notice of the nonpayment, because he could not possibly suffer any damage by the failure to give him notice (Cornay v. De Costa, 1 Esp. 303), since the only purpose of a notice would be to inform him of the necessity of resorting to the drawer for indemnity, which, in this case, is unnecessary, as he already has that indemnity in his hands." But in England it was recently held that the reply of the plaintiff to the indorser, who set up an absence of notice, that neither at the time when the bill was drawn nor afterward, nor when it became due, and in presentment thereof, had the acceptor, or the drawer, or any indorser prior to the defendant, any funds of defendant in his hands, and that the bill was drawn for the purpose of raising money for the defendant, the drawer, the acceptor, and the prior indorser, jointly, and the defendant was in no way damnified — was a bad reply, and that the indorser was discharged by want of notice. Foster v. Parker, 2 L. R. C. P. Div. 18 (1876).

52. French v. Bank of Columbia, 4 Cranch, 141; Bogy v. Keil, 1 Mo. 743; Croton v. Dalheim, 6 Greenl. 476; Jackson v. Richards, 3 Cai. 343; Carter v. Flower, 16 M. & W. 743; Sisson v. Tomlinson, Selw. N. P. 335; Brown v. Maffey, 15 East, 222.

53. Farmers' Bank v. Vanmeter, 4 Rand. 553, Green, J., citing Sisson v. Tomlinson, Selw. N. P. 324; Brown v. Maffey, 15 East, 216; Leach v. Hewitt, 4 Taunt. 731.

drawer; and if the indorser, with a knowledge of the facts, indorsed for the purpose of promoting the object of the drawer, he would be a participator in the fraud. * * * These cases are referred to for the purpose of showing that an indorser who unites with the drawer to deceive the holder by representing a bill as one that will probably be accepted, with a knowledge that it will not, is guilty of a fraud, which deprives him of the right to insist on notice."

§ **1084. The burden of proof as to want of funds.**— When the holder seeks to rely on this excuse for want of presentment or notice, the burden of proof rests upon him to show that there were no funds in the hands of the drawee to meet the bill;[54] and this he must do by affirmative proof, as it will be presumed that there were funds, although the bill were dishonored.[55] Having shown that there were no funds, a *prima facie* excuse is made out; and if there were such qualifying circumstances as would entitle the drawer to require strict presentment and notice — such as his being an accommodation drawer, or keeping an open account, and the like — he must show them, for they lie peculiarly within his own knowledge.[56]

SECTION II.

WHEN THE PARTY IS UNDER AN OBLIGATION TO PROVIDE FOR PAYMENT.

§ **1085.** In the *second* place, when the bill has been accepted for the mere accommodation of the drawer, and he has undertaken to supply funds to meet it, a failure to present it to the acceptor will be excused as against the drawer, who could not suffer save from his own laches.[57] And if the bill be drawn payable at his own house, it will be presumed to be for his (the drawer's)

54. Baxter v. Graves, 2 A. K. Marsh. 152; Golladay v. Bank of Union, 2 Head, 57; Ford v. McClung, 5 W. Va. 156.

55. Ibid.

56. Merchants' Bank v. Easley, 44 Mo. 288; Sullivan v. Deadman, 23 Ark. 14; Cook v. Martin, 5 Smedes & M. 379; Durrum v. Hendrick, 4 Tex. 495; Wood v. McMeans, 23 Tex. 122; Carter v. Flower, 16 M. & W. 743; Fitzgerald v. Williams, 6 Bing. N. C. 68; Kemble v. Mills, 1 M. & G. 771; Edwards on Bills, 645; *ante*, § 1082.

57. French v. Bank of Columbia, 4 Cranch (S. C.), 141; Barbaroux v. Waters, 3 Metc. (Ky.) 304; Holman v. Whiting, 19 Ala. 703; Torrey v. Foss, 40 Me. 74 (case of notice); Ross v. Bedell, 5 Duer, 462; Blenderman v. Price (N. J.), 12 Atl. 777, citing the text; Story on Bills, § 370; Sharp v. Bailey, 9 B. & C. 44; *Ex parte* Heath, 2 Ves. & B. 240; Bird v. Kay, 40 App. Div. 533.

accommodation.[58] And so, while the indorser of a bill drawn for the accommodation of the drawer or acceptor, and the indorser of a note made for the accommodation of the maker, is entitled to insist upon its due presentment at maturity, yet if the bill is drawn and accepted, or the note made for the accommodation of a particular indorser, that indorser is the real party who should make provision to pay the bill at maturity, and the failure to make a due presentment or give due notice will be excused as to him, though not as to the other indorsers, or to the drawer if it be a bill.[59] This rule rests upon the principle that the accommodated indorser can by no possibility (as a rule) suffer loss by reason of a failure to make due presentment; since if the bill or note were dishonored, there would be no party against whom he would have recourse upon paying it. Still, however, if there were circumstances in the transaction which subjected the party accommodated to loss by failure to make a due presentment, it would be open for him to show them, and to the extent of such loss he would be exonerated.[60] If the bill be drawn for the accommodation of the acceptor, both drawer and indorsers are entitled to notice, for they have a right to expect him to pay it.[61] Upon the same prin-

58. Sharp v. Bailey, 9 B. & C. 44.

59. Ibid.; Story on Notes, § 268; Edwards on Bills, 638; Keyes v. Winter, 54 Me. 400; French v. Bank of Columbia, 4 Cranch, 141; McVeigh v. Bank of Old Dominion, 26 Gratt. 785; Turner v. Sampson, 2 Q. B. Div. 23, 19 Moak's Eng. Rep. 195; Webster v. Mitchell, 22 Fed. 871, citing text; Morris v. Birmingham Nat. Bank, 93 Ala. 511, 9 So. 606; Witherow v. Slayback, 158 N. Y. 649, 53 N. E. 681, 70 Am. St. Rep. 507; Am. Nat. Bank v. Junk Bros., 94 Tenn. 624, 30 S. W. 753, citing text.

60. Story on Notes, § 269. But see McMean v. Little, 59 Tenn. 330, where one of two drawers was the acceptor for accommodation of the other, and it was held that the latter was discharged by failure in respect to demand and notice.

61. In French v. Bank of Columbia, 4 Cranch (S. C.), 141, Marshall, C. J., said: "Where he (the drawer) draws solely for the purpose of raising money by discount for himself, he expects to pay the bill, and there is no person to whom he can resort for payment. There is no person on whom he can have a legal or an equitable demand in consequence of the nonpayment of the bill. But how can the same reasoning be said to apply *a fortiori* to the case of the bill being drawn for the use of the acceptor? In such case the relative situation of the parties must be substantially the same as if the money raised on the bill for the acceptor were funds of the drawee in his hands on which the bill was drawn. Every motive for requiring notice of nonpayment, in the case of a bill drawn upon funds, except that which results from a right to claim those funds by a suit, would apply to a bill drawn to raise money for the acceptor, unless it was understood at the time that the acceptor was

ciple, a drawer, although drawing upon funds, is not entitled to require notice from an indorser who indorsed for his accommodation, to enable him to get his bill discounted, or add strength to its credit; for although as against other parties entitled to require strict diligence in respect to presentment and notice, as to such indorser the debt is his own.[62] But it does not seem that an agreement by an indorser of a note, made at the time of indorsement, to pay the note at maturity would bind him absolutely without presentment or notice; it would be understood to have been made with the implied reservation that if the maker paid he was not liable, and he would be discharged by failure to demand payment of him.[63] If the maker and the payee, who is also indorser, jointly borrows the money, a promise of the payee to pay it, dispenses with the necessity of presentment and notice.[64]

§ **1086. What relations between the parties excuse want of notice.** — Where one of several partners draws upon a firm of which he is a member, it has been held that he is not entitled to notice, both in the case of an accepted [65] and of an unaccepted bill.[66] The

not to pay the bill." * * * And then, after stating the principle set forth in this section, that where the money is received by the indorser he is not entitled to notice, be added: "But the same reasons do not appear to exist where the note has been discounted for the maker. In that case the funds which represent the note are in the hands of the maker, or, to use the language applicable to bills, in the hands of the acceptor before the draft becomes payable, the drawer had a right to draw, and had a right to expect that his bill would be paid. Upon principles of reason and of justice, then, it would seem that notice of nonpayment could as little be dispensed with in this case, as if he had himself paid the money to the maker of the note, and then received it from the bank, or as if the note had been given him for a previous debt, and had been discounted for his own use."

62. *Ex parte* Heath, 2 Ves. & B. 240; Story on Bills, § 310.

63. Davis v. Gowen, 19 Me. 447.

64. Bank of Seaford v. Conneway, 4 Houst. 206.

65. Rhett v. Poe, 2 How. 457; Story on Bills, § 392; 1 Parsons on Notes and Bills, 524. In Porthouse v. Parker, 1 Campb. 82 (1807), the bill was drawn by the agent of George, James, and John Parker, who were partners, upon John Parker, and accepted by the latter's agent. Lord Ellenborough held, that the bill having been accepted by order of one of the defendants, this was sufficient evidence of its having been regularly drawn; and, further, that the acceptor being likewise a drawer, there would be no occasion for the plaintiff to prove that the defendants had received express notice of the dishonor of the bill, as this must necessarily have been known to one of them, and the knowledge of one was the knowledge of all. See also New York, etc., Co. v. Meyer, 51 Ala. 325.

66. Fuller v. Hooper, 3 Gray, 334. In New York, etc., Co. v. Selma Sav.

drawer will, however (where a bill is drawn on a firm of which he is a member), be entitled to notice if the copartnership had dissolved before the bill was drawn.[67] The question of notice of the dissolution of the firm, it is said, might be important.[68] In like manner, where the drawer and drawee are partners in the particular transaction in which the bill was drawn, no notice, it has been held, is necessary, for the reason assigned that knowledge of one partner is the knowledge of the other, and notice to one partner is notice to the other.[69] But it has been held that notice must be given to the indorser, when one member of a firm makes a note and another indorses it, both parties signing in their own name, although the note was given for partnership purposes, and was to be paid out of the partnership funds.[70] Where one firm draws on another, and they have a common member,[71] or a firm draws on a member,[72] the drawer firm is not entitled to notice.

§ 1087. **What relations between parties excuse want of demand.**— Where the makers of a note constitute one firm, and it is indorsed by another firm, in each of which firms the same person is one of the partners, the indorsing firm is entitled to require strict presentment to the firm making the note, for the two firms stand in their business relations as distinct persons, with separate accounts, funds, and liabilities, although having a common member.[73] And, as has been said, to hold otherwise would subject the firm indorsing to payment of the note, because one of the partners belonged to both firms, when the firm primarily liable is solvent, and would pay at once if the note were presented.[74] The same rule applies

Bank, 51 Ala. 305, a bill was drawn by one firm on another, and was accepted by the latter. The two firms had a common member. Held, notice not necessary to charge the drawers. Taylor v. Young, 3 Watts, 339; Gowan v. Jackson, 20 Johns. 176; Story on Bills, § 392.

67. Taylor v. Young, 3 Watts, 339.

68. 1 Parsons on Notes and Bills, 525.

69. Harwood v. Jarvis, 5 Sneed, 375; Story on Bills (Bennett's ed.), 313*a*; Rhett v. Poe, 2 How. 457; Hays v. Citizens' Sav. Bank, 101 Ky. 201, 40 S. W. 573.

70. Foland v. Boyd, 23 Pa. St. 476, Lowrie, J.

71. New York, etc., Co. v. Selma Sav. Bank, 51 Ala. 305. See Porthouse v. Parker, 1 Campb. 82, *supra*.

72. New York, etc., Co. v. Meyer, 51 Ala. 325.

73. Dwight v. Scovil, 2 Conn. 654; Caunt v. Thompson, 7 M., G. & S. 400; Foland v. Boyd, 23 Pa. St. 476; 1 Parsons on Notes and Bills, 523; Story on Notes, § 294.

74. Swift, C. J., in Dwight v. Scovil, 2 Conn. 654.

when the drawer or indorser of a bill belongs to two firms.[75] For though each partner is presumed to have knowledge of all the facts known to another, yet knowledge of nonpresentment is no equivalent to it, nor is it a waiver of the holder's obligation to make it. Where the two firms reside in different and distant places, the necessity and reason of the rule is peculiarly obvious.[76]

§ **1088.** It is intimated by Professor Parsons that notice to the drawing or indorsing firm would be likewise necessary.[77] But this does not seem to be a necessary implication from the foregoing. A formal demand upon the firm primarily liable is necessary in order to ascertain whether or not it will pay the bill or note; and until such demand is made at its place of business or otherwise, according to law, the drawing or indorsing firm has not broken its contract that upon such demand the bill or note will be paid. But if it is not paid on demand, it might be urged that the firm drawing or indorsing must be chargeable with the default, as it should know of the dishonor through its common copartner, who was as much bound to see the bill or note paid as his associate in the other firm. This view has been taken, or at least very distinctly intimated, in a case where a question nearly identical was presented.[78]

§ **1088a. Where the drawer and the drawee of the bill are the same person** it is in effect a promissory note, and no notice of dishonor to the drawer is necessary,[79] and upon the doctrine that the maker of a note, like an ordinary debtor, must seek his creditor, the drawer of a bill upon himself has been held chargeable

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75. Story on Bills, § 376.

76. Dwight v. Scovil, 2 Conn. 654.

77. 1 Parsons on Notes and Bills, 523.

78. West Branch Bank v. Fulmer, 3 Pa. St. 399. The note in this case was made by one firm and indorsed by another. All the indorsers were partners in the firm which made the note, which firm had two additional members. No notice was given to Cochran & Perry, the indorsing firm, but they were held liable, and Gibson, C. J., said: "It would be absurd in an indorser to complain that he had not been served with formal notice of what was known to him, or that he was prejudiced for want of it. As, then, it was as much the business of Cochran, Perry & Co. as it was the business of the other members of Beers, Cochran & Co. (the makers) to provide for the payment of their joint note at its maturity, and as they all knew that provision had not been made for it, proof of notice to Cochran & Perry would have been superfluous in an action against them as indorsers."

79. Vol. I, §§ 128, 129, and cases cited.

without presentment.[80] But as to presentment this doctrine is doubtful.[81]

§ **1089. Joint makers at distance from each other.**— When there are joint makers of a note, and they live so far apart that it is impossible to make demand of both on the same day, it would seem that a delay for the necessary time to present to both would excuse for such time the want of demand on both, and the want of notice.[82]

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80. Bailey v. Southwestern Bank, 11 Fla. 266; Maux Ferry Co. v. Branegan, 40 Ind. 361; Fairchild v. Ogdensburg R. R., 15 N. Y. 337; 2 Ames on Bills and Notes, 462; Benjamin's Chalmers' Digest, 3.

81. See 2 Ames on Bills and Notes, 462; *ante*, § 1088.

82. 1 Parsons on Notes and Bills, 531. See chapter XX, on Presentment for Payment, § 595, vol. I.

CHAPTER XXXII.

SPECIAL CIRCUMSTANCES OF EXCUSE FOR WANT OF PRESENTMENT, PROTEST, AND NOTICE, ARISING FROM SPECIAL ACTS OF WAIVER.

SECTION I.

SPECIAL WRITTEN AND VERBAL WAIVERS OF PRESENTMENT, PROTEST, AND NOTICE — GENERAL PRINCIPLES RESPECTING NOTICE.

§ **1090.** When presentment of the bill or note at maturity has been dispensed with by prior agreement between the parties, or, in other words, has been waived by the party entitled to require it, the holder is excused for his failure to make it. It would be a fraud upon the holder to permit him to suffer by acting upon the assurance of the party to whom he looks as security upon the paper; and as prompt presentment is a requirement solely for the benefit of the drawer and indorsers, they are themselves the sole judges to determine whether or not they will enforce it. The waiver may be either verbally or in writing; it may be expressed *in totidem verbis*, or inferred from the words or acts of the party; and it matters not what particular language may be used, so that it conveys the idea that the presentment at maturity is dispensed with. The like observations apply to the protest and notice. Where the indorser of a check wrote over his name, "waiving demand and notice," it was held that he was not entitled to require any demand of the maker, or notice to himself of nonpayment, as conditions precedent to his liability.[1] Such words have the effect to dispense with the necessity for those formalities. If a higher security for the debt be given by the drawer or the indorser — as, for instance, a mortgage or deed of trust, and nothing is said therein respecting demand and notice, the

1. Emery v. Hobson, 62 Me. 578. See also Woodman v. Thurston, 8 Cush. 157, 16 Am. Rep. 514; State *ex rel.* Parks v. Hughes *et al.*, 19 Ind. App. 266, 49 N. E. 393; Quaintance v. Goodrow, 16 Mont. 376, 41 Pac. 76, citing text; Maddox v. Duncan, 143 Mo. 613, 45 S. W. 688, 65 Am. St. Rep. 678, note.

failure in respect to them will not impair the security given, which may be enforced upon default being made.[2]

§ **1091. Implied waiver.**— It is not necessary that the waiver should be direct and positive. It may result from implication and usage, or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended;[3] but there is authority to the effect that such waivers as we are now treating of should receive a strict construction.[4] And it has been said that to show a waiver of demand and notice there must be clear and unequivocal evidence,[5] and that equivocal circumstances or agreements will not suffice.[6]

Mr. Chitty intimates that an indorser's waiver must be express, while he admits that the drawer's may be implied.[7] But no distinction in this regard is recognized.[8]

Notwithstanding the waiver of protest, the holder may still have the bill protested if he desires to claim the statutory damages for nonpayment; nor is the protest after waiver, a sufficient ground upon which to maintain an action for tort, alleging injury to the credit of the waiving party.[9]

§ **1092. Sometimes the waiver is embodied in the instrument itself,** and in such cases the waiver enters into the contract of every party who signs it, whether as drawer, maker, acceptor, or indorser. Thus, where the words "presentation and protest waived," or "notices and protests of nonacceptance and nonpayment waived," are written in the bill, they are binding, not only upon the drawer, but also upon the indorser, who are in effect new drawers, and who become parties to the waiver in becoming parties to the bill.[10] Clearly this is the case

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2. Cardwell v. Allen, 33 Gratt. 164.

3. Fuller v. McDonald, 8 Greenl. 213; 1 Parsons on Notes and Bills, 594; Quaintance v. Goodrow, 16 Mont. 376, 41 Pac. 76, citing text.

4. Bird v. Le Blanc, 6 La. Ann. 470; Wall v. Bry, 1 La. Ann. 312.

5. Gregory v. Allen, Mart. & Y. 74.

6. Story on Bills, § 371; Wright v. Liesenfeld, 93 Cal. 90, 28 Pac. 849.

7. Chitty on Bills (13th Am. ed.) [*506], 573, on authority of dictum of Sir James Mansfield, in Borradaile v. Lowe, 4 Taunt. 93.

8. Thornton v. Wynn, 12 Wheat. 183; Story on Bills, § 321.

9. Bellinger v. Brockway, 80 Ala. 190.

10. Bryant v. Merchants' Bank, 8 Bush, 43; Smith v. Lockridge, 8 Bush, 423; Lowry v. Steele, 27 Ind. 170; Farmers' Bank v. Ewing, 78 Ky. 266; Woodward v. Lowry, 74 Ga. 148; Pool v. Anderson, 116 Ind. 94,

where such a waiver expressly includes the drawer and indorsers.[11]

§ 1092a. **Whether waiver over one indorsement applies to others.** — Sometimes the waiver is not embodied in the instrument itself, but is made by one of the indorsers by writing over his signature, "I waive demand," or "I waive presentment," or "waiving demand and notice," or "I hold myself accountable without protest or notice," [12] or some such expression; and in such cases the better opinion is that the waiver is simply the individual waiver of the indorser over whose signature it is written, and not binding upon others who do not make themselves parties to it.[13] For indorsement is a separate and independent contract, embodying, it is true, the terms of the bill, or note; but not by implication embodying the terms of any other indorsement, each indorsement speaking independently of others, and introducing such terms as may be consistent with the nature of the act. But a contrary view has been taken in Maine; and where the first indorser wrote

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citing the text; State *ex rel.* Parks v. Hughes *et al.*, 19 Ind. App. 266, 49 N. E. 393; Smith v. Pickham, 8 Tex. Civ. App. 326, 28 S. W. 565, citing text; Jacobs v. Gibson, 77 Mo. App. 244, text cited.

11. Bryant v. Lord, 19 Minn. 397; Loveday v. Anderson, 18 Wash. 322, 51 Pac. 463; Phillips v. Dippo, 93 Iowa, 35, 61 N. W. 216, 57 Am. St. Rep. 254, quoting with approval the text; Iowa Valley State Bank v. Sigstad, 96 Iowa, 491, 65 N. W. 407, citing the text.

12. Halley v. Jackson, 48 Md. 254; Jackson Bank v. Irons, 18 R. I. 718, 30 Atl. 420.

13. Duffy v. O'Connor, 7 Baxt. 498; Woodman v. Thurston, 8 Cush. 157. But if such waiver were originally indorsed on the back of the instrument it would seem that each indorser would be bound by it as a part of the instrument. Farmers' Bank v. Ewing, 78 Ky. 266; Bowie v. Hume, 13 App. D. C. 286; Portsmouth Sav. Bank v. Wilson, 5 App. D. C. 8. The District of Columbia Court of Appeals quotes at length from the text on this subject, and while it proves in general the statement of the text, it differentiates the case at bar from the general proposition, and Mr. Justice Morris, in delivering the opinion of the court, says: "It is quite clear to us that the words of waiver in this case were on the back of the blank form used for the note, not only before it was indorsed, but even before it was signed by the maker. The words are in print about the middle of the back of the note; and the signatures of the indorsers are beneath at a place where they would not ordinarily have been written if this printed formula had not been indorsed on the note. Finding this printed formula on the back of the note and placing their signatures with reference to it, the indorsers must be presumed to have seen and read the words, and to have adopted them in their contract."

over his signature, "waiving demand and notice," it was held that subsequent indorsers who merely appended their naked signatures were bound by the waiver, and that if a subsequent indorser intended to exclude himself from its operation he should use the words, "requiring demand and notice." [14]

§ **1092b. Waiver on separate paper.**— The waiver may also be upon a separate paper, written prior to,[15] contemporaneously with,[16] or subsequent to, the indorsement.[17]

§ **1093. Whether verbal waiver at time of indorsement may be shown.**— It is conceded on all sides that a verbal waiver is as effectual as a written one; and the weight of authority sustains the proposition that a parol promise to pay the note absolutely, made by the indorser at the time he indorses it, or a promise to pay it if the maker does not, or a verbal agreement between the parties that payment should not be demanded until after maturity, is admissible to prove a waiver of demand and notice. Such evidence is not offered for the purpose of varying the written contract of indorsement, which is simply to pay the note after exercise of due diligence against the maker, but to show that the parties have between themselves settled the amount of diligence to be required.[18] It has been held differently,[19] but the doctrine

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14. Parshley v. Heath, 69 Me. 90; Johnson v. Parker, 86 Mo. App. 660; Farmers' Exch. Bank v. Altura, etc., Co., 129 Cal. 263, 61 Pac. 1077.

15. Duvall v. Farmers' Bank, 7 Gill & J. 44.

16. *Post*, § 1093.

17. Spencer v. Harvey, 17 Wend. 489; Davis v. Miller, 88 Iowa, 114, 55 N. W. 89.

18. Dye v. Scott, 35 Ohio St. 194 (approving the text); Taylor v. French, 2 Lea, 260; Boyd v. Cleveland, 4 Pick. 525; Barclay v. Weaver, 19 Pa. St. 396; Annville Nat. Bank v. Kettering, 106 Pa. St. 531; Cummings v. Kent, 44 Ohio St. 96, citing the text; Schmied v. Frank, 86 Ind. 255, citing the text. See § 1103; Hazard v. White, 26 Ark. 174; Lane v. Steward, 20 Me. 98; Fuller v. McDonald, 8 Grecnl. 213. See also Wall v. Bry, 1 La. Ann. 312. See 1 Parsons on Notes and Bills, 584; Story on Bills, § 317, note 1; *ante*, § 719; Sloan v. Gibbes, 56 S. C. 480, 35 S. E. 408, 76 Am. St. Rep. 559, quoting and approving text; Quaintance v. Goodrow, 16 Mont. 376, 41 Pac. 76.

19. Beeler v. Frost, 70 Mo. 186. In Rodney v. Wilson, 67 Mo. 123, Hough, J., said: "We think the policy of the law requires that the paper 'shall tell its own story.'" See 2 Ames on Bills and Notes, 133; Hightower v. Ivy, 2 Port. 308; Barry v. Morse, 3 N. H. 132; Kern v. Van Phul, 7 Minn. 74; Davis v. Gowen, 19 Me. 447, held demand not waived, as the promise could not be construed to discharge that obligation. In New Jersey, where a note payable

of the text seems to us more consistent with the principles upon which waivers are sustained.

§ **1094. Extent of waiver.**— The terms of the waiver are often broad enough to include all the steps usually necessary to fix the liability of the indorser. Thus where the words, "I waive demand and notice,"[20] are written over the indorser's signature, or "presentation and protest waived,"[21] are embodied in the instrument, they import an express waiver of demand, protest, and notice. So, "waiving demand and notice,"[22] or "I waive protest and notice,"[23] or "I waive demand of protest,"[24] or "we hereby acknowledge the receipt of notice of protest on the within note,"[25] though somewhat variant in expression, have the same significance — a waiver of all steps usually taken to bind the indorser.

Sometimes notice alone is waived, as, for instance, where the drawer refused to give his address, saying that the acceptor would not pay, and that he would call in a few days, and inquire whether the bill had been paid or not.[26]

§ **1095. Effect of waiver of protest of foreign bill.**— The words, "I waive protest," or "waiving protest," or any similar phrase, importing that the protest is waived, are, when applied to a foreign bill, universally regarded as expressly waiving presentment and notice, the protest being according to the law merchant the formal and necessary evidence of the dishonor of such an instrument. In waiving "protest," the party is considered not only as dispensing with a formality, but as dispensing with the necessity

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"on demand after date" was indorsed by the payee for accommodation of the maker, parol evidence of the indorser's contemporaneous agreement for indulgence of the maker was inadmissible; and that a delay of demand of payment for nine months was unreasonable and discharged the indorser. Foley v. Emerald Brewing Co., 61 N. J. L. 430, 39 Atl. 650. See also Chaddock v. Vanness, 6 Vroom, 517, 10 Am. St. Rep. 256; Johnson v. Ramsey, 14 Vroom, 279, 39 Am. St. Rep. 580; Middleton v. Griffith, 28 Vroom, 442. See § 719; Wright v. Liesenfeld, 93 Cal. 90, 28 Pac. 849.

20. Woodman v. Thurston, 8 Cush. 157; Jaccard v. Anderson, 37 Mo. 91.

21. Bryant v. Merchants' Bank, 8 Bush, 43.

22. Johnston v. Searcy, 4 Yerg. 182.

23. Gordon v. Montgomery, 19 Ind. 110.

24. Porter v. Kemball, 53 Barb. 467.

25. City Sav. Bank v. Hopson, 53 Conn. 453; The Johnson, etc., Bank v. Lowe, 47 Mo. App. 151, citing text.

26. Phipson v. Kneller, 1 Stark. 116, 4 Campb. 285; Edwards on Bills, 633.

of the steps which must precede it, and of which it is merely the formal though necessary proof which the law requires.[27]

§ 1095a. Effect of waiver of protest of inland bill or note.— But when a waiver of protest is applied to an inland bill, or to a promissory note, it has not in all cases been considered clear that it was intended to dispense with notice; the protest of such instruments not being necessary in order to charge the drawer or indorsers. But the word "protest" has, by general usage, acquired a more extensive signification than the mere formal declaration of a notary. Inland bills and promissory notes may be protested by statutory enactment in many States, and the protest is accorded the same effect as to them when it is made, though it is not necessary to make it. And the weight as well as the number of authorities predominate in favor of construing a waiver of protest to signify as much when applied to inland bills and notes as when used in respect to a foreign bill.[28] And such seems to us clearly the correct conclusion.[29] In the Supreme Court of the United States a waiver of protest of an inland bill was considered under the circumstances ambiguous as to the intent of the party, and parol evidence was admitted to show that it had the full signification of a waiver of demand and notice; but the reasoning of the opinion seems to us to bear out the doctrine of the text that,

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27. Union Bank v. Hyde, 6 Wheat. 572; Brown v. Hull, 33 Gratt. 31; Edwards on Bills, 634; Timberlake v. Thayer, 76 Miss. 76, 23 So. 767; First Nat. Bank v. Falkenhan, 94 Cal. 141, 29 Pac. 866.

28. Coddington v. Davis, 1 N. Y. 186, 3 Den. 16. In this case the waiver was as follows: "Please not protest T. B. Coddington's note due, and I will waive the necessity of the protest thereof." Porter v. Kemball, 53 Barb. 467; Fisher v. Price, 37 Ala. 407; Jaccard v. Anderson, 37 Mo. 91; Carpenter v. Reynolds, 42 Miss. 807, note; Hood v. Hallenbeck, 7 Hun, 364, note. See Brown v. Hull, 33 Gratt. 31; Spragne v. Fletcher, 8 Oreg. 367; Shaw v. McNeill, 95 N. C. 535, citing the text; Johnson v. Parsons, 140 Mass. 175; Baker v. Scott, 29 Kan. 136, 44 Am. Rep. 629, citing the text; City Sav. Bank v. Hopson, 53 Conn. 453; Cont. Life Ins. Co. v. Barber, 50 Conn. 568; First Nat. Bank of Lancaster v. Hartman, 110 Pa. St. 196; Pool v. Anderson, 116 Ind. 94, citing the text; Fitch v. Citizens' Nat. Bank, 97 Ind. 212; Wolford v. Andrews, 29 Minn. 251, citing the text.

29. Harvey v. Nelson, 31 La. Ann. 434. In this case the text is quoted and approved. The indorsers had written on the note in suit: "We hereby waive the necessity of either protest or notice." White, J.: "The protest necessarily includes a due demand, and if such be the case the waiver of protest necessarily waived that which was an integral or essential part of the protest."

ex vi termini, it imports, according to the understanding of mercantile men, that all the steps to be ordinarily taken are dispensed with.[30] The contrary view obtained in Louisiana.[31] In Maine, by statute, waiver of demand and notice must be in writing.[32]

§ 1096. Construction of waivers.— A waiver is not to be construed to extend beyond the fair and reasonable import of its terms. Therefore, a waiver of notice, which is a separate and distinct step from the presentment, is not regarded as waiving the presentment or demand upon the drawee or maker.[33] The drawer or indorser may have had confidence that the drawee, acceptor, or maker would honor the bill or note upon its presentment; or the holder may have insisted on not incurring the risk of diligence required in giving prompt notice. Whatever motive may have actuated the waiver of notice, it does not expressly or inferentially extend to a waiver of the demand, and that must be duly

30. Union Bank v. Hyde, 6 Wheat. 572. The following undertaking of the indorser of a promissory note: "I do request that hereafter any notes that may fall due in the Union Bank, in which I am, or may be, indorser, shall not be protested, as I will consider myself bound in the same manner as if the said notes had been, or should be, legally protested," was held by the United States Supreme Court to be ambiguous as to whether it amounted to a waiver of demand and notice, and parol proof was admitted to show that it was the understanding of the parties that the demand and notice necessary by law to charge the indorser should be dispensed with. And it was said by Johnson, J.: "Had the defendant omitted one word from his undertaking, it would have been difficult to maintain the affirmative of this proposition. But what are we to understand him to intend when he says: 'I will consider myself bound in the same manner as if said notes had been, or should be, legally protested?' Except as to foreign bills, a protest has no legal binding effect, and as to them it is evidence of demand, and incident to legal notice. It either, then, had this meaning, or it had none. This reasoning, it may be said, goes no further than to a waiver of the demand; but what effect is to be given to the word 'bound?' It must be to pay the debt, or it means nothing." It was held by the court that, if this reasoning were inconclusive, the evidence admitted proved that it was the real intention of the parties to give this effect to the agreement.

31. Ball v. Greaud, 14 La. Ann. 305; Bird v. Le Blanc, 6 La. Ann. 470; Wall v. Bry, 1 La. Ann. 312.

32. Thomas v. Mayo, 56 Me. 40.

33. Sprague v. Fletcher, 8 Oreg. 367; Voorhees v. Atlee, 29 Iowa, 49; Scull v. Mason, 7 Wright, 99; Buchanan v. Marshall, 22 Vt. 561; Lane v. Steward, 20 Me. 98; Drinkwater v. Tebbets, 17 Me. 16; Berkshire Bank v. Jones, 6 Mass. 524; Backus v. Shipherd, 11 Wend. 629; Story on Bills, §§ 371, 375; Story on Notes, § 272. *Contra,* Matthey v. Gally, 4 Cal. 62.

made in order to charge the drawer or indorser. The words, "I hold myself accountable, and waive all notice," do not imply an extension of the waiver to the demand; but merely an accountability without notice, leaving the demand still as a condition precedent.[34] When time is extended by the waiver, as, for instance, where it is said, "We waive protest and notice, and hold ourselves responsible for payment on a certain future day, to which this note is extended by consent," the waiver applies to all steps of demand, protest, and notice at maturity, and also as to such steps at the prolonged or extended maturity of the paper.[35]

§ **1097. Statement of grounds of waiver.**— The fact that the waiver of protest, demand, or notice states the reasons or grounds of such waiver does not affect it, and where the waiver ran: "Notice, demand, protest, and due diligence waived on account of the war and insurrection," during the late civil war in the United States, it was held absolute upon its face, and that the liability of the indorsers were absolutely fixed by dishonor.[36]

§ **1098. Parol testimony as to waiver.**— Where there is a written waiver of demand upon the face of the bill or note, but not of notice, it may be shown by parol testimony that there was also a verbal waiver of notice, and so where there is a written waiver of notice a verbal waiver of demand may be proved. If a waiver of both the conditions (of demand and notice) may be proved by parol, we are aware of no good reason why that kind of proof should be excluded to show a waiver of one condition where a waiver of the other is made a part of the indorsement itself.[37]

§ **1099. Whether guaranty is waiver.**— Any language which implies a guaranty renders the party using it a guarantor, and consequently such party is not entitled to demand and notice as such guarantor. But it has been held that the words "surety" or "security,"[38] or "backer,"[39] placed after an indorser's name,

34. Burnham v. Webster, 17 Me. 50.

35. Blanc v. Mutual Nat. Bank, 28 La. Ann. 921. To same effect, see Forster v. Jurdison, 16 East, 105; Ridgeway v. Day, 13 Pa. St. 288. And does not qualify his original indorsement nor release his liability thereunder. Seward v. Derrickson, 12 Wash. 225, 40 Pac. 939.

36. Neal v. Wood, 23 Ind. 524 (1864).

37. Drinkwater v. Tebbets, 16 Me. 17; Mills v. Beard, 19 Cal. 161; Edwards on Bills, 635. See *ante*, § 1093.

38. Bradford v. Corey, 5 Barb. 461, Paige, J.

39. Seabury v. Hungerford, 2 Hill, 80.

is no waiver of demand and notice, on the ground that they were intended to secure to the parties the privileges of sureties as well as of indorsers. The authority of these cases, however, is doubted.[40]

The expressions, "accountable," "eventually accountable,"[41] and "hold ourselves responsible for payment,"[42] imply a waiver of demand and notice, and so does the word "holden."[43] And where an indorser wrote, "I assign the within note to J. T., and hold myself responsible for the payment of the same, the maker to have two years to pay the same, unless he prefers to pay sooner — interest on the same to be paid annually," it was held a waiver of demand and notice.[44]

§ 1100. Whether questions of waiver are of law or of fact.— Whether particular conversations amount to a waiver or not has been held by the United States Supreme Court to be a question of fact for the jury, and not one of law for the court.[45] But whether or not distinct words used amount to a waiver or not, would be, we should think, a question of law; although, if intermixed with others about which the testimony is not clear and concurrent, it would be a question of fact for the jury to determine whether or not there was a waiver. In Massachusetts, it has been said by Shaw, C. J.: "Though questions of due diligence and waiver were originally questions of fact, yet having been reduced to a good degree of certainty by mercantile usage, and a long course of judicial decisions, they assume the character of questions of law; and it is highly important that they should be so deemed and applied, in order that rules affecting so extensive and important a department in the transactions of a mercantile community may be certain, practical, and uniform as well as reasonable, equitable, and intelligible."[46]

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40. 1 Parsons on Notes and Bills, 579.

41. Turber v. Caverly, 42 N. H. 74; McDonald v. Bailey, 14 Me. 101; Burnham v. Webster, 17 Me. 50.

42. Blanc v. Mutual Nat. Bank, 28 La. 922. See Small v. Clarke, 51 Cal. 227.

43. Bean v. Arnold, 16 Me. 251; Blanchard v. Wood, 26 Me. 358; Bray v. Marsh, 75 Me. 452.

44. Airey v. Pearson, 37 Mo. 424.

45. Union Bank v. Magruder, 7 Pet. 287. See Carmichael v. Bank of Pennsylvania, 4 How. (Miss.) 567; Jones v. Roberts, 191 Pa. St. 152, 43 Atl. 123; Bank v. Urich, 191 Pa. St. 556, 43 Atl. 354.

46. Creamer v. Perry, 17 Pick. 332; Northwestern Coal Co. v. Bowman, 69 Iowa, 153, citing the text.

§ **1101.** Laches of a holder by delay may be waived, but the waiver should be distinctly proved. Where a draft was drawn in Ohio on New York, on July 10, 1857, and before presentment was lost; and on August 10th the drawer gave the holder another precisely similar, post-dated July 10, 1857, and wrote across it "duplicate," and the latter presented it on August 14th, and was refused payment, the drawees having failed the day before — it was held that the second draft was given as a substitute for the first, and to take its place, and that the plaintiff's delay was fatal.[47]

SECTION II.

SPECIAL WAIVER AFTER THE EXECUTION OF THE BILL OR NOTE.

§ **1102.** The waiver may not only be written upon the bill or note by the party at the time he signs it, but as well at any time before maturity; and when made after the execution of the instrument, no new consideration is necessary to support it.[48] All that the holder contracts to do in order to bind the indorser is to use due diligence in making presentment and demand of payment of the acceptor or maker, and in giving the indorser notice in the event of his default. Due diligence, in the absence of any agreement or understanding between the parties, fixes the time within which such presentment must be made and notice given; but when the indorser himself relaxes the rule, due diligence requires no more than that his own terms be complied with.

§ **1103. As to waiver before maturity by conduct, act, or agreement.**— Any act, course of conduct, or language of the drawer or indorser calculated to induce the holder not to make demand or protest or give notice, or to put him off his guard, or any agreement by the parties to that effect, will dispense with the necessity of tak-

47. Benton v. Martin, 40 N. Y. 345.

48. Wall v. Bry, 1 La. Ann. 312, Slidell, J., saying: "The indorsement of the defendant was made some months anterior to the indorsement and signature of the waivers. * * * The defendant urges that it was not binding, because made without consideration. The plea that the waiver was without consideration cannot avail the defendant. It was made before the maturity of the note; the holder may have regulated his conduct, in not protesting the note, by the defendant's waiver, confiding in it; and to relieve him from it now would be sanctioning a breach of good faith, and permitting that party to gain by his own disingenuousness." Robinson v. Barnett, 19 Fla. 670, 45 Am. Rep. 26, citing the text; Story on Notes, § 271.

ing these steps,[49] as against any party so dealing with the holder.[50]

And even though a statute requires the waiver of demand and notice, to be valid, must be in writing, it has been held that the course of conduct of the indorser may be such as will estop him from denying that the note was duly protested.[51]

Where the party told the holder eighteen months before maturity not to protest it, as it should be paid at maturity, it was held a waiver of demand and notice.[52] So where the indorser informed the holder that the maker had absconded, and requested forbearance.[53] So where, on the first day of grace, the indorser requests time, and says that an arrangement will be made, notice is waived;[54] so where the drawer,[55] or the indorser,[56] informs the holder that the bill will not be paid, or that he cannot pay it when due, it is a waiver of demand, protest, and notice. So where the drawer of a bill tells the holder to hold it without presentment an indefinite time, he takes the risks of the drawee's solvency; and if he fails in the meantime the want of presentment is excused.[57] So where the indorser of a note tells the holder to let it run and he will pay it when called for.[58] So where the drawer told the holder that his residence was immaterial, and that he would inquire whether the bill was paid.[59] Where a mere request was made

49. Boyd v. Bank of Toledo, 32 Ohio St. 526, approving text. See also Moyer's Appeal, 87 Pa. St. 129; Glaze v. Ferguson, 48 Kan. 157, 29 Pac. 396, quoting text; State Bank of St. Louis v. Bartle, 114 Mo. 276, 21 S. W. 816.

50. Tailer v. Murphy Furnishing Co., 24 Mo. App. 420.

51. Hallowell Nat. Bank v. Marston, 85 Me. 488, 27 Atl. 529; Markland v. McDaniel, 51 Kan. 350, 32 Pac. 1114.

52. Sigerson v. Mathews, 20 How. 496. But a mere promise to pay at maturity, at the time of an indorsement in blank, has been held not to imply a waiver of demand and notice. Isham v. McClure, 58 Iowa, 515; Freeman v. O'Brien, 38 Iowa, 406. No arrangement between the maker and holder can affect the rights of the indorser as to notice. Applegarth v. Abbott, 64 Cal. 459; Story on Notes, 291.

53. Leffingwell v. White, 1 Johns. Cas. 99.

54. Gove v. Vining, 7 Metc. (Mass.) 212; Cady v. Bradshaw, 116 N. Y. 191, citing the text.

55. Minturn v. Fisher, 7 Cal. 573. **56.** Hunter v. Hook, 64 Barb. 468.

57. Sheldon v. Chapman, 31 N. Y. 644.

58. Hale v. Danforth, 46 Wis. 555.

59. Phipson v. Kneller, 1 Stark. 116, Lord Ellenborough saying: "He thereby takes upon himself the *onus* of making inquiry and dispenses with notice." See *ante*, § 1094; 2 Ames on Bills and Notes, 469; Benjamin's Chalmers' Digest, 199.

by the indorser of the indorsee not to sue in case of nonpayment while the former was absent from home, it was held not to constitute a waiver of demand and notice.[60]

§ 1104. Where the indorser, before the note fell due, wrote to the holder stating that the maker had failed, acknowledging his liability and asking indulgence until funds could be realized, it was held a waiver of demand and notice.[61] So where the indorser, before the note fell due, was informed that the maker wished it to remain another year and replied that he was willing.[62] So where the indorser, being informed that the maker had failed, told the holder that there would be no trouble about it, and that he would pay it.[63] So where the indorser before maturity says that he will pay it, or arrange it, or uses any equivalent expression.[64] So where the indorser tells the holder to give himself no uneasiness, that the note will be paid at maturity, that he is collecting money for the maker, and will see it paid.[65] So an agreement by the indorser to pay, if the note cannot be collected of the maker by due course of law, binds him without demand or notice.[66] So where the indorser requested recall of the note which had been forwarded for collection without protest.[67] So where the indorser after maturity agreed with the maker to take up the note, to give back to him the property for which the note was given, and to return the note without further consideration, it was held that he was liable without demand or notice.[68]

§ 1105. **Putting impediment in way of demand and notice.**— So where the party puts any obstacle in the way of, or prevents de-

60. Dutton v. Bratt (Ark.), 11 S. W. 821.

61. Spencer v. Harvey, 17 Wend. 489.

62. Sheldon v. Horton, 53 Barb. 23. But the fact that the indorsee signed a renewal note procured by the plaintiff in anticipation of the maturity of the original, was held not to excuse want of presentation and notice of nonpayment of the original. Curry v. Van Wagner, 32 Hun, 453, distinguished from Sheldon v. Horton. *supra*.

63. Whitney v. Abbot, 5 N. H. 378.

64. Lary v. Young, 8 Eng. (Ark.) 401; Bruce v. Lytle, 13 Barb. 163; Marshall v. Mitchell, 35 Me. 221; Leonard v. Gary, 10 Wend. 504; Boyd v. Bank of Toledo, 32 Ohio St. 526; Seldner v. Mt. Jackson Bank, 66 Md. 488; Edwards on Bills, 633; Martin v. Perqua, 65 Hun, 225, 20 N. Y. Supp. 285.

65. Bryan v. Wilcox, 49 Cal. 47.

66. Backers v. Shepherd, 11 Wend. 629.

67. Hallowell Nat. Bank v. Marston, 85 Me. 488, 27 Atl. 529.

68. Andrews v. Boyd, 3 Metc. (Mass.) 434.

mand and notice, or makes an arrangement which will render demand unavailing, it operates as a waiver of demand and notice; as where the indorser obtained possession of the note before maturity and withheld it until after that time.[69] So where the drawer of a check[70] or bill[71] stops its payment; where the indorser had agreed with the maker for value to extend the time for a year, and had transferred the note to the holder without informing him of it;[72] and where the indorser failed to apply funds deposited with him by the drawer to meet the bill.[73]

§ 1106. Agreements for extension of time.— Where the indorser agrees to an extension of time of payment it waives demand, protest, and notice;[74] so an agreement to attend and take care of the note;[75] or an agreement for a renewal.[76] But a mere request for a renewal has been held no waiver of notice.[77] And where notes indorsed for accommodation are not protested, and no notice is given, the signing of new notes for accommodation, which are given in renewal, is no waiver of notice.[78]

Where the drawer of a dishonored bill gave the holder his own note for the amount, proof of notice was held to be dispensed with, and laches unavailable as a defense.[79] This seems to us clearly right, but the giving of a bond has been held to be only *prima facie* evidence of a waiver.[80] The fact that an indorser appeared at a meeting of creditors, and assumed the character of a creditor for a large sum, including the note sued on, has been held no

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69. Havens v. Talbott, 11 Ind. 323.

70. Purchase v. Mattison, 6 Duer, 587; Jacks v. Darrin, 3 E. D. Smith, 557.

71. Lilley v. Miller, 2 Nott & McC. 257. But it has been held to apply only to notice. Hill v. Heap, Dowl. & R. N. P. 57.

72. Williams v. Brobst, 10 Watts, 111; Manning v. Maroney, 87 Ala. 567.

73. Curtis v. Martin, 20 Ill. 557.

74. Ridgeway v. Day, 13 Pa. St. 208; Barclay v. Weaver, 19 Pa. St. 396; Farmers' Bank v. Wakles, 4 Harr. 429; Amoskeag Bank v. Moore, 37 N. H. 539; Cady v. Bradshaw, 116 N. Y. 191, citing the text; McMonigal v. Brown, 45 Ohio St. 503; Bank v. Dibrell, 91 Tenn. 301, 18 S. W. 626; Glaze v. Ferguson, 48 Kan. 157, 29 Pac. 396, quoting text.

75. Taunton Bank v. Richardson, 5 Pick. 436.

76. First Nat. Bank v. Ryerson, 23 Iowa, 508.

77. Sussex Bank v. Baldwin, 2 Harr. 487; Cayuga County Bank v. Dill, 5 Hill (N. Y.), 404.

78. Oswego Bank v. Knower, Hill & D. 122.

79. Leonard v. Hastings, 9 Cal. 236.

80. Ralston v. Bullitts, 3 Bibb, 261; Mills v. Rense, 2 Litt. 203.

waiver of demand and notice;[81] but it has been well observed that it might be regarded as evidence of such waiver.[82]

A declaration by the drawer of a check, who is paying teller of the bank on which it is drawn, three days before maturity, that it would not be paid;[83] and a declaration by the indorser of a check that the maker could not pay it, and had made an assignment preferring him,[84] have been considered as waivers of demand and notice.

Inquiries and attempts by an indorser to get the maker to pay have been held no waiver,[85] but the contrary has been held where the indorser himself undertook to present a bill after maturity.[86]

§ **1107. As to waivers on the day of maturity.**— The waiver may be made on the day of maturity as well as at any other time;[87] and where on that day the indorser requests the holder not to protest the note,[88] or admits liability and offers to arrange the matter, asking indulgence,[89] it has been held a waiver of demand. So where, in response to inquiry by the holder, the indorser tells him that it will be of no use to call upon the maker, demand and notice are waived.[90] And where the indorser of two bills, falling due the 4th and 5th of April respectively, called on the holder on the 4th and told him that the bills would not be paid, but it was not worth while to trouble him with a twopenny post letter to give notice, as it was not worth the money, and he would bring the plaintiff some money next week in part payment of the bills, it was thought that it would have dispensed with notice, but would not support an allegation of due notice.[91] In New York an accepted offer by the indorser to the holder to renew the note on terms which the former proposed, was held no waiver of notice;[92]

81. Miranda v. City Bank, 6 La. 740.
82. 1 Parsons on Notes and Bills, 591.
83. Minturn v. Fisher, 7 Cal. 573.
84. Taylor v. French, 4 E. D. Smith, 458.
85. Cram v. Sherburne, 14 Me. 48; Isham v. McClure, 58 Iowa, 517.
86. Hussey v. Freeman, 10 Mass. 84.
87. Robinson v. Barnett, 19 Fla. 670, 45 Am. Rep. 26, citing the text.
88. Scott v. Greer, 10 Pa. St. 103. But see Prideaux v. Collier, 2 Stark. 57. This latter case has not escaped the criticism of Professor Parsons (see 1 Notes and Bills, 592, note *g*).
89. Moyer's Appeal, 87 Pa. St. 129; Corner v. Pratt, 138 Mass. 447.
90. Barker v. Barker, 6 Pick. 80.
91. Burgh v. Legge, 5 M. & W. 418.
92. Cayuga County Bank v. Dill, 5 Hill (N. Y.), 404.

but the court was divided, and the decision has been justly criticised and condemned.[93] In a subsequent case in that State,[94] where, upon the maturity of a valid note, a renewal was given under an usurious agreement, an indorser of both notes was held not discharged from liability on the first because of failure to give notice of presentment, and nonpayment of the second.

§ 1108. And when the indorsers, on the last day of grace, wrote to the holder in Boston, where the note was payable at a bank, from St. Louis, where the indorsers resided, knowing that the maker had failed to provide for payment, expressing annoyance at the fact, and saying, "We hold ourselves responsible for the payment of this note, and shall see that it is done at an early day," the United States Supreme Court held that they were liable, although no demand of payment was made and no notice was given; and although, from the relative location of the indorsers and the holder, the latter could not receive the letter for several days. Of course this waiver was not after maturity, with knowledge of the holder's laches, as the indorsers, at whatever hour they wrote the letter, had no knowledge that there had been a failure to present and send notice of dishonor. But their promise to pay with knowledge of the maker's laches in not providing for its payment, was considered sufficient.[95] Clearly, the mere presence of an indorser at the time of presentment and refusal of payment is no waiver of notice.[96] Where on the day of maturity the indorsers wrote on the note, "We hereby waive protest on this note, and hold ourselves responsible for the payment of the same, which is hereby extended thirty days," it was held that neither protest nor notice at the end of thirty days was requisite.[97]

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93. 1 Parsons on Notes and Bills, 593; Boyd v. Bank of Toledo, 32 Ohio St. 526.

94. Leary v. Miller, 61 N. Y. 489.

95. Yeager v. Farwell, 13 Wall. 12, Davis, J.

96. Grant v. Spencer, 1 Mont. 136.

97. Blanc v. Mutual Bank, 28 La. Ann. 921.

SECTION III.

BY WHOM AND TO WHOM WAIVER OF DEMAND, PROTEST, AND NOTICE MUST BE MADE.

§ **1109.** The words or acts constituting a waiver must, of course, be those of the person entitled to require that the regular steps of demand, protest, and notice shall be taken; for it would be a solecism to permit one person to waive away the rights of another.[98]

Therefore, if one indorser write a waiver over his name, it does not affect another;[99] and the acts and declarations of the maker[1] or acceptor[2] cannot affect the drawer or indorsers, as the case may be, unless they adopt them as theirs also.

§ **1109a. Waiver by a partner.**— One partner may generally waive demand, protest, and notice for the firm, even after dissolution of the firm;[3] but if the firm were already discharged, the promise by one partner to pay, made after dissolution, would bind him only,[4] and after the dissolution of the firm there would be no authority in one partner to bind a dormant partner by such waiver.[5] And it has been held that if a firm indorse a note for accommodation, one partner cannot bind the others by any promise he might make for payment, since as to that they are not partners.[6]

§ **1109b. Waiver by agent.**— The acknowledgment by the party's agent, attorney, or clerk having the management of his case, is the same as his own.[7]

§ **1110. Promise to stranger does not operate as waiver.**— The promise to pay, in order to constitute a waiver, should be made to the party entitled to demand payment, and if made to an entire

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98. May v. Boisseau, 8 Leigh, 164, Tucker, P.

99. Central Bank v. Davis, 19 Pick. 373. See § 1092*a;* Farmers' Exch. Bank v. Altura, etc., Co., 129 Cal. 263, 61 Pac. 1077, citing text.

1. Lee Bank v. Spencer, 6 Metc. (Mass.) 308; Pierce v. Whitney, 29 Me. 188.

2. *Ex parte* Bignold, 2 Mont. & A. 633.

3. Darling v. March, 22 Me. 184; Star Wagon Co. v. Swezey, 52 Iowa, 394; Seldner v. Mt. Jackson Bank, 66 Md. 488.

4. Hart v. Long, 1 Rob. (La.) 83.

5. Manney v. Coit, 80 N. C. 300.

6. Baer v. Leppert, 12 Hun, 516. As to power of partner to waive homestead exemption as to copartner, see Hutchison & Wilson v. Powell, 92 Ala. 619, 9 So. 170.

7. Standage v. Creighton, 5 Car. & P. 406.

stranger, it is not evidence of a waiver of laches;[8] but it might be evidence that due presentment was made and notice given.[9] And so it seems a direct waiver of protest or notice will not bind if made to a stranger.[10] But when the promise is made to the holder, it inures to the benefit of all who acquire the bill or note through him;[11] and so will any agreement or understanding or arrangement between an indorser and the maker inure to the benefit of an indorsee in a suit against the indorser.[12]

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8. Miller v. Hackley, 5 Johns. 375; Olendorf v. Swartz, 5 Cal. 580; National Bank v. Lewis, 50 Vt. 622, 28 Am. Rep. 514, 517, and note; Devendorf v. West Va. O. & O. L. Co., 17 W. Va. 175. But in Byles on Bills [*292], it is said the promise may be made to a stranger.

9. Potter v. Rayworth, 13 East, 417, Lord Ellenborough saying: "Whether the promise to pay was made to the plaintiff, or to any other party who held the note at the time, it was equally evidence that the defendant was conscious of his liability to pay the note, which must be because he had due notice of its dishonor." Devendorf v. West Va. O. & O. L. Co., 17 W. Va. 175.

10. National Bank v. Lewis, 50 Vt. 622.

11. Kennon v. McRea, 7 Port. 175; Rogers v. Hackett, 1 Fost. 100; Potter v. Rayworth, 13 East, 417; Gunson v. Metz, 1 B. & C. 193, 2 Dowl. & R. 334.

12. Williams v. Brobst, 10 Watts, 111; Marshall v. Mitchell, 35 Me. 221; Curtiss v. Martin, 20 Ill. 557; 1 Parsons on Notes and Bills, 611; Devendorf v. West Va. O. & O. L. Co., 17 W. Va. 175.

CHAPTER XXXIII.

SPECIAL CIRCUMSTANCES OF EXCUSE WHICH SHOW AN INABILITY ON THE PART OF THE HOLDER TO MAKE DUE DEMAND, PRESENTMENT, OR PROTEST, OR GIVE DUE NOTICE.

SECTION I.

WHEN THERE IS NO PERSON IN EXISTENCE UPON WHOM DEMAND CAN BE MADE, OR WHO IS LEGALLY BOUND.

§ 1111. In the *first* place, where there is no person in existence upon whom demand can be made, or none who is legally liable, the presentment is excused, for the reason that it is either an impossibility or that it would be a fraud upon the holder to require it. And firstly, when there is no person in existence upon whom demand can be made. Thus, where the maker has died before maturity, and there is no personal representative of whom payment could be demanded, it cannot of course be made; but it would be otherwise if a personal representative had been appointed.[1] Where the maker and his whole family had been drowned two days before the maturity of the note, and there was no will, and no letters of administration taken out, the want of demand was excused.[2] And so in all cases, where there is an actual party bound as promisor, but no one then existing who represents him, the delay in making demand is excused.[3] But it is no excuse for want of notice to the drawer or indorser.[4]

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1. Chitty on Bills (13th Am. ed.) [*436–437]; 1 Parsons on Notes and Bills, 444, 445.

2. Haslett v. Kunhardt, Rice, 189.

3. Waring v. Betts, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890.

4. Price v. Young, 1 McCord, 339. This was a suit against an indorser of a note, the maker of which had died before maturity. The excuse alleged for want of demand was that there was no legal representative on whom it could be made. The court said: "Where a demand cannot be made, the law does not dispense with notice. The circumstances which prevented it, and the notice, are still required. It was the duty of the holder, in this case, admitting that a demand could not have been made, to have given the defendant notice in as short a period, after having ascertained that the demand could

§ **1112.** But where there is no principal party then or at any time existing, who is legally bound upon the bill or note, it would seem that both presentment and notice are excused.

Thus, when an agent signed his principal's name after his death, there could be no demand, and, therefore, the indorser would be bound without it.[5]

§ **1113. When note is void, and indorser knows it, demand and notice excused.**— So where the note is void as between the maker and payee, on account of an illegal consideration, the indorser may be held without any proof of demand or notice;[6] and the general principle is, that whenever the principal party is not bound, the indorser is bound without demand or notice.[7] The payee, when he indorses the note, warrants, by the very act of indorsement, that the maker is legally liable to pay it, knowing, as he necessarily must, that such is not the case. The holder, in the belief of its truth, might look only to the maker, and fail to take the usual steps to charge the indorser; and if, when he became aware that the maker was not legally bound, he could not recover against the indorser, the latter would be protected by his own fraud, and the holder suffer by the confidence placed in him. Thus, in Massachusetts,[8] where a note was void for usury between maker and payee, and the holder failed in suit against the maker on that account, it was held that he could not hold the indorser without any proof of demand or notice. Sewall, J., compared it to the case of a bill drawn without funds, the indorser of the note standing in the re-

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not be made, as she could have been required to do so, if a demand had been made. Suppose the demand had been made on the 26th of October, and no notice to the defendant had been given until the 10th or 15th of November, could this have been considered a reasonable time when the parties were so contiguous to each other as to have enabled the plaintiff to have given the notice in five hours, or at most in one day? I presume not. The law is express, that the notice shall be given as soon as shall be conveniently practicable."

5. Burrill v. Smith, 7 Pick. 291.

6. Bayley on Bills, chapter VII, section II, p. 205; 1 Parsons on Notes and Bills, 444, 445.

7. Perkins v. White, Ohio S. C., January, 1881; Cent. L. J., vol. 12, p. 263; Maddox v. Duncan, 143 Mo. 613, 45 S. W. 688, 65 Am. St. Rep. 678, note, text cited.

8. Copp v. M'Dugall, 9 Mass. 1. See also Chandler v. Mason, 2 Vt. 193; Maddox v. Duncan, 143 Mo. 613, 45 S. W. 688, 65 Am. St. Rep. 678, note, text cited.

lation of drawer, and the maker or acceptor, and said: "When the promise or acceptance is void, as it is in case of usury between the drawer and acceptor, if he will resort to that defense against his promisee, the contract becomes, as it respects the indorser, a draft accepted without funds — that is, in the case of a promissory note." The like doctrine has obtained in New York, where it is held that the indorser of a forged check is liable without demand or notice;[9] and in England, where it is held that the indorser of a bill drawn on an improper demand is not entitled to notice;[10] and it would extend to any case in which there was no legal principal bound, as where the maker or acceptor was an infant, married woman, or lunatic,[11] or was a fictitious person, the indorser knowing it.[12]

§ 1113a. Whether indorser is bound as such without demand or notice when he has no knowledge of infirmity in the bill or note.— Knowledge of the infirmity rendering the note void, on the part of the drawer or indorser, is considered by high authorities essential to charge them without demand or notice — the transaction amounting in such case to a fraud.[13] And an accommodation indorser of a fictitious bill purporting to be drawn by an agent on his principal, it has been held, is entitled to notice if he possessed no knowledge of the fraud, Mansfield, C. J., saying: "He has only placed himself in the common situation of an indorser;" and Gibbs, J.: "He is entitled to notice that he may have his remedy against them," *i. e.*, "those who ought to pay."[14] But every indorser warrants the instrument to be valid, and exactly what it seems to be; and whether he knows the contrary or not, it seems to us that he is absolutely bound, if his warranty fails, without demand or notice,[15] at least to the extent of refunding the con-

9. Turnbull v. Bowyer, 40 N. Y. 456.

10. Cundy v. Marriott, 1 B. & Ad. 696.

11. Burrill v. Smith, 7 Pick. 291; 1 Parsons on Notes and Bills, 445.

12. Farmers' Bank v. Vanmeter, 4 Rand. 553; 1 Parsons on Notes and Bills, 460.

13. "The infancy of the maker or acceptor," says the learned editor of Ames on Bills and Notes, vol. 1, p. 469, "of course forms no excuse for non-presentment of a bill or note," citing Wyman v. Adams, 12 Cush. 210. See the remarks of Prof. Parsons on this question, 1 Parsons on Notes and Bills, 444, note.

14. Leach v. Hewitt, 4 Taunt. 731. See Carter v. Flower, 16 M. & W. 747, and Farmers' Bank v. Vanmeter, 4 Rand. 561.

15. 1 Parsons on Notes and Bills, 560. See vol. I, §§ 669, 669*a*.

sideration paid on the ground that he has passed a thing which does not answer to its description.[16]

§ **1113b**. The doctrine that the indorser warrants the instrument to be valid, and must, therefore, be held as indorser if it turns out otherwise, without his knowledge, has recently received critical examination in New York, where it was held by the Court of Appeals that it would not apply to an accommodation indorser who received no part of the proceedings, and, therefore, was under no obligation to refund on the ground of failure of consideration. The court, in its instructive opinion, deprecated the nice distinctions dispensing with notice.[17]

SECTION II.

THE IMPRACTICABILITY OF FINDING THE PARTY TO WHOM PRESENTMENT SHOULD BE MADE, OR NOTICE GIVEN, OR ASCERTAINING HIS RESIDENCE OR PLACE OF BUSINESS.

§ **1114**. In the *second* place, the want of due presentment, or due notice, will be excused when the holder, after exercising due diligence, cannot find the party to whom presentment should be made or notice given, or ascertain his place of residence or business. When this excuse is relied upon, it becomes often a question of nicety to determine whether or not the steps taken by the holder to find the party to whom presentment should be made or notice given, or to ascertain his place of residence or business, amounted to the due diligence which the law exacts, and it is, therefore, important to define in what such diligence consists.[18] "It would be very hard, when the holder of a bill does not know where the indorser is to be found, if he lost his remedy by not communicating immediate notice of dishonor of the bill, and I think the law lays down no such rigid rules. The holder must not allow himself to remain in a state of passive and contented ignorance; but if he uses due diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered

16. See vol. I, §§ 730 *et seq.*, 740*a*.

17. Susquehanna Valley Bank v. Loomis, 85 N. Y. 207 (1881). See vol. I, §§ 669, 669*a*.

18. See on this subject, Story on Bills, § 351; Reinke v. Wright, 93 Wis. 368, 67 N. W. 737, citing text; Waring v. Betts, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890.

is due notice of the dishonor of the bill, within the usage and custom of merchants." [19] The burden of proving due diligence will be upon him who is seeking to avail himself of that excuse.[20]

§ 1115. What constitutes diligence.— Due diligence in making presentment for payment, and in communicating notice, consists, as a general rule, in making inquiries of such accessible persons, as from their connection with the transaction or place, or parties, are likely to be informed and in acting in accordance with the information derived from them.[21] The holder is not bound to inquire further than a reasonable and prudent man should, and every possible exertion is not exacted of him. "It is enough to send the notice to the place where the information received reasonably requires him to send it. If the place it reaches is the wrong one, it is not his (the holder's) fault," is the language of the United States Supreme Court.[22] An inquiry of the officers of the bank where the note was discounted is sufficient, if there be no others near likely to know the indorser's residence, when seeking to send him notice.[23] And so inquiry of a person who was well ac-

19. Bateman v. Joseph, 2 Campb. 463, 12 East, 433, Lord Ellenborough; Garvier v. Downie, 33 Cal. 176.

20. Martin v. Grabinsky, 38 Mo. App. 359; Smith v. Ojerholm, 18 Tex. Civ. App. 111, 44 S. W. 41; Waring v. Betts, 90 Va. 46.

21. Lambert v. Ghiselin, 9 How. 452. In this case inquiry was made of a person trading at a particular place, who said that the indorser lived in the same place with him. Held sufficient. It was held, also, that if due diligence were used in sending notice, and it turned out to have been sent to the wrong place, it was not necessary for the holder on ascertaining the fact to send another to the right place. In Bank of Utica v. Bender, 21 Wend. 643, inquiry of the drawer as to residence of his accommodation indorser, and acting on the information given, was held sufficient, although the notice went to the wrong place. So where inquiries were made at the banks of the place where the bill was dated, and the information received acted on, it was likewise held sufficient, though notice went amiss. Chapman v. Lipscombe, 1 Johns. 294. So where inquiry was made of the second indorser (Ransom v. Mack, 2 Hill, 587), and of the maker's son (Sturgis v. Derrick, Wight, 76), it sufficed in each case. Greenwich Bank v. De Groot, 7 Hun, 212; Harris v. Robinson, 4 How. 336. See Demond v. Burnham, 133 Mass. 339, for a case of insufficient inquiry.

22. Harris v. Robinson, 4 How. 336. See also Central Nat. Bank v. Adams, 11 S. C. 452.

23. Harris v. Robinson, 4 How. 336. McLean, J., dissenting, on the ground that notary should have inquired of the holder, and saying: "It is a new principle in the law of agency, that the knowledge of the principal shall not

quainted with the residence of the defendant, who hunted in the neighborhood, and from whom the notary usually obtained information, and notice sent accordingly, was deemed sufficient to charge the indorser, although there was in fact no post-office at the place of the address given, but one near to which it was the duty of the postal agents to send letters so addressed.[24] But an inquiry at the bank where the paper was deposited for collection, and consulting a directory, would not alone be sufficient.[25] Where the names of parties entitled to notice are illegible it has been held that the notary must make a reasonable effort to ascertain who they are; in default thereof the protest will not be available against such parties.[26]

In a New York case, Daniels, J., said:[27] "Both the rule of the commercial law and of the statute, requires that the holder shall obtain the information which diligent inquiry can secure, concerning the residence of the party to be charged by the service of notice. And that is not shown by merely consulting the directory, when other sources of accurate information may be within the convenient reach of the person whose duty it may be to secure it, through which it can be obtained." Acting on information received from the maker of a note, after consulting the directory, would be sufficient, although a wrong address were given,[28] and it has been held that inquiry after protest of employee of the party from whom the note was received, as to indorser's address, was insufficient.[29]

§ 1116. Inquiry should be made of parties to the instrument.— In seeking the acceptor or maker to make presentment of the bill or note, due diligence would necessitate an inquiry of the in-

affect him, provided he can employ an agent who has no knowledge on the subject." The particular point decided in this case has been dissented from. See Fitler v. Morris, 6 Whart. 406.

24. Central Nat. Bank v. Adams, 11 S. C. 452.

25. Packard v. Lyon, 5 Duer, 82. See Gilchrist v. Downell, 53 Mo. 691; Sweet v. Woodin, 72 Mich. 395; Sweet v. Powers, 40 N. W. 471; Bacon v. Hanna, 137 N. Y. 379, 33 N. E. 303; Cuming v. Roderick, 28 App. Div. 253, 50 N. Y. Supp. 1053.

26. McGeorge v. Chapman, 45 N. J. L. 395; *ante*, § 1042.

27. Greenwich Bank v. De Groot, 7 Hun, 213 (1876). To same effect, see Baer v. Leppert, 12 Hun, 516; University Press v. Williams, 48 App. Div. 188, 62 N. Y. Supp. 986, citing text.

28. Gawtry v. Doane, 51 N. Y. 92.

29. Hart v. McClellan, 80 Me. 95.

dorser or other party to the instrument, when such party can be conveniently found, before dishonoring it by protest for nonpayment, it being presumed from the relations of the parties that they would be likely to know the whereabouts of each other.[30] And for the same reasons, in seeking to ascertain the whereabouts of the indorser or drawer in order to communicate notice, inquiries should be made of the maker or acceptor.[31]

It is desirable that this rule should be strictly observed, as well for the sake of uniformity as for the reason that it secures diligence. There may be exceptions to its application, but as a rule it is worthy of application. The holder should not fail to communicate any knowledge he may have as to the residence or place of business of the party to whom the notary is to make presentment or give notice, and if he does not do so he will be bound by any consequent mistake made by the notary, and the drawer or indorser will be discharged.[32] And the holder will always be presumed to know the residence or place of business of his immediate indorser.[33]

§ 1117. When there is more than one indorser, and he cannot give the desired information as to the whereabouts of maker or acceptor, the inquiry should be continued to the other indorsers.[34]

30. Wheeler v. Field, 6 Metc. (Mass.) 290; Grafton Bank v. Cox, 13 Gray, 505; Porter v. Judson, 1 Gray, 175.

31. Whitridge v. Rider, 22 Md. 558; Weakly v. Bell, 9 Watts, 273; Waters v. Brown, 15 Md. 285; Earnest v. Taylor, 25 Tex. (Supp.) 37; Harrison v. Robinson, 4 How. 336; University Press Co. v. Williams, 48 App. Div. 188, 62 N. Y. Supp. 986, citing text.

32. Smith v. Fisher, 24 Pa. St. 222; Haly v. Brown, 5 Pa. St. 178; Fitler v. Morris, 6 Whart. 406; Lawrence v. Miller, 16 N. Y. 235; Aldine Mfg. Co. v. Warner, 96 Ga. 370, 23 S. E. 404, quoting and approving text.

33. Lawrence v. Miller, *supra*.

34. Hill v. Varrell, 2 Greenl. 233; Gilchrist v. Donnell, 53 Mo. 591. In this case a notary public not knowing the residence of an indorser, on the day of protest made inquiry at the bank of St. Louis, where the note was payable, and at the place of business of another indorser, and examined the city directory to ascertain the residence, but without success. He thereupon placed the notice in the city post-office. The evidence showed that other indorsers could have given the desired information, and that one of them lived in East St. Louis, immediately across the river. Held, that it was the duty of the notary to inquire at least of all the parties to the note, if accessible; and that he might have prosecuted his inquiries for that purpose for several days; and there was no search made, such as the law requires, and that putting the notice in the post-office under the circumstances amounted to nothing. Wheeler v. Field, 6 Metc. (Mass.) 290. In this case the notary inquired at the office of the third indorser the whereabouts of the maker and the other

There may be exceptions to the rule, however. As, for instance, when the maker or acceptor has left the State;[35] and it would not, we think, be necessary to pursue the inquiry of the maker, indorser, or other party, if, from previous answers of parties likely to know, the holder had received any information sufficiently reliable. Where the notary, desiring to give notice, finding the indorser's house closed, inquired of the nearest resident, and was told that he was out of town on a visit, for how long informant did not know, it was held that further inquiry was unnecessary.[36] But it would be advisable in all cases not to leave room for such questions to be raised.

§ **1118. When place of business of acceptor or maker is closed.**— If the doors of the business office of the acceptor or maker are closed, and there be no one there to answer the demand after repeated calls, it has been held by high authority that the bill or note may be protested without making further inquiries; for he is bound to have a suitable person there to answer inquiries and pay

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indorsers, and was told that the third indorser was out, but that a person living near by could give the desired information. This person on being asked did not know where the parties lived. The notary then protested the note; and it was held that the third indorser was discharged, Wilde, J., saying: "It cannot be doubted that if inquiries had been made of the payee or the other indorsers, the maker's place of residence might have been ascertained." [But in England inquiry of the last and next to last indorser, as to the whereabouts of the first indorser, was held sufficient. Browning v. Kinnear, Gow. 81; Chitty on Bills [*453].] Aldine Mfg. Co. v. Warner, 96 Ga. 370, 23 S. E. 404, quoting and approving text.

35. In Grafton Bank v. Cox, 13 Gray, 505, Merrick, J., said: "If the maker had at the maturity of the note resided in Boston, or in the State, or at any place to which the holder would have been bound to resort to demand payment of him, and there was reason to suppose that the indorser had knowledge of such residence, the omission to inquire of him concerning it would have been a failure to use diligence, and would have had the effect to discharge the indorser from his liability." University Press v. Williams, 48 App. Div. 188, 62 N. Y. Supp. 986, citing text.

36. Williams v. Bank of the United States, 2 Pet. 100. In 1 Am. Lead. Cas. 405, it is said: "The holder may rely upon information derived from the agent of the indorser to be affected, or from the drawer of an accommodation bill or maker of an accommodation note, indorsed and discounted for his benefit, or from his agent, or from a subsequent indorser who professes to know and is interested to speak truly; but not on the statements of mere strangers having no connection with the parties, and no probable knowledge of them, unless it appear that no better information can be had."

his bills and notes, if there demanded.[37] And in the case of a bill accepted by a firm, in such a case it would not be necessary to call individually upon one of the partners who has a residence in the city, or make any further inquiries for the acceptors than the repeated calls at their office.[38] It would be safer, however, to make some further effort to find the payor when the doors are found closed, as the authorities are not uniform on this question.[39] If

37. Sulzbacher v. Bank of Charleston, 86 Tenn. 201, approving the text; Baumgarden v. Reeves, 35 Pa. St. 250, Thompson, J., saying: "Where the presentation and demand has been attempted to be made at the maker's place of business, and there is no one to answer, and there is no proof that the party had any other place of business, or had removed, the authorities estimate this as equivalent to actual presentation and demand. * * * A different case might be presented if the proof was that the call was at the residence of the maker and his house was shut up." See also Berge v. Abbott, 83 Pa. St. 159; 1 Parsons on Notes and Bills, 457; Story on Bills, § 352; Story on Notes, § 235; Bynum v. Apperson, 9 Heisk. 625. Placing notice in post-office addressed to indorser is sufficient after inquiry at place of business, during business hours, and finding it closed. John v. City Nat. Bank, 62 Ala. 529; Waring v. Betts, 90 Va. 46, 17 S. E. 739.

38. Watson v. Templeton, 11 La. Ann. 137; Wiseman v. Chiapella, 23 How. 368, Wayne, J., saying: "All merchants register their acceptances in a bill-book. It cannot be presumed that they will be unmindful of the days when they are matured. Should their counting-rooms be closed on such days, the law will presume that it has been done intentionally to avoid payment, and, on that account, that further inquiries need not be made for them before a protest can be made for nonpayment. Cases can be found, and many of them, in which further inquiries than a call at the place of business of a merchant acceptor has been deemed proper, and in which such inquiries, not having been made, has been declared to be a want of due diligence in making a demand for payment; but the rulings in such cases will be found to have been made on account of some peculiar facts in them which do not exist in this case. And in the same class of cases it has been ruled that the protest should contain a declaration by the notary that his call to present a bill for payment had been made in the business hours of the day; but in no case has the latter ever been presumed in favor of an acceptor whose place of business has been so closed that a demand for payment could not be made there upon himself, or upon some one left there to attend to his business." Shed v. Brett, 1 Pick. 413, the case of a note in which no place of payment was specified. But see Granite Bank v. Ayres, 16 Pick. 394.

39. Collins v. Butler, 2 Stra. 1087; 1 Parsons on Notes and Bills, 457, note *y*; Story on Bills, § 352; Ellis v. Commercial Bank, 7 How. (Miss.) 294. In Otto v. Belden, 28 La. 302, suit was brought against the indorser of a note who resided in the city. The court said: "The certificate of the notary is, that he went several times to the office of the drawer (maker) to demand payment thereof, and that he found the doors closed, and no one in or about the premises of whom the demand could be made. No demand was made of

the acceptor's or maker's place of business has been permanently closed, and he has a domicile in the city or town, presentment should be made there.[40] This ruling intimates, as we think, the true distinction to be taken. If the place of business be permanently closed, it would be right to seek the payor at his domicile in the same place, if he have one, as that would be the place where he would be most likely found. But as long as he has a place of business, it is his duty to keep some one there to respond to business demands. That remains the place where he would be naturally and properly sought, and when he closes his doors, it is presumable that he declines to meet the usual business engagements.

§ **1119. When place of payment is closed.**— If the holder, on the day of maturity, finds the bank or other place of payment closed, he is not bound to make any further demand to charge either drawer [41] or indorser.[42] If the paper is payable at a certain bank that has ceased to exist, or at the counting-room of a firm which has dissolved before its maturity, it will certainly be sufficient to make presentment to the bank which has succeeded the former institution, if such there be,[43] or at the counting-room of the succeeding firm, if such there be.[44] Where a note was payable at

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the maker. Therefore the indorser is discharged." See also Story on Notes, § 238.

40. Granite Bank v. Ayres, 16 Pick. 392; Talbot v. National Bank, 129 Mass. 67. See *ante*, § 637.

41. Hine v. Allely, 4 B. & Ad. 624; Central Bank v. Allen, 16 Me. 41; Apperson v. Bynum, 5 Coldw. 349; Rogers v. Langford, 1 Cromp. & M. 637; Sands v. Clarke, 19 L. J. C. P. 84; Edwards on Bills, 498. See Howe v. Bowes, 16 East, 112, 5 Taunt. 30; Lane v. Bank of West Tennessee, 9 Heisk. 419; Erwin v. Adams, 2 La. 318.

42. De Wolf v. Murray, 2 Sandf. 166; Derg v. Abbott, 83 Pa. St. 158; Faulkner v. Faulkner, 73 Mo. 336, citing the text.

43. Central Bank v. Allen, 16 Me. 41; Roberts v. Mason, 1 Ala. 373; Bynum v. Apperson, 9 Heisk. 637; Hutchinson v. Crutcher, 98 Tenn. 421, 39 S. W. 725. In this case, note in question, by its terms, was payable at the Commercial Nat. Bank,— before maturity of the note, comptroller of currency under authority of law, appointed a receiver of said bank, and books and papers belonging to the insolvent bank were removed to another office in same city. At the time of the maturity of the note, Merchants' Bank was occupying old banking office of the Commercial Bank and the receiver of the last-named bank still occupied his separate office as above stated. Held, that the note must be presented to the receiver of the Commercial Nat. Bank, in order to hold indorser.

44. Sanderson v. Oakey, 14 La. 373.

" the Bank of the U. S. at Mobile," and before its maturity that bank had been sold out to the " Bank of Mobile," and ceased to have a place of business in Mobile, it was held that presentment at the Bank of Mobile was sufficient.[45] The like rule prevails as to notice. Where the holder, on the day of maturity, found the indorser's dwelling-house shut up, the doors locked, and the family out of town, as he learned from the next neighbor, on a visit of unknown duration, it was held that due diligence had been exercised to give notice, and the indorser was liable.[46] So where the cashier found the drawer's counting-room closed, and no one there to answer, it was held sufficient.[47]

§ **1120. Inability to find the maker or acceptor** does not excuse want of notice to drawer or indorser;[48] but inability to find the drawer or indorser, or ascertain his whereabouts, after exercising due diligence, does excuse want of notice, because it is then impossible.[49] But the holder must continue his inquiries from day to day, and give notice as soon as he does ascertain the party's whereabouts — the excuse being coextensive only with the necessary delay; and the impediment being only temporary, the duty revives with its cessation.[50]

Delays of one day,[51] of three days,[52] of nine days,[53] of over two months,[54] of four months,[55] have, under the particular circumstances, been excused.

The imprisonment of the party is no excuse for want of demand, protest, or notice.[56]

§ **1121. Extent of inquiry needful.**— When inquiry is among the public generally, it should not be abandoned until all prospect of results disappears Where inquiry was made by the notary in a place of persons at the hotel barroom, on the street, and at

45. Roberts v. Mason, 1 Ala. 373.

46. Williams v. Bank of the United States, 2 Pet. 96.

47. Crosse v. Smith, 1 Maule & S. 545. See *ante*, § 1016.

48. 1 Parsons on Notes and Bills, 527.

49. 1 Parsons on Notes and Bills, 527.

50. See *ante*, chapter XXX.

51. Browning v. Kinnear, Gow. 81.

52. Bateman v. Joseph, 2 Campb. 461.

53. Baldwin v. Richardson, 1 B. & C. 245.

54. Firth v. Thrush, 8 B. & C. 387.

55. Sturgis v. Derrick, Wight, 76. See 1 Parsons on Notes and Bills, 527, note *k*.

56. Story on Bills, § 318.

the post-office, it was held not sufficient, and the court said: "If he had been told by some credible person who would be likely to know the fact, he might have acted upon that information without pushing his inquiries further. But until some one is found who professes to be able to give the required information, it will not do to stop short of a thorough inquiry at places of public resort, and among such persons as would be most likely to know the residence of the indorser." [57] If the business men of a place give distinct information that the party sought resides at a certain other place, such information may be acted upon with safety, though erroneous.[58] "Ordinary diligence in a case like this can mean no more than that the inquiry shall be pursued until it is satisfactorily answered." [59]

§ **1122. If the party to be notified is traveling, or is absent from home** for any reason, and his present address is known to the holder, or if his absence from home is known, and the holder has any means of learning his address, or of ascertaining whom he has left behind to attend to his business, it would probably be his duty to send notice accordingly.[60] But if a party leaves home without taking the usual and proper precautions to facilitate sending business communications to him, undoubtedly this is his fault, and he can relieve himself from no responsibility by such fault, and will be held to all parties as if duly notified, provided due diligence be used.[61]

§ **1123.** If after due diligence neither the maker nor his usual place of residence or business can be found, presentment to him will of necessity be excused, and the indorser held liable without it. Thus, where the maker of a note is a sailor who has no established place of abode, and is at sea when the note matures, proof of these facts will constitute excuse for nonpresentment.[62] But if he has a place of residence where his family are living when the note matures, it will be necessary to present it there.[63]

And so if he has any known domicile in the State.[64]

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57. Spencer v. Bank of Salina, 3 Hill, 520. See Peet v. Zanders, 6 La. Ann. 364.

58. Brighton Market Bank v. Philbrick, 40 N. H. 506.

59. Bank of Utica v. Bender, 21 Wend. 643, Bronson, J.; *ante*, § 1117.

60. 1 Parsons on Notes and Bills, 493.

61. 1 Parsons on Notes and Bills, 493.

62. Moore v. Coffield, 1 Dev. 247; Taylor v. Snyder, 2 Den. 145.

63. Whittier v. Graffam, 3 Greenl. 82; Dennie v. Walker, 7 N. H. 199.

64. Glaser v. Rounds, 16 R. I. 236, 14 Atl. 863.

SECTION III.

RECEIVING THE BILL OR NOTE TOO LATE AS EXCUSE FOR WANT OF PRESENTMENT AND NOTICE.

§ **1124.** In the *third* place, where the payee, or subsequent indorsee, does not transfer and indorse the bill or note until so near its maturity that it is then impracticable on account of the distance from, or inaccessibility to, the place where the maker or acceptor has his place of business or residence, or where the bill or note is payable, the payee, or other indorser so transferring it, will be presumed to have waived the taking of these steps which they must have known were impossible.[65] This excuse, however, will only avail as between the immediate parties who have transferred and received the instrument at so late a period; for as to the previous parties who transferred it long enough before maturity to leave adequate time for its due presentment, they have a right to insist on the strict performance of their obligations by those who are subsequent holders, and it is the folly of such holders to take the instrument so late that they cannot hold all the parties liable upon it.[66] This doctrine is favored by the later text-writers, and seems entirely sound, and though Chitty states a different one, it does not seem to be sustained by the case he cites to its full extent.[67]

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65. 1 Parsons on Notes and Bills, 456; Story on Bills, § 326; Story on Notes, §§ 203, 265. (But all of the American cases cited by Story in his note do not enunciate the doctrine.) The broad doctrine is stated in Freeman v. Boynton, 7 Mass. 483, and some early cases, that distance is in itself an excuse for delay, and that the holder may wait for the maker to come and pay. See Haddock v. Murray, 1 N. H. 140; Barker v. Barker, 6 Pick. 80. But they find no favor in the latter authorities.

66. Ibid.; Bayley on Bills, chapter VII, section I, p. 149; Story on Notes, § 265; Mason v. Pritchard, 9 Heisk. 798.

67. In Anderton v. Beck, 16 East, 248, it appeared that, on December 26th, plaintiff received in Yorkshire a bill on London, payable there the 28th. He kept it till the 29th, and then sent it to the Lincoln Bank, which forwarded it to London without delay, and it was presented for payment on January 2d. The court decided that the holder had been guilty of laches in keeping the bill from the 26th to the 29th, and had lost his remedy against drawer and indorser. In Chitty on Bills (13th Am. ed.) [*389], 440, it is said: "But the circumstance of the holder having received a bill very near the time of its becoming due constitutes no excuse for a neglect to present it for payment at maturity, for he might renounce it if he did not choose to undertake that duty, and send the bill back to the party from whom he received it; but if he

SECTION IV.

SICKNESS OF OR ACCIDENT TO THE HOLDER.

§ **1125**. In the *fourth* place, when sudden illness or death of or accident to the holder or his agent prevents the presentment of the bill or note in due season, or the communication of notice, the delay is excused, provided that presentment is made and notice given as promptly afterward as the circumstances reasonably permit.[68] This doctrine rests upon the same principle as that which excuses want of punctuality when overwhelming calamities or accidents of a general nature prevent. Pothier states that where the holder transmits a bill to a distant correspondent for presentment and payment, and the latter dies suddenly on the eve of the time when the bill ought to be paid or protested for dishonor, it will be sufficient if the presentment is made within a reasonable time after the holder is informed of the accident, and is enabled to give orders to receive the money. And he puts the sudden illness of the holder or his agent on the same footing.[69] It is said by Mr. Chitty that "it has been considered that the detention of the bill, by contrary winds, or the holder having been robbed of the bill, or the like, would afford an adequate excuse, provided he present it as soon afterward as he is able."[70] He adds, however: "But a notice of the reason why the bill itself cannot be produced should be given; and a demand of payment should, if possible, be made on the very day the instrument falls due; and if it be a foreign bill, it should be duly protested, in case the drawee should refuse payment." In a subsequent

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keep it, he is bound to use reasonable and due diligence in presenting it. * * * But it has been considered in France, that if an indorser himself transfers a bill so late to the holder as to render it impracticable to present it precisely at maturity, he cannot take advantage of a delay in presentment so occasioned by himself, though the prior indorser and the drawer may." See also Thompson on Bills (Wilson's ed.), 297.

68. Story on Bills, § 308; Chitty on Bills (13th Am. ed.) [*330, 451, 491], 370, 509, 556; Thompson on Bills (Wilson's ed.), 280, 368; 1 Parsons on Notes and Bills, 267; Edwards on Bills, 649; Duggan v. King, Rice, 239; White v. Stoddard, 11 Gray, 258; Aymar v. Beers, 7 Cow. 705; Lord Kenyon, C. J., in Hilton v. Shepherd, 6 East, 16; Chitty, Jr., on Bills, 710. See *ante*, chapter XVII, § 478, vol. I.

69. Pothier De Change, note 144; Chitty on Bills (13th Am. ed), 509, note *a;* Story on Bills, § 309.

70. Chitty on Bills (13th Am. ed.), [*389], 439.

portion of his treatise, he places the circumstance of the robbery of the bill upon the same footing as its loss or destruction, and as not excusing delay in demand or notice.[71] And we cannot see that the robbery is distinguishable from the loss or destruction of a bill or note, in which event demand should be made upon a copy, and notice given accordingly.

§ **1126.** There seems to be no dissent to the opinion that the sudden illness or death of the holder or his agent is a sufficient excuse for delay. Where an agent, intrusted with a note to collect, died four days before its maturity, after a month's sickness, and the note was discovered by his executrix a month after his death, in a desk where it was locked up, and he immediately caused presentment and notice, the indorser was held liable.[72] And when the holder himself was dead at the time the note matured, and there was no presentment or notice, there being no personal representative to act in the premises, it was held that, as the proper steps were taken as to presentment and notice within a reasonable time after a representative was appointed, the indorser was charged.[73]

§ **1127.** The illness, in order to constitute a sufficient excuse, must be that of the holder or his agent, and of such a character as to prevent due presentment and notice by the exercise of due diligence. And where an indorser was called from home, in consequence of the dangerous illness of his wife, and left his house in care of a lad, without authority to open letters, it was held that he had lost recourse against his prior indorsers by the consequent delay in giving notice.[74] He should have left some one in charge with authority to open letters.

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71. Chitty on Bills (13th Am. ed.) [*491], 556.

72. Duggan v. King, Rice, 239.

73. White v. Stoddard, 11 Gray, 258; Story on Bills, § 365.

74. Turner v. Leach, Hilary Term, 1818; Chitty on Bills (13th Am. ed.) [*452], 509; 1 Parsons on Notes and Bills, 532; Thompson on Bills (Wilson's ed.), 368.

CHAPTER XXXIV.

SPECIAL CIRCUMSTANCES OF EXCUSE FOR WANT OF PRESENTMENT, PROTEST, AND NOTICE ARISING FROM THE CONDUCT OF THE PARTY.

SECTION I.

WHEN PARTY HAS RECEIVED MEANS TO TAKE UP THE BILL OR NOTE.

§ **1128.** In the *first* place, the receiving by the drawer or indorser of money from the acceptor, maker, or other party for whose benefit the bill or note was made, for the avowed purpose of taking up the bill or note at its maturity, dispenses as to such drawer or indorser with the necessity of a presentment to the acceptor or maker, for the obvious reason that the indorser becomes himself the person who should meet it. And so, receiving any other property, with the agreement that he shall apply its proceeds to paying the bill or note at its maturity, has the same effect.[1]

The indorser in such cases has no remedy over against any one. His arrangement with his principal substitutes him in that principal's place; and it would be a fraud for him to throw back upon him the burden which he had assumed when provided with the means to bear it.

These reasons apply with equal force to notice; and that, as well as the demand, under such circumstances, is dispensed with.[2]

SECTION II.

WHEN PARTY HAS RECEIVED SECURITIES OUT OF WHICH TO PROVIDE FOR PAYMENT.

§ **1129.** In the *second* place, the receiving of security or indemnity from the maker, or other party for whose benefit the bill or note was executed by the indorser, has been often held

1. Ray v. Smith, 17 Wall. 418 (see *post*, § 1143); Wright v. Andrews, 70 Me. 86; Bond v. Farnham, 5 Mass. 170 (demand and notice held waived); Cornay v. Da Costa, 1 Esp. 302; Watkins v. Crouch, 5 Leigh, 522; May v. Boisseau, 8 Leigh, 185, 196; Story on Notes, § 281; Bayley on Bills, chapter VII, section II, p. 202.

2. Ibid.; Story on Notes, § 357; Story on Bills, §§ 316, 374; Wright v. Andrews, 70 Me. 86.

to operate as a dispensation of demand and notice as to him. But there is great contrariety in opinion and decision on this subject, and many subtle refinements have been introduced in contradistinguishing particular cases. When the acceptance of the security is accompanied by any express agreement that the indorser is himself to provide for the payment of the bill or note, the dispensation is clear, whether he undertakes to do so out of the security, or to look to that for reimbursement. And so it is clear, also, when an agreement to this effect is implied by all the circumstances of the case. But in the absence of proof of any express agreement, the question whether or not demand and notice, or either, have been dispensed with, has been thought by some to turn on the intention of the parties, and by others on the effect of taking the security; and the time it was taken, its character and sufficiency, the form of the assignment, and whether or not it comprised all of the maker's property, have been considered as material elements in determining it.[3]

§ 1130. **(1) Assignment of all the maker's property.**— The doctrine is laid down by many authorities that the acceptance of an assignment of all the maker's property, by the indorser, to secure him against his liability, is a waiver of all right to require demand, protest, and notice,[4] even when it is insufficient for that purpose.[5] Under such circumstances, it is urged, the indorser prevents the holder from obtaining payment of the maker, by taking into his own hands all his available means; and he must be considered as holding out that he has assumed the responsibility of payment upon himself.[6] But it should be remembered, that if the indorser's liability is not fixed, the consideration of the assignment, so far as he is concerned, fails. He cannot then exercise any right of lien upon it, and it reverts at once to the maker, and is liable for his debts. The indorser is precisely in

3. See Saunderson v. Saunderson, 20 Fla. 307, citing the text.

4. Watkins v. Crouch, 5 Leigh, 522, *obiter*, Tucker, P.; Duvall v. Farmers' Bank, 9 Gill & J. 31; May v. Boisseau, 8 Leigh, 213, *obiter*, Tucker, P.; Kramer v. Sandford, 4 Watts & S. 328, Gibson, C. J.; Swan v. Hodges, 3 Head, 251, held, must be all or enough; Edwards on Bills, 637; 1 Parsons on Notes and Bills, 560, but see 571.

5. Watkins v. Crouch, 5 Leigh, 522, Tucker, P. (as to notice only).

6. Bank of South Carolina v. Myers, 1 Bailey, 412, the indorser had taken from the maker a confession of judgment which covered his whole estate; held, a waiver of demand and notice. See the remarks of the American editor of Chalmers on Bills and Notes. Benjamin's Chalmers' Digest, 197.

the same situation as if no assignment had been taken,[7] and so is the maker. Besides, even where the whole property has been assigned, the maker may have new accessions,[8] or he may be successful in negotiations, which render him perfectly ready to pay. These circumstances are worthy of consideration,[9] but they are not the controlling reasons for requiring demand and notice.[10]

§ 1131. A sufficient answer to the argument, that the indorser ought to be bound in such cases, may be given in the observation, that the holder loses nothing that he can subject to the payment of the debt, and any arrangement merely for the indorser's indemnity is a matter entirely between him and his principal. The case of Bond v. Farnham, 5 Mass. 170, has often been quoted as authority for the doctrine that the assignment of all the maker's property, even when insufficient, is a waiver of notice,[11] and its influence has been sensibly felt in relaxing the requirement of demand and notice in the United States. But there were particular

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7. In Dufour v. Morse, 9 La. 333, Martin, J., said: "Here the indorser received nothing but a mortgage for his indemnification. He might well expect that the duty and interest of the maker would prompt him to prevent the protest of the note. He knew that the only obligation he had incurred toward the holder of the note, was to pay it in case the maker did not, and after being duly and legally notified of the failure and neglect of the maker to take it up; toward the latter the indorser incurred no obligation. The mortgage was a useless paper in the hands of the defendants. The inchoate and conditional obligation which resulted for the indorsement never became perfect and absolute. The indorser, nor those who represent him in this case, have not suffered, nor can they now suffer, any injury for the indemnification of which they could resort to the mortgage. The defendants are precisely in the same situation as they would be if no mortgage had been taken."

8. Watkins v. Crouch, 5 Leigh, 522, Cabell, J.: "The indorser's right to notice from the holder depends on another principle, namely, his remedy over against the maker. And this principle applies as forcibly to a case where a part only of a note remains so unpaid or unprovided for. Again, the assignment on this case was made about a month before the note was to fall due. It is impossible for us to say that no accession was made, in that interval, to the maker's means of payment; and, of course, we cannot say that notice to the indorser would have been unavailing."

9. 1 Parsons on Notes and Bills, 567.

10. Kramer v. Sandford, 4 Watts & S. 828, Gibson, C. J.: "The chance of the maker's acquiring other property to which he might resort, if the funds in his hands should fall short, is so inconsiderable as to fall within the maxim *de minimis*."

11. Barton v. Baker, 1 Serg. & R. 334; Watkins v. Crouch, 5 Leigh, 522, Tucker, P.

features in that case which have not been sufficiently distinguished, and like the case of Cornay v. Da Costa, 1 Esp. 303, it has been made the pillar of a doctrine which it by no means upholds. The maker had assigned all his property to the indorser, who took it, as Chief Justice Parsons said, "for the express purpose of meeting this and his other indorsements," and it was held that he could not afterward "insist on a fruitless demand upon the maker, or on a useless notice to himself to avoid payment of demands, which, on receiving security, he has undertaken to pay." Thus understood, the principle decided conforms to the doctrine of the text, and though it has been supposed that the case has been overruled by more recent decisions in Massachusetts, there seems to us no conflict between them.[12]

The case of Creamer v. Perry[13] meets, as it seems to us, fully the argument that an assignment of all the maker's property to a trustee accepted by the indorser waives demand and notice, the true construction of the act being, as said by Chief Justice Shaw, "to secure and indemnify him against his legal liabilities. And as his liability as indorser of the note was conditional, and depended upon his having seasonable notice of its dishonor, his claim upon the property depended upon the like contingency." Even where there is an assignment or mortgage directly to the indorser himself, unless it were in a form to show that it was to enable him to take up the note, and he assumed to do so, it is now held in Massachusetts that it would not amount to a waiver of demand or notice,[14] and the strict rule is of late finding favor.[15]

12. 1 Parsons on Notes and Bills, 560. The learned author thinks it irreconcilable with Creamer v. Perry, 17 Pick. 332; but it seems to us otherwise.

13. 17 Pick. 332.

14. Haskell v. Boardman, 8 Allen, 39. The maker executed mortgages of all his real and personal estate to the indorsers, the condition being that the grantor should "fulfil and perform all contracts which the said grantees have heretofore signed, indorsed, or executed for the said grantor, and which said grantees shall hereafter sign, indorse, or execute for said grantor as indorsers,

15. In Wilson v. Senier, 14 Wis. 380, the court said: "Nothing short of a general assignment and actual transfer of all the maker's effects, or the receipt of money or property by him for the purpose of satisfying the debt, and with an understanding that he is to do so — in which case he changes place with the maker and becomes himself the principal — has ever been held to create such dispensation, and the disposition of the court has been to restrict rather than to enlarge the doctrine." Moses v. Ela, 43 N. H. 560; Woodman v. Eastman, 10 N. H. 367.

The opinion of Chief Justice Nelson in an often-quoted case might seem to sustain a contrary doctrine, and has been so considered; but it will be seen that it does not necessarily require that construction.[16]

§ **1132.** Where there was an assignment in trust to the indorser himself as trustee, or cotrustee, of all the maker's property, upon trust, to dispose of it, and pay the maker's debts in a certain order, first satisfying the notes and debts on which the indorser and a certain firm were liable as sureties or indorsers, the acceptance of it was held a waiver of demand and notice; and under such circumstances it might be reasonably inferred that the indorser assumed the payment upon himself.[17]

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guarantors, sureties, or otherwise, and save the said grantees harmless from all costs and expenses in consequence thereof." There was due demand, but notice was not received in due season. The indorsers were held discharged, Bigelow, C. J., saying: "There was no evidence offered at the trial on which a waiver of notice by the indorsers could be legally found. The mortgage relied on to show such waiver was not made to enable the indorsers to pay the notes, nor were they authorized to appropriate the property thereby conveyed to such purpose. The defect of the conveyances was only to secure the defendants against the legal liabilities assumed by them in behalf or on account of the promisor. Their liability as indorsers was conditional only, dependent on the contingency of their having due and seasonable notice of the dishonor of the notes. Their claim on the property for indemnity was dependent on the like contingency. On this point the case is within Creamer v. Perry, 17 Pick. 332."

16. In Spencer v. Harvey, 17 Wend. 489, Nelson, C. J., said: "Notice was supposed to have been dispensed with, on the ground that the indorser had taken indemnity of the makers by means of a judgment upon which execution has been issued; but it is extremely uncertain if anything will be realized out of the property. The security is already in litigation in chancery. The mere precaution by an indorser of taking security from his principal, has never been adjudged to operate as a dispensation of a regular demand and notice. It is, no doubt, a common occurrence, yet such effect has never been imputed to it. There must be something more, such as taking into his possession the funds or property of the principal, sufficient for the purpose of meeting the payment of the note; or he must have an assignment of all the property, real and personal, of the makers for that purpose. The notice is dispensed with when funds are received, upon the ground that the object for which it is required to be given, namely, to enable the indorser to obtain indemnity from his principal, has already been attained. Partial or doubtful security falls short of this, and leaves the rule requiring notice in full force."

17. Mechanics' Bank v. Griswold, 7 Wend. 165; Clift v. Rogers, 25 Hun, 41.

§ 1133. **(2) Sufficiency of the security.**— The sufficiency of the security is by many authorities made the criterion of the question whether or not presentment and notice are dispensed with; and the reasoning by which the conclusion is reached by some that full security or indemnity dispenses with these conditions is, that in such cases "it is plain that the indorser can receive no damage from the want of a due presentment," as said by Justice Story in his work on Promissory Notes,[18] and by a number of judges in rendering decisions.[19] Others place the doctrine on the implied assumption of the indorser to pay.[20] If the question of damage determined an indorser's liability, it would be plain that sufficient indemnity fixed it; but when the maker is utterly insolvent, and indeed as well when he remains perfectly solvent, the indorser can in neither case suffer damage by default in demand or notice.

§ 1134. **When the maker or acceptor is insolvent,** he may lose nothing by default in demand and notice. If he is perfectly solvent, and has merely neglected payment, the indorser is indemnified against loss. True, there are contingencies under which he might lose, in the one case, as friends might have assisted the insolvent; and in the other, as misfortune might overtake the solvent. But might not the indemnity depreciate, or be destroyed, or the opportunity to use it be lost? It seems to us

18. Story on Notes, § 281. See also Story on Bills, § 374. No distinction is made between demand and notice in this particular.

19. Watkins v. Crouch, 5 Leigh, 522, Carr, J. (security was insufficient); Marshall v. Mitchell, 35 Me. 221, Welles, J. (*obiter*); Walker v. Walker, 2 Eng. (Ark.) 542, Oldham, J. (presentment and notice held waived); Nelson, C. J. (the security was insufficient); Durham v. Price, 5 Yerg. 300, in which case the court instructed the jury that if the defendant had full indemnity, or promised to pay after maturity, with knowledge of the facts, demand and notice were waived. Barrett v. Charleston Bank, 2 McMullan, 191; Develing v. Ferris, 18 Ohio, 170; Kyle v. Green, 14 Ohio, 495. In Beard v. Westerman, 32 Ohio St. 29, it was held that demand and notice were unnecessary to charge an indorser who at maturity had sufficient property of the maker in his possession held as security against his liability. In Second Nat. Bank v. McGuire, 33 Ohio St. 295, where property was insufficient to pay the note, it was held that the holder was not thereby exonerated from demand and notice. In Smith v. Lounsdale, 6 Oreg. 157, it was held that if indorser had sufficient security before or at maturity, he would be deemed to have waived demand and notice. Stephenson v. Primrose, 8 Port. 155; Spencer v. Harvey, 17 Wend. 489, Nelson, C. J. (the security was insufficient).

20. Watkins v. Crouch, 5 Leigh, 522, Tucker, P.

a total misconception of the obligation of an indorser to place his liability at all upon any question involving the pecuniary circumstances of his principal; or of security to himself, unless in taking the security he has stepped into the principal's shoes. And, indeed, when he has thus stepped into his principal's place, unless there be some privity with the holder in the arrangement, it is rather from his obligation to his principal, which the law transposes to the holder, than from any other consideration, that the holder is permitted to recover against him.

Chancellor Kent,[21] as well as Justice Story, already quoted, has considered ample indemnity a dispensation with demand and notice; but on the other hand, Professor Parsons,[22] and other eminent jurists, have reached the conclusions which we express, and the grounds that these conclusions rest upon seem to us entirely unassailable.

It was well said in a New York case, by Ingraham, J.: "Mere security for the indorsement affords no reason for dispensing with demand. On the contrary, it furnishes a stronger reason why the indorser who holds the security should be informed of the nonpayment. Without notice thereof he might suppose it to have been paid, and in consequence of such neglect have parted with his security." [23] And to the same effect in Connecticut, where the indorser held the goods for which the note was given as security, and there had been laches as to notice, Bissell, J., said: "From the fact that no notice was given, he would have a right to presume that the note was paid by the maker, and might thus be induced to part with his security." [24]

§ **1135. "If the security be to the full amount of the note,** the indorser will be held liable, without notice, for the full payment

21. 3 Kent Comm. 113.

22. 1 Parsons on Notes and Bills, 571. In Kramer v. Sandford, 4 Watts & S. 329, a judgment bond was taken from the maker by the indorser in double the amount of the note, and judgment had been entered, and execution issued, and levied on sufficient personal property to pay the note; but it was held no waiver of demand, protest, or notice, Gibson, C. J., delivering the opinion of the court.

23. Taylor v. French, 4 E. D. Smith, 458. See also Seacord v. Miller, 13 N. Y. 55.

24. Holland v. Turner, 10 Conn. 308. Where the indorser took mortgage to secure the note in suit, and another, from the maker, held no waiver. Woodman v. Eastman, 10 N. H. 359; Smith v. Ojerholm, 18 Tex. Civ. App. 111, 44 S. W. 41.

of the note; if the security be partial, he will be bound *pro tanto*," says Mr. Justice Story in his treatise on Promissory Notes;[25] but he quotes no authority for such a doctrine, and we have not found it so much as intimated by any other writer or jurist. And it seems, on the contrary, to be universally conceded that, unless the security is full, or comprises all the maker's estate, there is no waiver of demand,[26] and, with a single exception,[27] the concession seems equally universal as to notice.[28] But even that exception does not adopt Story's doctrine. And where the sufficiency or the entirety of the assignment is urged as a waiver, proof of such sufficiency, or that it comprises the maker's entire estate, must be given.[29]

§ **1136. Distinction as to demand and notice.** — The opinion has been intimated that an insufficient assignment accepted by the indorser would operate as a waiver of notice, but not of a regular demand. And it is based on the ground that the object of notice is to put the indorser on the alert, which cannot be necessary when he has been warned by the assignment, while the demand is a part of the holder's contract, which he must comply with strictly.[30] But the distinction rests on no well-defined idea. Knowledge and alertness are not notice, and unless the indorser has placed himself in the maker's place, in which event neither demand nor notice would be necessary, he cannot be regarded as waiving any right as an indorser. And it has been so held.[31]

§ **1137.** Some of the cases, while recognizing the principle that the criterion is whether or not the indorser has obligated himself to take up the note, consider that when he has received an

25. Story on Notes, § 357.

26. Burrows v. Hanegan, 1 McLean, 309; Watkins v. Crouch, 5 Leigh, 522; Kyle v. Green, 14 Ohio, 495; Brunson v. Napier, 1 Yerg. 199; Wilson v. Senier, 14 Wis. 380; Holman v. Whiting, 19 Ala. 708; Woodman v. Eastman, 10 N. H. 359. In Brandt v. Mickle, 28 Md. 436, it was held that a transfer of part of the maker's property to the indorser did not dispense with demand and notice although it covered all he had when the note fell due. Spencer v. Harvey, 17 Wend. 489, Nelson, C. J.; Chitty on Bills (13th Am. ed.) [*441], 496; 1 Parsons on Notes and Bills, 569, 570.

27. Watkins v. Crouch, 5 Leigh, 522, Tucker, J.

28. *Ante*, § 1134.

29. Benedict v. Caffe, 5 Duer, 226; Duval v. Farmers' Bank, 9 Gill & J. 31; Marshall v. Mitchell, 34 Me. 227.

30. Watkins v. Crouch, 5 Leigh, 522, Tucker, P.

31. Denny v. Palmer, 5 Ired. 610, Ruffin, C. J.

assignment of the whole estate of the maker,[32] or has received an assignment adequate to meet the note,[33] that he places himself in the maker's shoes, and impliedly assumes its payment. But there have been circumstances connected with the transaction, in some of the cases at least, which strengthened that presumption on the part of the court;[34] and for the reasons already stated, we cannot perceive that the mere assignment of all of the maker's estate, whether it be sufficient or not, in itself creates an implied obligation on the part of the indorser to pay the note.

§ 1138. **(3) When security given at time of indorsement.**— When the security is given at the time the indorser becomes a party to the paper, whether it be in the form of collaterals deposited with him, or of a deed transferring real or personal property to trustees, to indemnify and hold him harmless, it could hardly be reasonably inferred that the indorser intended to dispense with any diligence on the part of the holder either in respect to demanding payment at maturity, or notifying him in case of default. The proper construction, as it seems to us, of the indorser's receiving such security, would be that if he became liable to pay the bill or note, he would resort to it as indemnity, and not to dispose with any of the conditions precedent to the fixing of such liability upon him. If he designed in the outset to be unconditionally bound he would naturally sign as a comaker if it were a note, and as drawee and ac-

32. Barton v. Baker, 1 Serg. & R. 334 (1815). In this case James Brown & Co. were makers of the note, and a few months before it was due, Armat Brown, one of the partners, made an assignment of his whole estate, for the purpose, amongst other things, of indemnifying the indorser against his indorsements on account of James Brown & Co. The sufficiency of the assignment did not appear, nor was it adverted to. Tilghman, C. J., said: "It is confessed that due notice was not given; but the plaintiff contends that, under the circumstances of the case, notice was not necessary. * * * Now, by the taking of this assignment, it is not unreasonable to presume that the defendant took upon himself the payment of the indorsed notes, especially as when he did receive notice (ten days after the note fell due), although he knew and remarked that it was out of time, he did not deny his responsibility, but said that his ability to pay would depend upon the arrival of a vessel. I agree, therefore, with Bond v. Farnham, 5 Mass. 170, where it was held that in such a case the indorser dispenses with notice." Kramer v. Sandford, 4 Watts & S. 328, Gibson, C. J.

33. Watkins v. Crouch, 5 Leigh, 522. In this case the assignment was to a trustee, and, amongst other purposes, to indemnify the indorser to the extent of one-fourth of the note. It was held no waiver of demand.

34. Barton v. Baker, 1 Serg. & R. 334, *supra.*

ceptor if it were a bill, or with express waiver of demand and notice written over his signature; and in becoming an indorser he indicates sufficiently by the very form of his contract that he requires due demand and notice before he will be charged. If demand is not made, or notice not given, we should say that the contingent liability against which he was indemnified had not accrued, and the consideration of the indemnity failing, it would revert to the party who had made it. But these inferences may be all met with proof that it was the agreement of the parties that the indorser should pay the note, and that the security was given either to provide the means of payment or to reimburse him.[35]

§ 1139. (4) When security given after indorsement and before dishonor.— When the security is given after the indorsement, during the currency of the instrument — that is, before its maturity — and nothing but the mere naked fact of its acceptance by the indorser appeared, the inference, as it seems to us, would arise that he became apprehensive that the party who was primarily liable might be unable to meet it, and that to provide for the contingency of having the liability devolved upon him, he had taken the security as indemnity against such liability; but that liability still being contingent upon due demand and notice, the mere fact that the indorser had guarded himself against personal loss, in whole or in part, would still seem to us to create no presumption that he designed to change the nature of his contract, and dispense with the conditions necessary to make his liability absolute. There is no privity with the holder in the subsequent arrangement between the principal and his indorser. The indorser does not change his contract, but only protects himself from loss, and it is going very far to say, that a transaction with one person, of itself affects his contract with a third. There may be circumstances, however, connected with the indorsement, or with the acceptance of security, which indicate an intention of the indorser to dispense with demand and notice; or from which such intention may be so strongly presumed that it would operate as a fraud upon his principal or the holder, to discharge him. These views are borne out by high authority.[36] "The true criterion," as expressed by Chief Justice Gibson, "seems to be the obligation to take up the note."[37]

35. Bond v. Farnum, 5 Mass. 170.

36. Haskell v. Boardman, 8 Allen, 38; Taylor v. French, 4 E. D. Smith, 458; 1 Parsons on Notes and Bills, 571, 572; Kramer v. Sandford, 4 Watts & S. 329.

37. Kramer v. Sandford, 4 Watts & S. 328.

§ 1140. (5) When security is given after dishonor.— As a general rule, it is the settled doctrine that where security is taken after dishonor of the instrument, the drawer or indorser taking it does not thereby waive the right to show any laches of the holder in respect to presentment or notice.[38] In Massachusetts, where the indorser took two assignments, the one before and the other after maturity, and it appeared that neither demand nor notice were in proper time, Shaw, C. J., said: "The second assignment does not affect the question; it does not appear to have been made till several days after the note became due."[39] And it has been said, in New York, that where the indorser takes an assignment after maturity, even supposing himself liable to pay the same, it will not amount to a waiver of the objection to want of due presentment or notice, "since it cannot justly be inferred that he intends, at all events, to make himself liable for the payment of the note, but he takes the security merely contingently, in case of his ultimate liability."[40]

Where, however, it is distinctly shown that the drawer or indorser, taking security after maturity, knew at the time of the holder's laches in respect to presentment or notice, the fact that he took the security would be a circumstance of evidence to show a waiver of the objection, though not conclusive or perhaps even presumptive proof. Such, at least, is the view which seems to us correct. Further, we do not think the law could justly go, but the doctrine of the text, as above stated, is not without dissent.[41]

Taking an assignment of all the maker's property by the indorser to cover his liability to him, after dishonor, does not waive the want of notice, the note not being mentioned in the deed.[42]

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38. Story on Notes, § 278; 1 Parsons on Notes and Bills, 595; First Nat. Bank v. Shreiner, 110 Pa. St. 188; First Nat. Bank v. Hartman, 110 Pa. St. 196.

39. Creamer v. Perry, 17 Pick. 332. To same effect, see May v. Boisseau, 8 Leigh, 164; Tower v. Durell, 9 Mass. 332; Richter v. Selin, 8 Serg. & R. 425.

40. Otsego County Bank v. Warren, 18 Barb. 290.

41. Debuys v. Mollere, 15 Mart. 318. And in 1 Parsons on Notes and Bills, 619, it is said: "There is certainly ground to contend that if an indorser takes security after maturity, this is evidence of demand and notice; for why should a person take these steps to secure himself unless his liability actually existed?" Saunderson v. Saunderson, 20 Fla. 307, approving the text.

42. Walters v. Munroe, 17 Md. 154, Goldsborough, J., saying: "The deed to Funsten" (the trustee) "was executed after the note had fallen due, and the question is, whether such a deed dispenses with proof of notice to the indorser. And we think a sufficient answer is, that this note is nowhere

§ 1141. **(6) Form of assignment and character of security.**— The form in which the security is given may often be an important matter of consideration in determining whether or not the indorser assumed the payment of the note. When the property has been placed directly in his hands, and he has power to convert it immediately into money, slighter circumstances might suffice to complete the proof of such assumption by him, than when it has been conveyed to a trustee.[43]

In the latter case, unless there was plain language to indicate the contrary, the presumption would be strong that the trust was created as an indemnity in the event of liability being fixed; and in the former that presumption would still exist, if nothing but the mere assignment appeared, but it might be much more easily overcome by circumstances.[44]

§ 1142. The character of the security may also have a material bearing on the question. If before maturity the maker placed in the indorser's hands a sufficient sum of money, the latter's intention to assume the payment would be presumed; and if the security were bills, or notes falling due before maturity, or other securities readily made available, slighter circumstances would prove the assumption that if it consisted of real or personal property, which is not so easily convertible into money. And some of the cases

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mentioned or referred to in the deed. But, then, it is said, if the defendant admits he was fully indemnified, that will excuse the want of notice. Whatever effect such an admission might have, if made by a party with full knowledge of the facts which discharge him from liability on the note, it is unnecessary for us to decide. In this case, the declaration of Munroe" (the indorser) "relied on is, 'that he was fully indemnified for all his liabilities for Harrison'" (the maker), "which must be understood to refer to his legal liabilities, and cannot be construed to deprive him of his legal defense in this case, based upon want of notice, without which he was not legally liable."

43. Story on Notes, § 282; Denny v. Palmer, 5 Ired. 610.

44. In May v. Boisseau, 8 Leigh, 195, Brockenburgh, J., said: "It must be observed that there is a great difference between an absolute conveyance and a mere conveyance to a trustee, as an indemnity. In this case the property was not put into the hands of Peter Boisseau to pay off these particular debts, but into the hands of a trustee as an indemnity. It was designed, too, to indemnify not only against these supposed indorsements, but against various other suretyships on which Peter was bound for Edward, and to secure a debt due from Edward to Peter, and a debt and an annuity due from Edward to his mother, Priscilla Boisseau." See also Tucker, P., p. 213, and Cabell, J., p. 204, and Cornay v. Da Costa, 1 Esp. 303.

have intimated that the acceptance of securities readily convertible is in itself an implied assumption to pay the note.[45]

A confession of judgment is *prima facie,* but not conclusive evidence of waiver of laches in respect to demand and notice. "It may be evidence of an acknowledgment of liability, but is not conclusive evidence. It is not a legal presumption. It is capable of being explained and repelled by the circumstances under which it was given." [46]

§ **1143.** Where the money or the security is received to meet a particular indorsement or indorsements, there is no waiver of demand or notice as to any other.[47]

In England it has been held, that where the acceptor told the drawer a few days before maturity that he could not pay the bill, and that the latter must take it up, and gave him a part of the money for that purpose; and the drawer received the money and promised to take it up; nevertheless he might still set up want of due presentment, and the money received as had and received to plaintiff's use.[48] This decision is quoted with apparent approval,[49] but it seems to us unjust.

The fact that the indorser has funds in his hands belonging to the maker, which he is merely authorized to apply to the payment of the note, but which he has not received for that avowed purpose, nor agreed to apply to that purpose, is no waiver of presentment, protest, or notice.[50]

SECTION III.

WHEN MAKER OR ACCEPTOR HAS ABSCONDED.

§ **1144.** In the *third* place, the absconding of the maker or acceptor is a valid excuse.

When the payor of the bill or note has actually absconded between its execution and its maturity, and especially when he is notoriously insolvent, inquiries are unnecessary. Presentment to him personally is of course impossible, and presentment at his last place of residence or business is altogether unnecessary. The mere

45. Dufour v. Morse, 9 La. 333; Kramer v. Sandford, 4 Watts & S. 328.

46. Richter v. Selin, 8 Serg. & R. 425.

47. Prentiss v. Danielson, 5 Conn. 175; Bond v. Farnham, 5 Mass. 170.

48. Baker v. Birch, 3 Campb. 107; Chitty, Jr., on Bills, 848.

49. Chitty on Bills (13th Am. ed.) [*338], 379; 1 Parsons on Notes and Bills, 587.

50. Ray v. Smith, 17 Wall. 416.

fact of absconding is all that it is necessary for the holder to show. This doctrine is well settled in England,[51] and by the current of American authorities;[52] and Massachusetts is perhaps the only State in which a contrary view is taken. The earlier authorities in that State were of the same tenor,[53] but the more recent cases have adopted a more rigid theory, placing the absconding debtor upon the same footing as one merely removing into another jurisdiction.[54] It is to be regretted that there is any departure from a principle so reasonable and so well settled.

Even when he had absconded to another place in the same State or country, the excuse for nonpresentment would be sufficient, unless the holder knew where he was, in which case he should seek him.[55]

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51. Bayley on Bills, chapter VII, section I, p. 196; Anonymous, Ld. Raym. 743. "It is clear," says Chitty on Bills (13th Am. ed.) [*367], 412, "that if the drawee has never lived at the place of address, or has absconded, this circumstance will sufficiently excuse the holder from not making further inquiries after him."

52. In Lehman v. Jones, 1 Watts & S. 126, the court said: "Where indeed the drawer of a note or the drawee of a bill has merely removed from the place of his residence indicated by the bill, it is the business of the holder to inquire for him and ascertain where he is gone, in order that he may follow him; but when he has secretly fled, an application at the place would lead to no information in respect to him; and the law requires nothing which is nugatory." Gillespie v. Hannahan, 4 McCord, 503; Wolfe v. Jewett, 10 La. Ann. 383; Taylor v. Snyder, 3 Den. 145; Duncan v. McCullough, 4 Serg. & R. 480; Bruce v. Lytle, 13 Barb. 163; Ratcliff v. Planters' Bank, 2 Sneed, 425, 455; Hunt v. Maybee, 7 N. Y. 266; Story on Bills, § 351; Hoffman v. Hollingsworth, 10 Ind. App. 353, 37 N. E. 960.

53. Putnam v. Sullivan, 4 Mass. 45; Hale v. Burr, 12 Mass. 85; Shaw v. Reed, 12 Pick. 132; Widgery v. Munroe, 6 Mass. 449. These cases were positive and clear; and in one of them (Hale v. Burr, 12 Mass. 89), it was said: "It is well settled that if the promisor absconded before the day of payment, or has concealed himself, the necessity of a demand is taken away. Due diligence to find him is all that is required in the latter case; and in the case of absconding, even that is not necessary."

54. Pierce v. Cate, 12 Cush. 190 (1853). In this case the doctrine is reversed, the court overruling instructions that "if the maker had absconded, leaving no visible property subject to attachment, no presentment of the note to the maker, or demand at the dwelling-house, or other inquiry for him, was necessary." The contrary doctrine was deemed so well settled, that the question was not discussed. See 1 Parsons on Notes and Bills, 450. A return to the former ruling has been anticipated in Redf. & Big. Lead. Cas. 452; but in Grafton Bank v. Cox, 13 Gray, 504, it has been reiterated.

55. Reid v. Morrison, 2 Watts & S. 401; Duncan v. McCullough, 4 Serg. & R. 480. In Redf. & Big. Lead. Cas. 339, it is said: "If the absconding

But the absconding of the drawee, acceptor, or maker is no excuse for want of notice to the drawer or indorser, who all the more need to be put upon their guard.[56]

When the drawer or indorser has himself absconded, notice should be left at his last place of abode, or left with the person representing his estate;[57] but if he had no fixed place of abode, or it be unknown, and undiscovered after reasonable inquiries, and there be no known representative of his estate, want of notice is altogether excused.[58]

SECTION IV.

WHEN THE MAKER OR ACCEPTOR HAS REMOVED HIS DOMICILE TO ANOTHER STATE OR A FOREIGN COUNTRY.

§ 1145. In the *fourth* place, if between the time a note is made or a bill accepted and its maturity, the maker or acceptor removes from the place at which he resided and transacted business to another State or country, no obligation is imposed upon the holder to go out of his own State in order to make a demand upon him personally, or at his new place of residence or business.

It will be sufficient under such circumstances to make a demand at the payor's last place of residence or business, and when that has been done due diligence requires no more.[59] Whether or not it requires this much is questioned, and it has been held that when the payor has gone into a foreign jurisdiction, no demand whatever is necessary, either upon him personally or at his last place of residence or business, such removal placing him, according to

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is any excuse at all, it should be without reference to the locality of the hiding-place, unless this is within the jurisdiction, and the holder knows where it is."

56. May v. Coffin, 4 Mass. 341; Leonard v. Olson, 99 Iowa, 162, 68 N. W. 677, 61 Am. St. Rep. 230, quoting with approval the text.

57. *Ex parte* Rohde, Mont. & M. 430; 1 Parsons on Notes and Bills, 528.

58. Story on Notes, § 356.

59. McGruder v. Bank of Washington, 9 Wheat. 598; Taylor v. Snyder, 3 Den. 145; Adams v. Leland, 30 N. Y. 309; Foster v. Julien, 24 N. Y. 28; Anderson v. Drake, 14 Johns. 114; Dennie v. Walker, 7 N. H. 199; Gist v. Lybrand, 3 Ohio, 308; Reid v. Morrison, 2 Watts & S. 401; Grafton Bank v. Cox, 13 Gray, 503; Wheeler v. Field, 6 Metc. (Mass.) 290; Central Bank v. Allen, 16 Me. 41; Gillespie v. Hannahan, 4 McCord, 503; Whittier v. Graham, 3 Greenl. 32; Herrick v. Baldwin, 17 Minn. 209; Cromwell v. Hynson, 2 Esp. 211, 3 Kent Comm. 96; Chitty on Bills (13th Am. ed.), 318, 413; Story on Bills, § 451; Leonard v. Olson, 99 Iowa, 162, 61 Am. St. Rep. 230, citing text.

this view, in the same position as if he had absconded.[60] But a mere removal would not warrant the supposition that the payor had not made arrangements to meet his obligations at his previous domicile; and the better opinion is that the holder would not exercise due diligence without presenting the bill or note at his last place of residence or business.[61] It would be sufficient, however, to present it at the last place of business, without inquiry at his last residence, or of the indorser as to his present residence.[62] If he leaves no one at his last place of residence on whom demand can be made, in the place where he last resided, no demand is necessary to charge an indorser.[63]

§ 1146. **When the removal is to another locality within the same State or country,** it is the duty of the holder to seek and demand payment of the promisor, at his new place of residence or business;[64] but when he has crossed the line into another State or country, it matters not how near his new place of residence may be to his former one, the mere fact that he has passed into a foreign jurisdiction is sufficient to excuse nonfulfilment, either upon him personally or at his new place of residence or business.[65]

60. Gist v. Lybrand, 3 Ohio, 307, in which case it is said: "Whether a demand should be made at any other place is not made a point, or adjudicated upon in that case (McGruder v. Bank of Washington). But it seems to us a clear consequence of the decision, that such a demand is unnecessary. The fact of removal commits the indorser, and dispenses with all demand, unless a particular place be appointed for the payment of the note in the note itself." Dennie v. Walker, 7 N. H. 199; Foster v. Julien, 24 N. Y. 28 (Mason, J., dissenting); Eaton v. McMahon, 42 Wis. 487; Whitely v. Allen, 56 Iowa, 224.

61. Wheeler v. Field, 6 Metc. (Mass.) 290; Grafton Bank v. Cox, 13 Gray, 503; 1 Parsons on Notes and Bills, 452; Redf. & Big. Lead. Cas. 330; Glaser v. Rounds (R. I.), 14 Atl. 862.

62. Grafton Bank v. Cox, 13 Gray, 503.

63. Brown v. Petrie, Iowa S. C., June, 1881, 9 N. W. 190; Whitely v. Allen, 56 Iowa, 224.

64. Louisiana Ins. Co. v. Shamburgh, 7 Mart. (N. S.) 260, the maker having removed from New Orleans to Plaquemine, in Louisiana; Anderson v. Drake, 14 Johns. 114, the maker having removed from New York city to Kingston, in New York State.

65. McGruder v. Bank of Washington, 9 Wheat. 598, Johnson, J., saying: "We think that reason and convenience are in favor of sustaining the doctrine that such a removal is an excuse from an actual demand. Precision and certainty are often of more importance to the rules of law than their abstract justice. On this point there is no other rule that can be laid down which will not leave too much latitude as to place and distance. For his absconding or removal out of the kingdom, the indorser is held in England to

This latter doctrine was applied by the United States Supreme Court where the maker removed from the District of Columbia to a new residence in Virginia only nine miles distant, and it seems well established,[66] though not without some dissent. In some cases, however, it has been held that in the event of a permanent removal beyond the State line, the holder must use reasonable efforts to ascertain the new place of residence, and give notice there.[67] In respect to notice, when the drawer or indorser entitled to it has left the State, it is sufficient to leave it at his last place of residence.[68]

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stand committed, and although from the contiguity, and in some instances reduced size of the States, and their union under the general government, the analogy is not perfect, yet it is obvious that a removal from the seaboard to the frontier States, or *vice versa*, would be attended with all the hardships to a holder, especially one of the same State with the maker, that could result from crossing the British Channel." To same effect, see Gillespie v. Hannahan, 4 McCord, 503; Widgery v. Monroe, 6 Mass. 449.

66. See *supra*.

67. Barker v. Clark, 20 Me. 156; Phipps v. Chase, 6 Metc. (Mass.) 491.

68. Herrick v. Baldwin, 17 Minn. 209.

CHAPTER XXXV.

SPECIAL WAIVERS OF PRESENTMENT, PROTEST, AND NOTICE, AND OF THE EVIDENCE THEREOF, BY PROMISES TO PAY AND PART PAYMENTS AFTER MATURITY.

SECTION I.

WAIVER BY PROMISE OF DRAWER OR INDORSER TO PAY MADE AFTER MATURITY WITH KNOWLEDGE OF HOLDER'S DEFAULT.

§ **1147.** In the *first* place, promises to pay after maturity, or acknowledgments of continued liability and obligation to pay, with knowledge that the usual steps of demand, protest, or notice were not duly taken, are almost universally regarded as absolutely fixing the liability of the drawer or indorser making them, and he will not afterward be permitted to set up the defense that the demand or protest were not made in point of fact, or the notice not given.[1] The doctrine, as thus laid down, is settled in England and in the United States, indeed almost wherever the law merchant

1. Yeager v. Falwell, 13 Wall. 12; Sigerson v. Mathews, 20 How. 496; Reynolds v. Douglass, 12 Pet. 497; Thornton v. Wynn, 12 Wheat. 183; Salisbury v. Renick, 44 Mo. 554; Hughes v. Bowen, 15 Iowa, 446; Martin v. Winslow, 2 Mason, 241; Spurlock v. Union Bank, 4 Humphr. 336; Hazard v. White, 26 Ark. 280; James v. Wade, 21 La. Ann. 548; Walker v. Rogers, 39 Ill. 279; Mathews v. Allen, 16 Gray, 594; Smith v. Curlee, 59 Ill. 221; Tardy v. Boyd, 26 Gratt. 637; Carter v. Sprague, 51 Cal. 239; Givens v. Merchants' Nat. Bank, 85 Ill. 444; Ross v. Hurd, 71 N. Y. 14; Trimble v. Thorne, 16 Johns. 152; Duryee v. Dennison, 5 Johns. 248; Scott v. Meeker, 20 Hun, 163; Fell v. Dial, 14 S. C. 247; Armstrong v. Chadwick, 127 Mass. 156; Gove v. Vining, 7 Metc. (Mass.) 212; Moyer's Appeal, 87 Pa. St. 129; Smith v. Lounsdale, 6 Oreg. 80; Oxnard v. Varnum, 111 Pa. St. 193; Turnbull v. Maddox, 68 Md. 579; Shaw v. McNeill, 95 N. C. 535; Hudson v. Wolcott, 39 Ohio St. 623; Sieger v. Second Nat. Bank (Pa.), 19 Atl. 217; Story on Bills, §§ 280, 320, 373; Story on Notes, 274, 275; 3 Kent Comm., lect. 44; 1 Parsons on Notes and Bills, 594; Byles on Bills (Sharswood's ed.), 349; Edwards on Bills, 650, 651, 652; 2 Ames on Bills and Notes, 505, notes; Bank of Gilby v. Farnsworth, 7 N. Dak. 6, 72 N. W. 901, citing text; Linthicum v. Caswell, 19 App. Div. 541, 46 N. Y. Supp. 610; Alabama Nat. Bank v. Rivers, 116 Ala. 1, 22 So. 580, 67 Am. St. Rep. 95, citing text.

prevails, though the particular grounds upon which it rests are the subject of difference of opinion, and there are authorities denying it altogether.[2]

§ 1147a. Discussion of the principle that promises to pay with knowledge of laches bind party without demand or notice.— The objection to it is placed upon the ground that the drawer or indorser is absolutely discharged by default of the holder in respect to making due presentment and giving notice; and that, being no longer a party to the contract, he cannot renew his liability by a new promise, unless it be supported by a new consideration.[3] This argument is a forcible one, but it has not impressed the courts, with few exceptional cases, as valid, and may be regarded as overruled and obsolete. And when we refer to the fundamental principles upon which the requirements of demand and notice are based, it seems more plausible than sound. The object of demand and notice is to secure the drawer or indorser from loss — not actual loss necessarily, but from any possible loss by delay in making the demand of payment of the principal party, and notifying the indorser of his default. The law presumes an injury, or at least his exposure to injury, when these steps have not been taken; but as it exacts them rigidly from the holder, it allows him the advantage of any assurance from the drawer or indorser that no injury has been suffered, and that he will not avoid his liability by the mere chance of suffering it. Waiver is not, therefore, the revival of the claim of recourse against him, but a declaration that there was no ground for the only plea on which it could be discharged.[4] Indeed, while it is everywhere said that the indorser's liability is conditioned upon due demand and notice, it should be remembered that the condition is not a strict and absolute condition precedent as conditions in contracts construed by the common law. We have already seen that even overruling necessity does not exonerate a contractor at common law, while it is a well-settled excuse for noncompliance with the requirement of demand and notice. And in the same liberal spirit, and for the benefit of trade, the obligation of the indorser is regarded rather

2. Lawrence v. Ralston, 3 Bibb, 102; Donelly v. Howie, Hayes & J. 436 (Irish Court of Exchequer). See also Cathcart v. Gibson, 1 Rich. (S. C.) 10; Huntington v. Harvey, 4 Conn. 124; 2 Ames on Bills and Notes, 504; Linthicum v. Caswell, 19 App. Div. 541, 46 N. Y. Supp. 610.

3. Story on Notes, § 275; 1 Parsons on Notes and Bills, 611.

4. Thompson on Bills (Wilson's ed.), 377; Edwards on Bills, 650, 651.

as voidable by nonfulfilment of these conditions than as actually avoided. If he chooses to affirm rather than disaffirm his liability, it can injure no one to leave him to the exercise of his discretion.[5]

§ 1148. It makes no difference, when the promise to pay is made with knowledge of laches, that the party making it did not know its legal effect as a waiver,[6] or that he had a legal defense to the bill or note,[7] for it is a maxim that ignorance of the law excuses no one. The contrary notion has been long since exploded,[8] though at one time it found favor.[9]

And it makes no difference at what particular time the promise is made. It may be after suit brought,[10] and even while a motion for a new trial is pending.[11]

§ 1149. **Proof of knowledge — how far essential to proof of waiver.**— Knowledge on the part of the drawer or indorser that the holder has been in default, in not making due presentment and giving notice, is an element of the waiver as indispensable

5. In Ross v. Hurd, 71 N. Y. 14, the holder and maker of a note went to the indorser who had been discharged by want of demand and notice, and on the holder agreeing to an extension, the indorser said, "Then I will waive protest." Held, that this authorized recovery against the indorser. Sebree Deposit Bank v. Moreland, 96 Ky. 150, 28 S. W. 153, quoting with approval the text; Alabama Nat. Bank v. Rivers, 116 Ala. 1, 22 So. 580, 67 Am. St. Rep. 95; Workingmen's Banking Co. v. Blell, 57 Mo. App. 410.

6. Third Nat. Bank v. Ashworth, 105 Mass. 503; Mathews v. Allen, 16 Gray, 594; Hughes v. Bowen, 15 Iowa, 446; Cheshire v. Taylor, 29 Iowa, 492; Davis v. Gowen, 17 Me. 387; Beck v. Thompson, 5 Harr. & J. 537; Pate v. McClure, 4 Rand. 164; Richter v. Selin, 8 Serg. & R. 425; Kennon v. McRea, 7 Port. 175; Bilbie v. Lumley, 2 East, 469; Stevens v. Lynch, 12 East, 38; Chitty on Bills (13th Am. ed.) [*503], 447; Story on Bills, § 320; 2 Ames on Bills and Notes, 505; Glidden v. Chamberline, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479, citing and approving text.

7. Givens v. Merchants' Nat. Bank, 85 Ill. 444, Scholfield, C. J.: "The plaintiff in error says he was not aware at the time he made these promises that he had any legal defense to the note. * * * If it was because of his ignorance of the law, it cannot avail him, and he must be charged with full knowledge." Sebree Deposit Bank v. Moreland, 96 Ky. 150, 28 S. W. 153, quoting with approval the text.

8. Tebbets v. Dowd, 23 Wend. 379.

9. Chatfield v. Paxton, N. P., quoted in Bilbie v. Lumley, 2 East, 469; Freeman v. Boynton, 7 Mass. 483; Warder v. Tucker, 7 Mass. 449.

10. Oglesby v. Steamboat Co., 10 La. Ann. 117; Hart v. Long, 1 Rob. (La.) 83.

11. Hart v. Long, 1 Rob. (La.) 83.

as the promise itself, according to the American text-writers on the subject, and the great body of the adjudicated cases.[12] Thus, it has been decided by the United States Supreme Court that where an indorser of a note, on being informed that the maker had not paid it, observed that "he knew he had not to pay it; that it was the concern of himself (the indorser) alone; and that the maker had nothing to do with it," was an admission of liability, but that the plaintiff could not recover against him without proving that he was apprised of his laches in not making a regular demand of payment.[13]

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12. Thornton v. Wynn, 12 Wheat. 183. And to same effect, holding that it must be proved in addition to the promise itself, see Spurlock v. Union Bank, 4 Humphr. 336; Ford v. Dallan, 3 Coldw. 67; Ticknor v. Roberts, 11 La. 14; Blum v. Bidwell, 20 La. Ann. 43; Walker v. Rogers, 40 Ill. 278; Van Wickle v. Downing, 19 La. Ann. 83; Baskerville v. Harris, 41 Miss. 535; Harvey v. Troupe, 23 Miss. 538; Farrington v. Brown, 7 N. H. 271; Hunter v. Hook, 64 Barb. 469; Jones v. Savage, 6 Wend. 658; Gawtry v. Doane, 48 Barb. 148; United States Bank v. Southard, 2 Harr. 473; Barkalow v. Johnson, 1 Harr. 397; Bank of the United States v. Leathers, 10 B. Mon. 64; Walker v. Rogers, 39 Ill. 279; Cheshire v. Taylor, 29 Iowa, 492; Sigerson v. Mathews, 20 How. 464; Salisbury v. Renick, 44 Mo. 454; Otis v. Hussey, 3 N. H. 346; Newberry v. Trowbridge, 13 Mich. 264; Schierl v. Baumel, 75 Wis. 75, citing text; Glaser v. Rounds, 16 R. I. 237, 14 Atl. 863, citing text; Norris v. Ward, 59 N. H. 487; Freeman v. O'Brien, 38 Iowa, 406; Kelley v. Brown, 5 Gray, 108; Baer v. Leppert, 5 Hun, 453; 1 Parsons on Notes and Bills, 601; Story on Bills, § 320; Lilly v. Petteway, 73 N. C. 358; Williams v. Union Bank, 9 Heisk. 441 (1872), in which case it was held that it must appear that the party promising was under no misapprehension as to the law or the facts. In Arnold v. Dresser, 8 Allen, 435, Bigelow, C. J., saying: "No such waiver is made where an indorser promises to pay the note in ignorance of the fact that he has been discharged by the laches of the holder in not making due demand of the promisor, or where such promise is made under a misapprehension or mistake of facts concerning the due presentment and demand of the note." See *post*, § 1161; Porter v. Thom, 30 App. Div. 363, 51 N. Y. Supp. 974, citing text; Linthicum v. Caswell, 19 App. Div. 541, 46 N. Y. Supp. 610, citing text; Closz & Mickelson v. Miracle, 103 Iowa, 198, 72 N. W. 502.

13. Thornton v. Wynn, 12 Wheat. 183. "These declarations," said the Supreme Court, "amounted to an unequivocal admission of the original liability of the defendant to pay the note, and nothing more. It does not necessarily admit the right of the holder to resort to him on the note, and that he had received no damage from the want of notice, unless the jury to whom the conclusion of the fact from the evidence ought to have been submitted, were satisfied that the defendant was also apprised of the laches of the holder in not making a regular demand of payment of the note, by which he was discharged of responsibility to pay it. The knowledge of this fact formed an in-

Even where the party wrote a written acknowledgment, addressed to the plaintiff's counsel, stating, "I hereby hold myself accountable for the payment of a note signed by J. Brown, payable to me, and indorsed by me," etc., it was held insufficient, no proof of knowledge of laches appearing.[14] And it is said and held that even if the drawer or indorser pays the amount of the bill or note, in ignorance that he has been discharged by laches, he may recover it back.[15]

§ 1150. There is certainly strong ground for contending that upon principles of estoppel, proof of a distinct promise to pay after maturity (no question of fraud or deceit arising) should in itself close all controversy as to demand, protest, and notice. The drawer or indorser may not only waive the fact that demand, protest, and notice were not duly made or given, they may also waive proof that they were made or given. And when he promises to pay the bill or note, such promise imports an unconditional assumption of it; and a dispensation with whatever preliminary evidences might be necessary to charge him with its payment. The holder is thereby advised that the party raises no question as to his liability, and to permit him when sued to require other proofs of what he has recognized, might enable him to practice a fraud by lulling the holder to quiet reliance on his promise, and then springing the defense upon him unawares. If there were a failure as to demand and notice, there might be excuses which the holder would come prepared to prove if the promise had not intimated that it was unnecessary. Or there might be witnesses whom he would have summoned, or testimony which he would have preserved, if not thus warned that the indorser acknowledged his liability. And good faith would seem to suggest that if the party deliberately promises to pay, he shall not afterward go behind that promise and deny facts which it presupposes, and is impliedly based upon.[16] Nev-

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dispensable part of the plaintiff's case, since without it, it cannot be inferred that the defendant intended to admit the right of the plaintiff to resort to him, if, in point of fact, he had been guilty of such laches as would discharge him in point of law." Workingmen's Banking Co. v. Beell, 57 Mo. App. 410.

14. Farrington v. Brown, 7 N. H. 271.

15. Story on Promissory Notes, § 361; Crutchers v. Wolf, 2 Mon. 88.

16. In Debuys v. Mollere, 15 Mart. 318, Mathews, J., said: "The indorser must have known whether he was duly notified of the protest. If he were not, by promising to pay he waived the advantage which such negligence

ertheless, it may be said *per contra*, that to consider the promise to pay as evidence *prima facie* of due demand and notice, or of knowledge of the want of the one or the other, and to throw the burden of proving want of diligence and ignorance thereof, with due circumspection taken to prevent surprise to the plaintiff, are all that is essential to protect him; and the authorities which adopt this equitable intermediate view are perhaps upon the whole best calculated to effectuate justice.[17]

§ 1151. In Virginia it was held, that where the drawer of a protested bill who was sued, called for proof of notice, and it was proved that when he was applied to for payment he acknowledged that the debt was a just one, and said he would pay it, it was a waiver of all notice, though nothing was said about notice in the acknowledgment; and that instructions that, "unless the said acknowledgment was made with a knowledge of all the facts of the case as to the laches of the holders of the said bill, the said evidence was not to be received," were properly refused by the court below.[18] And in a subsequent case the doctrine was reiterated.[19] It will be observed, that in neither of these cases was there any proof of any laches; but the doctrine which they recognize is, that such proof is absolutely precluded by the waiver.

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would otherwise have given; if he did not receive regular notice he is liable under his subsequent promise." See Bogart v. M'Clurg, 11 Heisk. 105; First Nat. Bank v. Weston, 25 App. Div. 414, 49 N. Y. Supp. 542; Porter v. Thom, 30 App. Div. 363, 51 N. Y. Supp. 974, citing text.

17. See *post*, § 1152 *et seq.*

18. Walker v. Laverty, 6 Munf. 487 (1810). No authorities quoted. Devendorf v. West Virginia O. & O. L. Co., 17 W. Va. 175. See Cardwell v. Allen, 33 Gratt. 166.

19. In Pate v. McClure, 4 Rand. 169 (1826), Carr, J., said: "Alexander McClure says, in direct response to a particular interrogatory in the bill, that immediately on the return of the bills he gave due notice of the protest, both to Lynham and Pate; and this is strongly corroborated by the correspondence. But in truth, the case is taken wholly off that ground by the various subsequent promises to pay and acts of sanction and ratification given and done by Pate — promises and acts covering an interval of twelve years, and done in the most solemn manner with full knowledge of the facts." [The court evidently does not mean knowledge of any laches, which it thought had not been committed, but knowledge of nonpayment.] "After this," continues the judge, "it is equally repugnant to reason and to law, that he should claim to be discharged for want of notice, and call on the other party to prove that he proceeded in strict conformity with all the niceties of the law merchant. If he

SECTION II.

PROMISE TO PAY AS PRESUMPTIVE EVIDENCE OF KNOWLEDGE OF LACHES.

§ **1152.** When it is conceded or proved that there was laches in respect to the demand, protest, or notice, the promise to pay after maturity should be regarded as *prima facie* evidence that the party making it knew of such laches, whenever such knowledge is deemed necessary to constitute a waiver. It is a promise against interest. The drawer or indorser should know when the instrument to which he was a party fell due. His promise to pay presupposes it to be overdue and unpaid. And if he has not received notice, he has every reason to suppose that it was not sent, and that the steps which should precede it were not taken.[20] If he received notice of due dishonor, and nevertheless demand and protest were not duly made, it might be otherwise. As a general rule, however, the American decisions require separate proof of knowledge in all cases.[21] And it has been held that a promise to pay, with knowledge that no notice was given, would not be a waiver unless there was also knowledge that due demand was not made.[22]

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had intended to place himself on this ground, the time was when the bills came back and he was pressed for payment of them. He should then have said, 'Show that in all things you have proceeded strictly; that the bills have been regularly protested, and due notice of protest given to me.' Nor will it avail him to say that he was ignorant of the law; every man is bound to know the law." Insurance Co. v. Wilson, 29 W. Va. 541, citing the text.

20. "The weight of authority," says Chancellor Kent, "is that this knowledge may be inferred as a fact from the promise under the attending circumstances, without requiring clear and affirmative proof of the knowledge." 3 Comm. lect. 44. In Thompson on Bills (Wilson's ed.), p. 381, it is said, "There must be proof of knowledge of the failure;" and p. 384, "Though it should not be proved, it will be presumed that he knew of the failure." Chitty on Bills (13th Am. ed.) [*504–505], 570; 1 Parsons on Notes and Bills, 603; Hopley v. Dufresne, 15 East, 275 (1812); Taylor v. Jones, 1 Campb. 105; Turnbull v. Hill (Scotch case), Thom. 381; Barkalow v. Johnson, 1 Harr. 397, Hornblower, C. J., saying: "The indorser knew indeed whether he had or had not received a notice of demand and nonpayment." Landrum v. Trowbridge, 2 Metc. (Ky.) 283; Loose v. Loose, 36 Pa. St. 538; Nash v. Harrington, 1 Aik. 39; Debuys v. Mollere, 15 Mart. 318; *ante*, § 1150.

21. See *ante*, § 1149; Ford v. Dallam, 3 Coldw. 67; Trimble v. Thorn, 16 Johns. 152 (overruled by Tebbetts v. Dowd, 23 Wend. 379); New Orleans Bank v. Harper, 12 Rob. (La.) 231; Lilly v. Petteway, 73 N. C. 358.

22. Low v. Howard, 11 Cush. 268.

§ 1153. Inferences as to knowledge in respect to presentment and notice.— The inference is not so strong as to knowledge of laches respecting the presentment as to the notice, but still strong enough, we think, to bear out the views expressed. Where there has been due presentment, and a promise to pay afterward resisted on the ground of no notice, the presumption that it was given, or that if not given the promisor knew the fact, would be very strong.[23] Where it is alleged that there was neither presentment nor notice, the promise to pay would still lead, we think (for the reasons already given), to the same conclusions,[24] though respecting the presentment, high authority, which recognized the inference respecting notice, has thought differently.[25]

§ 1154. Distinction between promises to pay in respect to notice of nonpayment and notice of nonacceptance.— A distinction may well be taken between the effect of a promise to pay, in regard to the inference of notice, in cases of nonpayment and nonacceptance, where a bill has been presented for acceptance before it becomes due. In the former case (nonpayment) the party is supposed to have known when the bill became due, and must actually know, or might readily have ascertained, whether or not there had been laches; and, therefore, the inference arises from a promise to pay, of a regular presentment for payment and of due notice. But in the latter case (when the bill was dishonored for nonacceptance), the fact of a bill having been presented for acceptance before it fell due, and dishonored, lies peculiarly in the knowledge of the party presenting it; and there is no inference that a party who promises to pay after the bill falls due, would have known of the refusal to accept, or of the neglect to give notice of such nonacceptance. Therefore, in such cases,

23. Ladd v. Kenney, 2 N. H. 340; Chitty on Bills (13th Am. ed.) [*504–505], 570.

24. Croxen v. Worthen, 5 M. & W. 5. An action against maker of a note payable at a specified place. There was no evidence of presentment there, which was charged in the declaration, but the defendant had promised to pay by instalments. Alderson, B., said: "The defendant is supposed to know the law; he knows, therefore, that he is not liable unless the note has been duly presented. With that knowledge he undertakes to pay. Is not that evidence for the jury that he knows it has been presented?"

25. In Thornton v. Wynn, 12 Wheat. 183, Washington, J., said: "That due notice was not given to the defendant, he could not fail to know; but a regular demand of the maker of the note could not be inferred from the admissions of the defendant."

the promise to pay would not be in itself a waiver of laches, nor presumptive evidence of diligence.[26] This doctrine is held in England as well as in the United States.[27]

§ **1155.** When proof of knowledge, apart from any presumption which the promise to pay may give rise to, is required, all the circumstances may be looked at, and it may be made out inferentially by the relations, acts, and expressions of the parties, and the time which had elapsed after maturity when it was made.[28] Where the indorser applied for an extension of time after suit brought in which due presentment was alleged, it was thought sufficient evidence of knowledge to go before a jury.[29] Where the drawer, knowing that notice had not been sent, himself took the bill and demanded it of the drawee some time after it was due, it was inferred that he must have known the failure in making a previous demand.[30]

SECTION III.

PROMISE TO PAY AS EVIDENCE OF DILIGENCE, OR WAIVER OF PROOF OF NEGLIGENCE.

§ **1156.** We have already seen the double aspect in which a promise to pay after maturity may appear, and that when relied on as a waiver of laches, knowledge of such laches by the promisor must accompany it. But when no laches are proved or conceded, it assumes another aspect. Instead of proving demand and notice, the holder proves an acknowledgment of liability, and a promise to discharge it — a liability presupposing and based upon demand and notice, or dispensation with them. It is, therefore, presumptive evidence that demand was duly made and notice duly given, and sufficient in itself to the plaintiff's recovery, unless it be rebutted.[31]

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26. Landrum v. Trowbridge, 2 Metc. (Ky.) 283; Bank of Tennessee v. Smith, 9 B. Mon. 609; Phillips v. McCurdy, 1 Harr. & J. 187.

27. Blessard v. Hurst, 5 Burr. 2670 (1770). The promise to pay was made without knowledge that the holder had presented for acceptance, and not given notice of refusal till after payment had been likewise refused. Goodall v. Dolley, 1 T. R. 712.

28. Martin v. Winslow, 2 Mason, 241; Givens v. Merchants' Nat. Bank, 85 Ill. 444.

29. Hopley v. Dufresne, 15 East, 275.

30. Cram v. Sherburne, 14 Me. 48.

31. Tebbetts v. Dowd, 23 Wend. 379; Lewis v. Brehme, 33 Md. 412; Hazard v. White, 26 Ark. 280; Dickerson v. Turner, 12 Ind. 223; Edwards on Bills,

§ 1157. Order in which burden of proof shifts.—A failure to discriminate between the promise to pay as a waiver of demand and notice, and as a waiver of proof of demand and notice, has led to much confusion in the adjudicated cases.

There is certainly great force in the view that a distinct promise to pay, made after maturity, ought to be regarded either as conclusive evidence that there was due demand and notice, which the promisor is estopped to rebut, or as an absolute waiver of all proof to that effect.[32] But a majority of the cases consider it *prima facie* evidence of demand and notice merely, and open to rebuttal; and that if the defendant does rebut it, with proof of laches, the plaintiff must rejoin with proof that the defendant had knowledge of the laches, his position being shifted from a reliance on his own diligence, to proof that his negligence was waived. This view has been illustrated with great power in New York (in Tebbetts v. Dowd), and is adopted in other cases,[33] and is, upon the whole, as it seems, the best calculated to effectually protect the interests of all parties. The order in which the burden of proof shifts, and is borne, may, therefore, be stated as follows:

(1). Plaintiff must prove demand and notice.

(2). By proving a promise to pay after maturity this proof *prima facie* is supplied.

(3). Defendant rebuts this proof by showing laches in respect to demand or notice.

(4). Plaintiff makes sufficient rejoinder by showing that defendant had knowledge of laches when promise to pay was made.

It has been held that even where the promise to pay was in writing, it is only *prima facie* evidence, and open to rebuttal.[34]

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652. The objection has been urged that a promise to pay, when made by parol, is within the Statute of Frauds, being a promise to pay the debt of another. The liabilities of drawers and indorsers are governed by the law merchant, and are not, as we think, at all affected by the Statute of Frauds. See *ante*, § 567. And it seems to us that there is nothing in this objection. In an action on the promise to pay, it was sustained, however, in Peabody v. Harvey, 4 Conn. 119. But in an action on the note, it was decided to be unavailing in United States Bank v. Southard, 2 Harr. 473.

32. See *ante*, § 1150; Byles on Bills (Sharswood's ed.) [*291], 450.

33. Tebbetts v. Dowd, 23 Wend. 379; Loose v. Loose, 36 Pa. St. 588; Nash v. Harrington, 1 Aik. 39; Bruce v. Lytle, 13 Barb. 163; Dorsey v. Watson, 14 Mo. 59; Thompson on Bills (Wilson's ed.), 383, 384.

34. Commercial Bank v. Clark, 28 Vt. 325.

§ 1158. English authorities.— In England, there is no doubt that acknowledgment of liability or a promise to pay by the drawer or indorser after maturity is sufficient evidence of due demand, protest, and notice. Thus, where the drawer said when demand was made that he would be glad to pay as soon as his accounts with his agents were cleared, Lord Ellenborough said: "By the promise to pay he admits his liability; he admits the existence of everything which is necessary to render him liable. When called upon for payment of the bill he ought to have objected that there was no protest. I must, therefore, presume that he had due notice, and that a protest was regularly drawn up by a notary." [35] And demand, protest, or notice have been presumed where the indorser promised a subsequent indorser to pay;[36] where the indorser said "he had not regular notice, but as the debt was justly due he would pay it;" [37] where the drawer and indorser wrote a letter promising a payment;[38] where the drawer entered into an agreement to pay the bill by instalments.[39] And it has been held that an offer on the part of an indorser to compromise by paying one-half of a bill of exchange, or securing the payment of it, dispensed with proof of notice, there being no evidence on the subject of notice.[40] But this seems to go too far, and is dissented from by high authority;[41] and an offer to pay costs and the residue on time has been held insufficient to dispense with proof of notice, Lord Denman, C. J., saying: "The defendant might, if time had been given him, have been willing to have waived any objection with respect to the notice of dishonor." [42] But the English decisions are not at all clear or reconcilable. In one case, where the drawer had written a letter promising to see the bill arranged, and had also promised to give a judgment for the amount, but swore that he knew nothing of the dishonor until a fortnight after maturity,

35. Gibbon v. Coggen, 2 Campb. 188; Taylor v. Jones, 2 Campb. 105; Stevens v. Lynch, 2 Campb. 332, 12 East, 38; Hopes v. Alder, 6 East, 16; Croxen v. Worthen, 5 M. & W. 5; Lawrence v. Hammond, 4 App. D. C. 467.

36. Potter v. Rayworth, 13 East, 417.

37. Lundie v. Robertson, 7 East, 231.

38. Wood v. Brown, 1 Stark. 217; Campbell v. Webster, 2 C. B. 258.

39. Gunson v. Metz, 1 B. & C. 193.

40. Dixon v. Elliott, 5 Car. & P. 437. See Edwards on Bills, 652, 653, note; Metcalf v. Richardson, 73 Eng. C. L. 1070.

41. Phillips on Evidence, vol. II, p. 24; Chitty, Jr., on Bills, 1619, note *a*.

42. Standage v. Creighton, 5 Car. & P. 406.

the judge told the jury that they must arrive at the conclusion that notice was given the day of maturity, but if they believed the defendant they must find for him. A verdict for the plaintiff was sustained.[43] In another case a verdict for the defendant was directed, although he had used language which the court thought equivalent to a promise to pay.[44]

But where it appears that there was laches in respect to demand, protest, or notice, and that the drawer or indorser could not from his situation have known the fact, or was really ignorant of it, the holder cannot recover.[45] Thus, where the day after a bill was dishonored in London, and before the fact of its dishonor could be known in Yorkshire, the drawer's clerk called in Yorkshire upon the indorser prior to the holder, and a conversation took place as to the bill being likely to come back, and the clerk said: "I suppose there will be no alternative but my taking up the bill, and if you will bring it to Sheffield on Tuesday I will pay the money;" and the indorser did not receive either the bill or notice until some days after the Tuesday, and notice of dishonor was not given to the drawer in due time: it was held that such promise was not sufficient to dispense with due notice of dishonor to the drawer.[46]

§ 1159. Circumstances operating as presumptive evidence of demand and notice.— There are other circumstances which operate as presumptive evidence of due demand, protest, and notice. Thus a written admission of notice would waive the necessity of proof, but it might be explained away by showing that it was made under mistake, and that the holder was duly warned not to rely on it.[47] So an agreement by the indorser with the maker to take back the note and return the property for which it was given, is evidence from which a jury might infer demand and notice; and it would also operate as a waiver if there were laches.[48] So the insertion of a bill in a schedule of liabilities by an insolvent,[49] or the recognition by an indorser of an account

43. Jones v. O'Brien, 26 Eng. L. & Eq. 283.

44. Chapman v. Annett, 1 Car. & K. 552.

45. Blesard v. Hirst, 5 Burr. 2670; Pickin v. Graham, 1 Cromp. & M. 725; Stevens v. Lynch, 2 Campb. 332; Chitty on Bills (13th Am. ed.) [*504], 570.

46. Pickin v. Graham, *supra*. See Yeager v. Falwell, 13 Wall. 12.

47. Commercial Bank of Albany v. Clark, 28 Vt. 325.

48. Andrews v. Boyd, 3 Metc. 434.

49. Hyde v. Stone, 20 How. 170. See *contra*, Jones v. Savage, 6 Wend. 658.

with a request that the bill be charged separately,[50] would afford presumptive evidence of demand and notice.

§ **1160.** The courts have gone so far in admitting circumstances to go to the jury as evidence of demand and notice, that Professor Parsons very justly observes:[51] "Some of the cases have almost gone so far that the only safe course for an indorser or drawer, when payment is demanded of him, would be expressly to deny both presentment and notice. Thus, for instance, a verdict against the drawer of a bill was sustained where the only evidence of notice was, that the defendant, two days after maturity, sent a person to the plaintiff to say that he had been defrauded of the bill and should defend any action upon it." [52] So, objecting to payment upon any other grounds than laches in respect to presentment and notice;[53] and so failure to produce a letter containing, as alleged, notice of dishonor, and the production of which was called for.[54] So an answer by the drawer on being informed of nonpayment by the acceptor that he would see the acceptor about it.[55]

§ **1161. Ignorance of material facts affecting promise.**— In Massachusetts, it has been held that if the indorser promises to pay, without knowledge of material facts affecting his liability, as, for instance, that an agreement had been made by the holder by which he was discharged, he will not be bound, although he knew of the laches respecting demand and notice.[56] This view

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50. Bank of United States v. Lyman, 20 Vt. 666.

51. 1 Parsons on Notes and Bills, 616.

52. Wilkins v. Jadis, 1 Moody & R. 41; Glidden v. Chamberline, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479, citing text, court said: "Evidence of circumstances or of conversations between the holder and the second indorser of a promissory note after its maturity, which are equivocal in their character, and which do not impart a clear admission of liability or amount to a distinct promise to pay, and are consistent with the view that the indorser was merely seeking to avoid or postpone a suit against himself, is not sufficient, in an action on the note, either to prove actual notice to him of the dishonor of the note, or a waiver of such notice; and a subsequent agreement by him to pay the holder a certain rate of interest so long as the note shall remain unpaid has no greater effect."

53. Curlewis v. Corfield, 1 Q. B. 814, 1 Gale & D. 489.

54. Roberts v. Bradshaw, 1 Stark. 28.

55. Metcalf v. Richardson, 73 Eng. C. L. 1010; Edwards on Bills, 652, 653.

56. Low v. Howard, 10 Cush. 159. See Arnold v. Dresser, 8 Allen, 435, and *ante*, § 1149.

depends upon the principles which regulate the liabilities of all sureties, and is sustainable without reference to the peculiar doctrines respecting demand and notice. And it concurs with the English doctrine on the subject.[57]

SECTION IV.

WHAT AMOUNTS TO AN ACKNOWLEDGMENT OR PROMISE TO PAY.

§ 1162. The burden of proof is upon the plaintiff to show clearly and distinctly the acknowledgment of liability and promise to pay the bill or note.[58] But it matters not what particular phrase may be used, so that it amounts to such acknowledgment or promise. Where the indorser of a note said to the plaintiff's agent, who called on him and inquired what he was going to do, "that in a few days he would see the agent and arrange it," the United States Supreme Court said: "This was an unconditional promise to pay the note, which no one could misunderstand, and which he could not repudiate at any subsequent period." [59]

So where the drawer said he would see the bill paid;[60] and where the drawer said, on being informed of the dishonor of the bill, "it must be paid;" [61] but where an indorser, on being asked what would be done with the note, replied that "it will be paid," it was thought that "from the general tenor of his conversation, it could not be inferred that it was his intention, knowing of his discharge, to waive his defense, and promise to pay the note, or see it paid at all events," and that it might have been "a mere assertion of his expectation that it would be paid by the promisor." [62]

So it was considered sufficient where the drawer promised to pay when it was in his power;[63] and where the indorser said he would pay as soon as he could, but he doubted when that would be;[64] so a promise to pay in a few days with a request for

57. Stevens v. Lynch, 12 East, 38, 2 Campb. 332. See Story on Bills, § 320.
58. Creamer v. Perry, 17 Pick. 332; Porter v. Thom, 30 App. Div. 363, 51 N. Y. Supp. 974, citing text.
59. Sigerson v. Mathews, 20 How. 496.
60. Hopes v. Alder, 6 East, 16.
61. Rogers v. Stephens, 2 T. R. 713.
62. Creamer v. Perry, 17 Pick. 332.
63. Donaldson v. Means, 4 Dall. 109.
64. Rogers v. Hackett, 1 Fost. 100.

delay;[65] a promise to arrange with the drawee so that the draft should be paid;[66] a promise to pay if the note could not be collected of the maker by suit;[67] an acknowledgment by the drawer, with a promise to send funds with which to take up the bill;[68] a promise by the indorser that he would set the matter to rights, when he returned;[69] a promise to pay in a few months;[70] or by instalments on short time.[71]

§ 1163. There must be an absolute promise to operate a waiver of laches.— If the remark of the party do not amount to a promise, or is a conditional promise unaccepted, it will not suffice as a waiver of absence of due demand or notice.

Thus, where the indorser said, on being arrested, it was true the note had his name on it, but he had security, though he wished for time to pay it, it was held insufficient. So where he said he would rather pay the note than be sued;[72] or if I am bound to pay it, I will;[73] or that he would see what he could do, and endeavor to provide effects;[74] or where the indorser remarked to a third party, talking generally, that he would take care of the bill, or see it paid;[75] so a reply that the indorser knew of no defense is not a promise;[76] nor is any equivocal answer.[77]

"The promise must be unequivocal, and amount to an admission of the right of the holder; or the act done must be of a nature clearly importing a like admission of the right. If it be defective in either respect, or if it be a conditional offer of payment unaccepted, then, and in such a case, the holder has no right to insist upon it as a waiver. So if the promise be qualified, it must be received with its qualification, and cannot be insisted upon as an absolute waiver." [78]

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65. Hopkins v. Liswell, 12 Mass. 52.
66. Bryam v. Hunter, 36 Me. 207. See Moyer's Appeal, 87 Pa. St. 129.
67. Lane v. Stewart, 20 Me. 98.
68. Read v. Wilkinson, 2 Wash. C. C. 514.
69. Anson v. Bailey, Boll. N. P. 276.
70. Hart v. Long, 1 Rob. (La.) 83.
71. Union Bank v. Grimshaw, 15 La. 321; Croxen v. Worthen, 5 M. & W. 5.
72. Keyes v. Fenstermaker, 24 Cal. 329.
73. Dennis v. Morrice, 3 Esp. 158.
74. Prideaux v. Collier, 2 Stark. 57.
75. Miller v. Hackley, 5 Johns. 375; Glidden v. Chamberline, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479, citing text.
76. Griffin v. Goff, 12 Johns. 423.
77. Borradaile v. Lowe, 4 Taunt. 93; Sherrod v. Rhodes, 5 Ala. 683.
78. Story on Bills, § 321; Crain v. Colwell, 8 Johns. 384; Kennon v. McRea,

If the promise is conditional, the acceptance of it must be proved in order to make it binding. And where it appeared that the indorser offered to give his own note, which was not accepted, it was held no waiver.[79] So an offer to pay part cash and give his note for the balance;[80] or to procure a renewal;[81] or to pay in depreciated bank bills,[82] or in Confederate States currency.[83]

§ **1164. Circumstances coupled with qualified promises.**— But qualified or conditional promises to pay, taken in connection with other circumstances, have been held presumptive evidence that due demand was made and notice given.[84] Edwards says[85] of such a promise: "As an admission, it is evidence for the jury like any other conversation; if the liability of the drawer or indorser be conceded by him, the concession is quite as good evidence of demand and notice as a promise to pay; for as we have said, the promise to pay is deemed an admission of liability — an admission that the bill or note has been presented in time, and that due notice of nonpayment has been given. And there is no reason why the same admission may not be made by a negotiation for time, or by any other act or language that acknowledges the obligation to pay the note or bill." In Tennessee it is held that if the indorser knew he was discharged by want of notice, either an admission of liability or promise to pay would bind him.[86]

SECTION V.

WAIVER BY PART PAYMENT AFTER MATURITY.

§ **1165.** In the *second* place, the part payment of a bill or note after its maturity, by the drawer or indorser, is an acknowledgement of liability, and, therefore, alone and unexplained is pre-

7 Port. 175; Ross v. Hurd, 71 N. Y. 14; Tardy v. Boyd, 26 Gratt. 637, Christian, J.: "If the conduct or acts of the indorser be equivocal, or the language used be of a qualified or uncertain nature, the indorsee will not be held responsible." Isbell & Co. v. Lewis & Co., 98 Ala. 550, 13 So. 335.

79. Sice v. Cunningham, 1 Cow. 397; Agan v. McManus, 11 Johns. 180.

80. Barkalow v. Johnson, 1 Harr. 397. But see Dixon v. Elliott, 5 Car. & P. 437.

81. Laporte v. Landry, 17 Mart. 359.

82. Newberry v. Trowbridge, 13 Mich. 637.

83. Tardy v. Boyd, 26 Gratt. 637.

84. Dixon v. Elliott, 5 Car. & P. 437.

85. Edwards on Bills, 655.

86. Bogart v. McClurg, 11 Heisk. 614.

sumptive evidence that the liability was duly fixed according to law.[87] And if it be shown that such part payment was made with knowledge of laches of the holder in respect to demand, protest, or notice, it is settled that it constitutes a waiver of such laches, and binds the party making it absolutely.[88] And it is held, in some cases, that a part payment is a distinct concession of liability, and that whenever the drawer acknowledges himself to be liable to payment, the necessity of proving demand and notice is dispensed with, because such acknowledgment carries with it internal evidence that the drawer knew that due diligence had been used by the holder, or even if it had not, that still the drawer confessed that he was under an obligation to pay.[89] But it has been held that part payment will not operate as a waiver unless the indorser knew of the insufficiency of the demand or notice.[90]

§ **1166.** It seems to us that part payment after maturity stands upon precisely the same footing as a promise to pay. It is simply the executed act, while the promise is executory. Therefore, it is *prima facie* evidence that the party was duly charged by demand and notice. If he shows that he was not charged, it is still *prima facie* evidence that he knew of the holder's laches. But when he shows in rebuttal that he paid the part supposing there was no laches, and that in fact there was, it becomes unavailing, being paid under a mistake of fact, and may be recovered back, negligence not impairing the right of recovery.[91]

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87. In Vaughn v. Fuller, 2 Stra. 1246, Lee, C. J., said that part payment by the indorser made proof of demand upon the maker unnecessary. Holford v. Wilson, 1 Taunt. 12, held that part payment warranted the jury in presuming that due notice had been given the drawer. Whitaker v. Morrison, 1 Fla. 25, held waiver of notice; Chitty on Bills [*500], 564, 565; Brown v. Mechanics & Traders' Bank, 16 App. Div. 207, 44 N. Y. Supp. 645, citing text.

88. Sherer v. Easton Bank, 33 Pa. St. 134; Williams v. Robinson, 13 La. 419; Harvey v. Troupe, 23 Miss. 538; Linthicum v. Caswell, 19 App. Div. 541, 46 N. Y. Supp. 610, citing text.

89. Levy v. Peters, 9 Serg. & R. 125, Tilghman, C. J.; Curtiss v. Martin, 20 Ill. 557; Bank of United States v. Lyman, 20 Vt. 666; Read v. Wilkinson, 2 Wash. C. C. 514; Bibb v. Peyton, 12 Smedes & M. 575; Lane v. Steward, 20 Me. 98. See Whitaker v. Morrison, 1 Fla. 25; 1 Parsons on Notes and Bills, 608, 609. See Story on Bills, § 320.

90. Newberry v. Trowbridge, 13 Mich. 264; Porter v. Thom, 30 App. Div. 363, 51 N. Y. Supp. 974, citing text.

91. See as to negligence not affecting the right to recover money paid under mistake, National Bank of Commerce v. National M. B. Assn., 55 N. Y. 211; Lawrence v. American Nat. Bank, 54 N. Y. 435; *post*, § 1220; Porter v. Thom, 30 App. Div. 363, 51 N. Y. Supp. 974, citing text.

§ 1167. An offer to pay a part of the bill or note, without any objection made as to demand and notice, has been held sufficient to dispense with proof of demand and notice;[92] but it has been held otherwise where the drawer, on being arrested, offered as a compromise to give his bill at two months,[93] and where the plaintiff's attorney offered to pay a part cash and secure the residue;[94] and such offers when refused seem to signify nothing but tenders of compromise, and not to be alone either acknowledgments of due demand and notice, or waivers of laches.

§ 1168. Where the promise is only as to part of the sum, it is only a waiver *pro tanto*. Thus where the drawer of a bill for £200, who had not received notice, said: "I do not mean to insist on want of notice, but I am only bound to pay you £70," Abbott, C. J., said: "The defendant does not say that he will pay the bill, but that he is only bound to pay £70. I think the plaintiff must be satisfied with the £70." [95]

If the part payment were made by the indorser as agent of the maker, or were otherwise explained, it would not operate as a waiver.[96] Story considers that part payment is ordinarily a sufficient excuse for the omission of notice, because it evinces that the party so paying could not have sued on the note on payment thereof, and is in fact the true party for whose benefit the note was made.[97]

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92. Dixon v. Elliott, 5 Car. & P. 437; Margetson v. Aitken, 3 Car. & P. 388; Harvey v. Troupe, 23 Miss. 538, Smith, C. J., said: "A promise to pay generally, or a promise to pay a part, or a part payment made, with a full knowledge that he has been released from liability on the bill by the neglect of the holder, will operate as a waiver, and bind the party who makes it for the payment of the whole bill."

93. Cuming v. French, 2 Campb. 106.

94. Standage v. Creighton, 5 Car. & P. 406.

95. Fletcher v. Froggatt, 2 Car. & P. 569 (12 Eng. C. L.).

96. Whitaker v. Morrison, 1 Fla. 25.

97. Story on Notes, § 359; Porter v. Thom, 40 App. Div. 34, 57 N. Y. Supp. 479, citing the text.

CHAPTER XXXVI.

CIRCUMSTANCES WHICH WILL NOT EXCUSE FAILURE TO MAKE PRESENTMENT OR PROTEST, OR GIVE NOTICE.

§ **1169.** Circumstances not infrequently arise under which the making presentment of the bill or note, or giving notice of its dishonor, would seem to be a useless formality, or a peculiarly onerous task, and which on these accounts have been often urged as excuses for failure to make such presentment, or give such notice; but they are of a character which the law does not recognize as sufficient to exonerate the holder from taking the usual steps in order to charge an indorser. They may be classified as follows:

(1) The want of injury to the party.

(2) The bankruptcy or insolvency of the acceptor or maker.

(3) The loss or mislaying of the bill or note.

(4) The appointment of drawer or indorser as executor or administrator.

(5) The transfer of the bill or note as collateral security.

(6) The death of the maker or acceptor.

(7) The misdating of a bill or note by a foreign resident.

SECTION I.

THE WANT OF INJURY TO THE PARTY.

§ **1170.** In the *first* place, the want of prejudice or injury to the drawer or indorser is never a sufficient excuse for default in making presentment or protest, or giving notice of dishonor.[1] In some of the early cases, and indeed in some modern cases, and treatises also, the holder is said to be excused for his failure in making presentment and giving notice, when there are no funds in the drawee's hands, on the ground that there could be no prejudice or injury

1. Chitty on Bills (13th Am. ed.) [*439, 436], 490; 1 Parsons on Notes and Bills, 551, 630; Foster v. Parker, L. R., 2 C. P. Div. 19 (1876), Lindley, J.: "He (the indorser) would be damnified in the legal sense if he had a remedy over against any of them (prior parties), and was not bound, as between himself and them, to meet the bill." Hawley v. Jette, 10 Oreg. 31, 45 Am. Rep. 132, citing the text; Collingwood v. Merchants' Bank, 15 Nebr. 121; Kavanaugh v. Bank, 59 Mo. App. 540, citing text.

to the drawer or indorser,[2] and at one time the question of injury seems to have been the criterion whether or not presentment or notice was excused.[3] The reports exhibit frequent expressions of regret that the strict rule requiring presentment and notice has been even so far relaxed as to admit the exception arising from the want of funds;[4] and it is now perfectly well settled that the question of injury does not enter at all into the consideration. The law requires presentment and notice as conditions precedent to the fixed liability of the drawer and indorser, not merely as an indemnity against actual injury, but as security against a possible injury, which might result from the holder's laches.[5] It is true, that when the drawer has no funds in the drawee's hands, he can, as a general rule, suffer no injury from want of presentment or notice; but drawing in such a case would be a fraud, and it is for that reason, rather than the absence of actual injury, that presentment and notice are excused.[6] Where it was endeavored to show excuse for want of notice by showing want of injury, Lord Kenyon said: "I cannot hold the law to be so. The only case in which notice is dispensed with, is where there are effects of the drawer in the drawee's hands. This would be extending the rule still further than ever has been done, and opening new sources of litigation, in investigating whether in fact the drawer did receive a prejudice from the want of notice or not." [7]

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2. Cory v. Scott, 3 B. & Ald. 519; Mechanics' Bank v. Griswold, 7 Wend. 165; Commercial Bank v. Hughes, 17 Wend. 94; Edwards on Bills, 446, 636; Story on Bills, § 280.

3. Meggadow v. Holt, 12 Mod. 15 (1691); Mogadara v. Holt, 1 Show. 317; Chitty, Jr., on Bills, 57, 182.

4. *Ex parte* Heath, 2 Ves. & B. 240; Clegg v. Cotton, 3 Bos. & P. 239; Carter v. Flower, 16 M. & W. 743.

5. In Hill v. Martin, 12 Mart. 177, Porter, J., said: "The plaintiff read from Chitty on Bills, p. 151, to show that when the indorser was not injured by want of notice the laches to give it was cured. The rule is stated in a note to the edition of 1809, but it is not law." Foster v. Parker, 2 C. P. Div. 18, 19 Moak's Eng. Rep. 293, Denman, J.; French v. Bank of Columbia, 4 Cranch, 141, Marshall, C. J.; May v. Coffin, 4 Mass. 341; Nash v. Harrington, 2 Aitkens, 9; Hill v. Heap, Dowl. & R. 15; Bickerdike v. Bollman, 1 T. R. 405; Edwards on Bills, 636; Story on Bills, § 306.

6. *Ante*, chapter XXXI, section I.

7. Dennis v. Morris, 3 Esp. 158.

SECTION II.

THE BANKRUPTCY OR INSOLVENCY OF THE ACCEPTOR OR MAKER.

§ **1171.** In the *second* place, the bankruptcy and insolvency of the drawee of a bill, however well known, constitute no excuse for neglect to make due presentment thereof for acceptance,[8] or to give due notice of its dishonor [9] to the drawer and indorsers if it is not accepted. And the same rule applies as to the necessity of presentment for payment to the acceptor of a bill or maker of a note,[10] and as to notice of its dishonor by nonpayment.[11] This doctrine rests upon the twofold ground that it is a part of the contract of drawer and indorser that the bill or note should be presented for acceptance or payment, as the case may be, and due notice given if it be dishonored; and further, that it cannot be definitely settled without a presentment that the instrument will be dishonored, as through friends or resources unknown to others, the principal party may derive the means for payment.

§ **1172.** The English and American cases are now uniform on this subject,[12] and it was long ago said: "It sounds harsh that a known bankruptcy should not be equivalent to a demand or notice,

8. Chitty on Bills (13th Am. ed.) [*330], 369; Citizens' Nat. Bank, etc. v. Third Nat. Bank, etc., 19 Ind. App. 69, 49 N. E. 171, citing text.

9. Chitty on Bills (13th Am. ed.) [*330], 369. Bank v. Bradley, 117 N. C. 526, 23 S. E. 455, citing text, and holding that protest was not necessary, in case of an inland bill, but notice of dishonor must be given with the same promptness as in cases where protest is necessary. Phipps v. Harding, 17 C. C. A. 203, 70 Fed. 468.

10. Chitty on Bills [*354], 396; Story on Notes, § 286; Story on Bills, §§ 318, 326, 346; 1 Parsons on Notes and Bills, 446; Basenhorst v. Wilby, 45 Ohio St. 340.

11. Story on Notes, § 367; 1 Parsons on Notes and Bills, 528; Hawley v. Jette, 10 Oreg. 31, 45 Am. Rep. 132, approving the text.

12. Nicholson v. Gouthit, 2 H. Bl. 609; Bowes v. Howe, 5 Taunt. 30; Warrington v. Furbor, 8 East, 242; Esdaile v. Sowerby, 11 East, 114; Thackeray v. Blackett, 3 Campb. 164; Smith v. Becket, 13 East, 187; Cory v. Scott, 3 B. & Ald. 619; Leach v. Hewitt, 4 Taunt. 731; Free v. Hawkins, 8 Taunt. 92; Russell v. Langstaffe, Doug. 496; Armstrong v. Thurston, 11 Md. 148; May v. Coffin, 4 Mass. 341; Clair v. Barr, 2 Marsh. 255; Benedict v. Caffee, 5 Duer, 226; Watkins v. Crouch, 5 Leigh, 522; Hunt v. Wadleigh, 26 Me. 271; Barton v. Baker, 1 Serg. & R. 334; Hightower v. Ivy, 2 Port. 308; Denny v. Palmer, 5 Ired. 610; Nash v. Harrington, 2 Aik. 9; Hawley v. Jette, 10 Oreg. 31, 45 Am. Rep. 132, citing the text. The maker was insolvent and in prison. See Chitty on Bills [*438]; Bank of Seaford v. Connoway, 4 Houst. 206. But *contra*, Bogy v. Keil, 1 Mo. 743; Strothart v. Parker, 1 Overt. 260.

but the rule is too strong to be dispensed with," [13] though at one time a different view obtained.[14]

The same rule applies where the insolvency arises between drawing or indorsing and maturity;[15] and where the insolvency is known to the party at the very time when he signs his name,[16]

13. Nicholson v. Gouthit, 2 H. Bl. 609; Chitty on Bills [*449].

14. De Berdt v. Atkinson, 2 H. Bl. 336. In Jackson v. Richards, 2 Cai. 343, Kent, C. J., said: "Within two years subsequent to the decision (in De Berdt v. Atkinson) the same court decided directly the contrary in the case of Nicholson v. Gouthit. I think the reasoning in the last decision the best, and ought to be followed."

15. Crossen v. Hutchinson, 9 Mass. 205.

16. In Brown v. Ferguson, 4 Leigh, 53, it was said by Tucker, P.: "It has been long since settled that notice, or rather knowledge, by anticipation will not dispense with the necessity of notice of nonpayment. Even the known insolvency of the drawee will not have that effect; for as many means of securing payment may exist through the assistance of friends, or otherwise, it is reasonable that the drawer or indorsers shall have notice that the holder designs to look to them, in order that they may have the opportunity of availing themselves of such means. Knowledge of the fact of insolvency, or that a bill will be dishonored, is one thing, and notice of protest for nonpayment is another. For, until the drawer or indorser receives such notice, he has no reason to conclude that resort will be had to him. He is lulled into security, instead of being awakened to the necessity of providing for his own indemnity." In the case (4 Leigh, 49), Carr, J., said: "Upon the reason and justice of the case, I at first felt doubts whether the drawer was entitled to strict commercial notice. There is no doubt that he was authorized to draw the bill, for the jury find that the drawees owed him the sum for which it was drawn. This, under the general rule, would entitle the drawer to notice. But it is also found that, before the bill was presented for acceptance, the drawees having been advised of it, wrote a letter to the drawer on the subject, in answer to which letter he (the drawer) writes: 'I am sorry you will be unable to retire the draft. When the draft is nearly due, you can draw on me at sixty days, to enable you to take it up.' It is found also that when the time for paying the bill drew near, the drawees did draw on Ferguson (the drawer) for the purpose of meeting it; that this bill was sold on condition that Ferguson should accept it, and was sent on and presented to him and dishonored by him. These facts seemed to me to show clearly that Ferguson (the drawer) had, if not a perfect knowledge, the strongest grounds to conclude that Foster and Moore (the drawees) would not pay the bill he had drawn on them, and, therefore, was not entitled to strict notice. An examination of the subject, however, has satisfied me that my first impressions are in opposition to the fixed and settled law of the subject. Nicholson v. Gouthit, 2 H. Bl. 609, is the leading case on the point, which has been since uniformly followed. In Esdaile v. Sowerby, 11 East, 117, the indorser of a bill had full knowledge of the bankruptcy of the drawer, and the insolvency of the acceptor, before and at the time when

expectation or knowledge of the drawer or indorser that the bill or note will not be paid are not excuses, for knowledge is not notice.[17]

The bankruptcy and insolvency of the drawer or indorser is no excuse for want of notice to him; it should be given to his assignee.[18] In case of assignment, notice to an insolvent alone has been held sufficient.[19]

SECTION III.

THE LOSS OR MISLAYING OF THE BILL OR NOTE.

§ 1173. In the third place.— The loss or mislaying or destruction of a bill or note payable on a day certain, so that, at its maturity, the holder is not able to deliver it up to the acceptor or maker, upon its being paid, is, as a general rule, no excuse for want of a demand of payment of acceptor or maker, or of due notice to drawer or indorser.[20] Due demand should be made, accompanied by a tender of indemnity to maker or acceptor, and then should he refuse, due protest should be made (where requisite) and due notice given. But the acceptor or maker is not bound under such circumstances to pay the amount due by the bill or note, if lost or mislaid, although he may at his election do so;

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the bill became due; yet the court held that this did not dispense with the necessity of giving such indorser regular notice of the dishonor of the bill. The case of Staples v. O'Kines, 1 Esp. 332, seems directly in point to the present case. In an action against the drawer of a bill, the defense was want of notice; the plaintiff called the acceptor, who proved that, when the bill was drawn, he was indebted to the defendant in more than the amount, but that he then represented to the defendant that it would not be in his power to provide for the bill when it should become due, and that it was, therefore, then understood between them that the drawer should provide for it; and it was contended that this superseded the necessity of giving the drawer notice, but Lord Kenyon held that it did not, and nonsuited the plaintiff. There are many more cases to the same point. The authority of these adjudications, and the reason on which they are founded, satisfy me that the drawer, in the case before us, was entitled to regular notice of the nonpayment of the bill." Farnum v. Fowle, 12 Mass. 89; Sandford v. Dillaway, 10 Mass. 52; Allwood v. Hasledon, 2 Bail. 457; Phipps v. Harding, 17 C. C. A. 203, 70 Fed. 468.

17. Cases *ante*, § 1164; Citizens' Nat. Bank, etc. v. Third Nat. Bank, etc., 19 Ind. App. 69, 49 N. E. 171, citing text.

18. *Ex parte* Johnson, 1 Mont. & A. 622; Citizens' Nat. Bank, etc. v. Third Nat. Bank, etc., 19 Ind. App. 69, 49 N. E. 171, citing text.

19. Donnell v. Savings Bank, 80 Mo. 171. See *ante*, § 1002.

20. Story on Notes, 290; Story on Bills, § 348.

for he is entitled in all cases to have the bill or note delivered up to him as a voucher upon payment thereof.[21] The proper remedy for the holder in case of a refusal to pay is in equity.[22] If the instrument be destroyed, however, he may recover at law, and there are some other exceptional circumstances under which he may do so, elsewhere considered.[23]

In respect to a bill drawn at sight, and which must be presented within a reasonable time, the loss thereof will excuse a reasonable delay;[24] and if, upon its loss, a second one be given by the drawer, necessary delay in presenting that will be excused.[25] But where the word "duplicate" was written on the second draft, it was deemed, in view of extrinsic facts, to import that it was made as a substitute for, and to take the place of, the original; and the defendant having been discharged from liability upon the original, by laches as to presentment, the plaintiff could not recover on the duplicate.[26]

§ **1174.** Story, upon the authority of Pothier, lays down the doctrine, that if the holder has lost or misplaced the bill before acceptance, he should still apply for acceptance thereof, and upon refusal protest the bill.[27] We know of no other authority for this doctrine.

SECTION IV.

THE APPOINTMENT OF DRAWER OR INDORSER AS EXECUTOR OR ADMINISTRATOR OF MAKER OR ACCEPTOR.

§ **1175.** In the *fourth* place, it is well settled that the appointment of the drawer or indorser as executor or administrator of the maker or acceptor does not excuse the holder from making a demand upon him as personal representative,[28] or from giving him

21. See chapter XLVI, on Lost Bills and Notes, and chapter XXXVIII, on Payment; Thompson on Bills, 204; Story on Bills, § 348; Edwards on Bills, 508; Lane v. Bank of West Tennessee, 435.

22. See chapter XLVI, on Lost Bills and Notes.

23. See chapter XLVI, on Lost Bills and Notes.

24. Aborn v. Bosworth, 1 R. I. 403.

25. Benton v. Martin, 31 N. Y. 382 (1865).

26. Benton v. Martin, 40 N. Y. 346 (1869), 51 N. Y. 572 (1873); Angaletos v. The Meridian Nat. Bank of Indiana, 4 Ind. App. 573, 31 N. E. 368.

27. Story on Bills, § 279; Pothier De Change, note 145.

28. Magruder v. Union Bank, 3 Pet. 87, 7 Pet. 287; Juniata Bank v. Hale, 16 Serg. & R. 157; Carolina Nat. Bank v. Wallace, 13 S. C. 347; Story on Bills, § 376.

notice that he is looked to personally for payment.[29] Demand is indispensable in order to fix the liability of drawer or indorser; and then, it is said, notice to the indorser is necessary in order that he may be informed that the holder does not mean to resort solely to the estate of which he is personal representative, but to him also in his individual character as indorser; and that, if he received no notice, he would have a right to conclude that the holder intended to look to the estate only.[30] But when demand for payment is made to the representative of the maker or acceptor, who is also his indorser, such person would be bound to make the payment primarily for his principal, and it might be reasonably inferred that in the event of his refusal to do so in that character, the like demand applied to him in his individual character. And it would seem to be superfluous to add to it a new and formal notification that he is looked to as indorser for payment.[31] Indeed, knowledge of dishonor obtained by communication from the holder amounts to notice, though knowledge derived from a stranger does not;[32] and it has been held in England, that where a demand was made at the house of the acceptor, and it was answered by the drawer that the acceptor was dead, and that he was his executor, and requesting that the bill might be allowed to stand over for a few days, and he would see it paid — that this was sufficient notice of dishonor.[33] It has been observed that the case cited "does not decide that where the party sought to be charged has become executor of the payor, notice is dispensed with, but that the circumstance in that particular case constituted notice."[34] But it seems to have been considered by the court that information of dishonor derived in such a manner from the holder necessarily constituted notice.

If the maker die, leaving his estate insolvent, neither demand[35] nor notice[36] will be excused.

29. Ibid.

30. Juniata Bank v. Hale, 16 Serg. & R. 157.

31. 1 Parsons on Notes and Bills, 526.

32. Miers v. Brown, 11 M. & W. 372; Tindal v. Brown, 1 T. R. 167.

33. Caunt v. Thompson, 7 C. B. 400. Creswell, J., after quoting cases cited in preceding note, says: "In substance, these cases seem to establish, that in order to hold a prior holder responsible, he must derive from some person entitled to call for payment information that the bill has been dishonored, and that the party is in condition to sue him; from which he may infer that he will be held responsible."

34. Redf. & Big. Lead. Cas. 428.

35. Gower v. Moore, 25 Me. 16; Johnson v. Haith, 1 Bail. 482.

36. Lawrence v. Langley, 14 N. H. 70.

SECTION V.

THE TRANSFER OF THE BILL OR NOTE AS COLLATERAL SECURITY.

§ **1176.** In the *fifth* place, if the bill or note has been transferred to the holder by mere delivery without indorsement, as collateral security, the transferrer is not entitled to insist on a strict presentment at maturity to the maker or acceptor; nor will he be released from the debt for which the bill or note is delivered as collateral security, unless he can show that he has actually sustained damage or prejudice by such nonpresentment.[37] And to the same extent only can he claim exoneration by failure to give him due notice.[38]

This circumstance of transfer without indorsement as collateral security is generally enumerated amongst the cases in which presentment and notice are dispensed with or excused; but really it is simply a case in which the transferrer does not come at all within the rule entitling him to notice.[39] It is true that Mr. Chitty has several times in his treatise declared that a transferrer by delivery of a note or bill payable to bearer is ordinarily entitled to regular notice as a party to the bill;[40] but this is incorrect. Declining to indorse, he declines to become a party to the bill, and the only liability which he incurs is for the consideration given, which, if the instrument be forged or illegal (and in England if it be worthless by reason of insolvency of the parties), may be received back.[41] He is in no sense a party, and not entitled to strict demand and notice.[42]

SECTION VI.

THE DEATH OF THE MAKER OR ACCEPTOR.

§ **1177. In the sixth place.**— The death of the maker of a note, or acceptor of a bill, is no excuse for want of presentment for payment. In such a case, the holder should make presentment to executor or administrator of the deceased, if one has been ap-

37. Van Wart v. Woolley, 3 B. & C. 439; Swinyard v. Bowes, 5 Maule & S. 62; Story on Notes, § 284; Story on Bills, § 372.

38. Ibid.

39. Story on Bills, § 372.

40. Chitty on Bills (13th Am. ed.) [*443], 479.

41. See *ante*, §§ 732 *et seq.*, vol. I.

42. 1 Parsons on Notes and Bills, 503; Story on Bills, § 372.

pointed, and his whereabouts can be ascertained;[43] or if there be no personal representative, the presentment should be made at the house of the deceased,[44] unless, indeed, the instrument be payable at a particular place, in which case presentment there is always sufficient.[45] Nor is this circumstance an excuse for want of notice to drawer and indorser.[46] It may be all the more needful, and should be immediately given. It has been held, however, that the indorser who knew of the maker's death when he indorsed is not entitled to notice;[47] but this distinction rests on no sound principle.

In like manner, the death of the drawer or indorser is no excuse for want of notice, which should be given to his personal representative.[48]

§ 1178. Effect of drawee's death before presentment for acceptance.— When the drawee dies before the bill is presented for acceptance, it is generally stated that it will not operate as an excuse for nonpresentment for acceptance.[49] But this may be doubted. The acceptance of the personal representative, to whom it is said the bill should be presented for acceptance, would not be according to the tenor of the bill, whether he bound himself personally, or bound himself to pay out of the decedent's assets; and as the holder would not be bound (as we think) to take such an acceptance, there is no reason why he should be required to present the bill for such acceptance.[50] There is an obvious difference between this, and the presentment to the personal representa-

43. Story on Notes, § 241; Chitty on Bills [*356], 399; Story on Bills, § 318; White v. Stoddard, 11 Gray, 528; Landry v. Stansbury, 10 La. 484; Frayzer v. Dameron, 6 Mo. App. 153. See chapter XX, on Presentment for Payment, § 591, vol. 1, and chapter XVII, on Presentment for Acceptance, § 458, vol. I.

44. Juniata Bank v. Hale, 16 Serg. & R. 157; Magruder v. Bank of Georgetown, 3 Pet. 87; Story on Notes, § 241; Chitty on Bills [*356], 398; Story on Bills, § 346.

45. Chitty on Bills [*356–357], 399; Story on Notes, § 253.

46. 1 Parsons on Notes and Bills, 525; Edwards on Bills, 454. See *ante*, § 1000 *et seq.;* 2 Ames on Bills and Notes, 510; Lane v. Bank, 9 Heisk. 219.

47. Davis v. Francisco, 11 Mo. 572; Edwards on Bills, 489; Picker v. Harlan, 75 Mo. 678.

48. See chapter XXIX, on Notice, section IV; Oriental Bank v. Blake, 22 Pick. 206.

49. Story on Bills, § 230.

50. See chapter XVII, on Presentment for Acceptance, § 458, vol. I. See also Smith v. Bank, L. R., 4 P. C. 194; 2 Ames on Bills and Notes, 510.

tive for payment. He may have assets, and be ready to pay, and it is due to drawer and indorsers to afford him the opportunity.[51]

§ 1179. But even as to presentment for payment, the death of the maker or acceptor has been held to operate as an excuse.

Thus where an executor or administrator is allowed by law a certain time within which to settle up the estate, and is not liable before its expiration, he will seldom hazard the payment of a debt before he has ascertained the condition of the estate, or pay the debt before he is obliged to do so; and a demand upon him would doubtless be met with a refusal. "And therefore" (as said by Parker, C. J.), "such a demand would be merely a troublesome formality, without any use; and notice to the indorser that, the promisor being dead, he will be looked to for payment, will in every respect be as advantageous to him as a previous demand upon the promisor." [52] In England a different policy and a different rule exist.[53] The fact that the indorser is the personal representative of the maker will not excuse nonpresentment to him.[54]

SECTION VII.

THE MISDATING OF A BILL OR NOTE BY A FOREIGN RESIDENT.

§ 1180. **In the seventh place.**— When a foreign resident dates a bill or note in another State, where he executes and delivers it, and if he knew of such foreigner's residence at the time he received the note, or learned it within such period as afforded him time to present it, it would be his duty to do so.[55] Whether, in-

51. Edwards on Bills, 454.

52. Hale v. Burr, 12 Mass. 86. See also Landry v. Stansbury, 10 La. 485; Oriental Bank v. Blake, 22 Pick. 206.

53. Hale v. Burr, *supra.*

54. Magruder v. Union Bank, 3 Pet. 87, 7 Pet. 287. See *ante*, § 1175.

55. Taylor v. Snyder, 3 Den. 145; Burrows v. Hannegan, 1 McLean, 309; Bank of Orleans v. Whittemore, 12 Gray, 473, the court saying: "Where the maker of a note, when it is made and indorsed, has a known residence out of the State, which residence remains unchanged at the maturity of the note, demand must be made on him, or due diligence used for that purpose, and notice of nonpayment given to the indorser before the indorser can be charged. So it was decided by the Court of Appeals in New York, in Taylor v. Snyder, before referred to, and in Spies v. Gilmore, 1 N. Y. 321. In this last case Bronson, J., said: "The only excuse which has been offered for not making demand is, that it would have been inconvenient to go or send to Matamoras for the purpose. It is often inconvenient to present the note for

deed, the holder would be excused, even if misled by the date, is questionable. Certainly the burden would be upon him to show that he was misled. In all cases the holder must exercise due diligence, and the only question is, what does due diligence require? The holder may, as it seems, presume the party making the note to reside where he has dated it, and may proceed accordingly to inquire for him at that place, and prepare to make presentment there at maturity. If, then, he learns for the first time that he resides elsewhere, his failure to present to him would be excused. Such, at least, seems to us the correct doctrine.[56] But if the note be dated at one place, and there be a memorandum of the maker's address under his name, or elsewhere upon the paper, due diligence would require inquiry at the place designated.[57] There are authorities which maintain the view that if the maker of a note resides and has his domicile in one State, and actually dates and makes and delivers a promissory note in another State, it will be sufficient for the holder to demand payment thereof at the place where it is dated, if the maker cannot personally, upon reasonable inquiries, be found within the State, and has no known place of business there.[58]

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payment when the maker and holder both reside in the same State; and yet, when the maker has a known place of residence, and there has been no change of circumstances after the giving of the note, mere trouble or inconvenience to the holder has never been held a good excuse for omitting demand. And this is so, however wide asunder the maker and holder may live. If the plaintiff wished to avoid the inconvenience of sending to Matamoras, he should have made the note payable in New York, or got an indorsement with a waiver of demand. He has no right to change the contract which the indorser made, for the purpose of promoting his own convenience." 1 Parsons on Notes and Bills, 459, note *c*.

56. Smith v. Philbrick, 10 Gray, 252; Meyer v. Hibscher, 47 N. Y. 270; Stayler v. Williams, 24 Md. 199; Apperson v. Bynum, 5 Coldw. 348; Moodie v. Morrall, 3 Const. 367. See especially chapter XX, on Presentment for Payment, § 639 *et seq.*, vol. I, and chapter XXIX, on Notice of Dishonor, section VI, vol. II.

57. Nicholson v. Barnes (Nebr.), 9 N. W. 652.

58. Story on Notes, 1236; Hepburn v. Toledano, 10 Mart. 643.

BOOK V.

ACTION ON NEGOTIABLE INSTRUMENTS; AND DEFENSES, DISCHARGES, AND DAMAGES.

CHAPTER XXXVII.

ACTION OR SUIT UPON BILLS AND NOTES.

SECTION I.

GENERAL PRINCIPLES AS TO WHO MAY SUE.

§ **1181.** It is not within the province of this volume to treat otherwise than incidentally of those questions which concern negotiable instruments in a collateral way, rather than being immediately associated with their negotiable qualities. Therefore this chapter will not enter into any minute discussion of the intricacies of pleading and practice involved in the prosecution of a suit upon a bill or note, but confine itself to a statement of the leading general principles of the most important character.

§ **1181a. Holder with legal title may sue.**—Any holder of a bill or note who can trace a clear legal title to it, is entitled to sue upon it in his own name, whether he possesses the beneficial interest in its contents or not.[1] If the note be payable to A. or B., it may

1. Caldwell v. Lawrence, 84 Ill. 161; § 1191; Harpending v. Daniel, 80 Ky. 456. If the owner has transferred the note as collateral security, he cannot maintain a suit on it. Smith v. Felton, 85 Ind. 223, 84 Ind. 485. For the purposes of pleading, an allegation of indorsement, assignment, or execution to the plaintiff, sufficiently shows title in him. Eichelberger v. Bank, 103 Ind. 401; Thompson v. Building Assn., 103 Ind. 279. In this connection, see Prescott Nat. Bank v. Butler, 157 Mass. 549, 32 N. E. 909. In this case, among other questions raised, was whether a national bank, under the Revised Statutes (United States), was authorized to discount promissory notes; the court said: "Even if a national bank does not get the legal title to a promissory note brought in the market, it may maintain a suit as the holder, and the maker and the indorsers cannot be relieved from their contract to pay holder

be sued upon by them jointly or by either one of them.[2] If there be a special indorsement, or assignment to a particular person, he is the proper person to sue; and if he is in possession he may sue although his name be indorsed on the paper, after the special indorsement or assignment. For in such case his indorsement will be presumed to be a mere memorandum, or evidence that he had negotiated the paper and then taken it up.[3]

Agents,[4] receivers, assignees,[5] trustees,[6] or personal representatives,[7] may sue on a note or bill payable to bearer, or indorsed in blank. And the donee *causa mortis* of a note payable to the donor's order may use the name of his personal representative, even against his protest.[8] But a mere depositary of such a note cannot maintain suit.[9] If the paper be indorsed specially to a particular person, none but such person or his representative can

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the amount promised in writing." Seybold v. National Bank, 5 N. Dak. 460, 67 N. W. 682; Hoskinson v. Bagby, 46 Kan. 758, 27 Pac. 110; Stamper v. Gay, 3 Wyo. 322, 23 Pac. 64, citing text; Berney v. Steiner Bros., 108 Ala. 111, 19 So. 806, 54 Am. St. Rep. 144; Rice v. Rice, 106 Ala. 636, 17 So. 628; Jenkins v. Sherman, 77 Miss. 884, 28 So. 726; Fant v. Wickes, 10 Tex. Civ. App. 394, 32 S. W. 126; Sparks v. Coats, 22 Tex. Civ. App. 455, 54 S. W. 913. See Jackson v. West, 22 Tex. Civ. App. 483, 54 S. W. 297; Keller v. Alexander, 24 Tex. Civ. App. 186, 58 S. W. 637; Giselman v. Starr, 106 Cal. 651, 40 Pac. 8.

2. Westgate v. Healy, 4 R. I. 524; Middleton v. Griffith, 57 N. J. L. 442, 31 Atl. 405, 51 Am. St. Rep. 617, citing text.

3. Humphreyville v. Culver, 73 Ill. 485; Middleton v. Griffith, 57 N. J. L. 444, 31 Atl. 405, 51 Am. St. Rep. 617, citing text; Verney v. Steiner Bros., 108 Ala. 111, 19 So. 806, 54 Am. St. Rep. 144. See § 1198.

4. Law v. Parnell, 7 C. B. (N. S.) 282; §§ 1192, 1192*a*.

5. Smith v. Kendal, 1 Esp. 231, 6 T. R. 123; Bowman v. Wood, 15 Mass. 534; Beeson v. Shively, 28 Kan. 574; Beckham v. Hague, 44 App. Div. 146, 60 N. Y. Supp. 767.

6. Haxtun v. Bishop, 3 Wend. 13; Stoll v. Sheldon, 13 Nebr. 207; Giselman v. Starr, 106 Cal. 651, 40 Pac. 8.

7. See *ante*, § 264, vol. I; 2 Parsons on Notes and Bills, 446. Where a guardian transfers by delivery without indorsement, to the heirs of his deceased ward as a part of the ward's estate, a promissory note payable to him, the heirs of deceased ward may maintain an action against the makers of the note if the original payee is made a party defendant and files a disclaimer. See Casto *et al.* v. Evinger *et al.*, 17 Ind. App. 298, 46 N. E. 698; Fant v. Wickes, 10 Tex. Civ. App. 394, 32 S. W. 126; Harts v. Emery, 184 Ill. 560, 56 N. E. 865.

8. Grover v. Grover, 24 Pick. 261; Sessions v. Moseley, 4 Cush. 87; Bates v. Kempton, 7 Gray, 382; Brown v. Brown, 18 Conn. 410.

9. Sherwood v. Roys, 14 Pick. 172; Woodsum v. Cole, 69 Cal. 142.

sue.[10] A party for accommodation who pays the bill may sue prior parties, but not subsequent ones. If an acceptor or maker for accommodation pays the bill he cannot sue drawer or indorser upon the bill, because, according to its terms, he is liable to them. But he may sue the accommodation party for money paid at his request.[11]

§ **1182. In partnership cases.**— If a bill or note be made payable to, or indorsed specially to a firm, all the partners must join in the suit;[12] and if so payable or indorsed to A. & Co., A. cannot recover unless he shows that he alone composed the nominal firm.[13] If, in fact, he alone composes the firm, the title to the paper is in him, and no indorsement is necessary to enable him to maintain the suit.[14] If one of the copartners of a firm should die, suit should be brought by the survivor or survivors;[15] but if the paper be indorsed in blank to a firm, either copartner may fill it up in his own name and sue,[16] even though one of the copartners be dead,[17] and if indorsed to one member of the firm, it may be filled up and suit brought on it in the firm name.[18]

§ **1183.** A copartner cannot sue a firm of which he is a member, upon a bill or note payable by it to himself, because he would be in fact suing himself;[19] but if a firm make its bill or note payable

10. See vol. I, § 692; Burch v. Daniel, 109 Ga. 256, 34 S. E. 310. Held, in this case, that a plaintiff who brought suit upon a promissory note, the legal title to which was not in him when his petition was filed, could not maintain the action by proving that before the trial he had procured an indorsement of the note to himself from the person in whom such title had vested at the time the action was begun."

11. Stark v. Alford, 49 Tex. 260; § 1206.

12. Guidon v. Robson, 2 Campb. 302; Atwood v. Rattenbury, 6 J. B. Moore, 579.

13. Robb v. Bailey, 13 La. Ann. 457; Hoyt v. Kountze, 54 Nebr. 368, 74 N. W. 585.

14. Smith v. Hanie, 74 Ga. 327.

15. Parsons on Partnership, 447.

16. Lovell v. Evertson, 11 Johns. 52.

17. Atwood v. Rattenbury, 6 J. B. Moore, 579; Weaver v. Bromley, 65 Mich. 213.

18. Hutchinson v. Crane, 100 Ill. 272. And it has been likewise held that a corporation *de facto* can bring an action on notes received by it, and the maker thereof cannot avail himself of the defective corporate existence of the company in order to avoid a just liability. See Bank of Port Jefferson v. Darling, 91 Hun, 236, 36 N. Y. Supp. 153.

19. Parsons on Partnership, 510, note.

to the order of a copartner, and the latter indorse it, the indorsee may sue.[20] Nor will an indorsement by one of a firm which is the payee of a note to another, enable the latter to sue thereon in his own name; for anything less than indorsement of the partnership name is an irregularity and a departure from the legitimate mode of transfer in such cases.[21] But if a note indorsed by two of three payees to the third payee and a stranger, be subsequently indorsed by the third payee, the indorsee may sue in his own name.[22] And a firm may indorse to one member who may sue.[23]

§ 1183a. **Joint parties not partners** must all unite in the action if living. On the death of one of them the remedies for collection survive to those living, who may lawfully receive payment, and sue at law or in equity, as may be appropriate, without uniting the personal representative of the deceased joint party.[24] It has been held that one of two joint owners cannot maintain an action thereon in his own name, though the note be payable to bearer and be in his possession.[25]

§ 1184. **In cases of married women.**—On a bill or note given to a single woman, who afterward marries, the husband must join her in the action.[26] If she dies, the right of action is in her personal representative, not in the husband.[27] If the husband dies, the right of action is in her, and not in the husband's personal

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20. Thayer v. Buffum, 11 Metc. (Mass.) 398; Davis v. Briggs, 39 Me. 304.

21. Estabrook v. Smith, 6 Gray, 570.

22. Goddard v. Lyman, 14 Pick. 268.

23. Manegold v. Dulan, 30 Wis. 541.

24. Lannay v. Wilson, 30 Md. 536; Martin v. McReynolds, 6 Mich. 70; Allen v. Tate, 58 Miss. 586.

25. McNamee v. Carpenter, 56 Iowa, 276. But he may if his co-owner indorses to him. Regan v. Jones, 1 Wyo. Ter. 210; Nagal v. Lutz, 41 App. Div. 193, 58 N. Y. Supp. 816. In the latter case a promissory note was given in the following form: "On demand after thirty days, we promise to pay to the order of John F. Nagal seven hundred and fifty ($750.00) dollars; also to Chas. H. Callahan the sum of seven hundred and fifty ($750.00) dollars, with use —" this note was indorsed by third persons before delivery, with intent on the part of the indorsers to give the maker credit with the payees. Held, that this note created two separate and independent causes of action against the indorsers, one in favor of each of the payees, and they were not entitled to unite as plaintiffs in a single action to enforce the liability of the indorsers.

26. Sherrington v. Yates, 12 M. & W. 855, overruling M'Neilage v. Holloway, 1 B. & Ald. 218.

27. Hart v. Stevens, 6 Q. B. 637.

representative.[28] So the right of action survives to the wife, upon a note payable to husband and wife, when the husband dies, and does not pass to his representative.[29]

On a bill or note made payable to a married woman after marriage the husband may sue alone as payable to him,[30] or he may join in an action with his wife.[31] If payable to the husband, or to his wife, in the alternative, he should sue.[32]

The wife cannot sue her husband on a note made by him to her after marriage;[33] nor on a joint and several note made to her by him and others;[34] but in this case if he dies she may sue the others.[35]

§ **1185.** If the instrument be payable to "A. for the use of B.," [36] or "on account of B.," [37] A. is the proper person to bring the suit. One who has paid a note to the payee, who indorsed it to him upon payment, may sue as indorsee against the maker, though he is a party to the note as guarantor.[38] In some cases it is held that the plaintiff may sue in a fictitious name.[39]

A deposit-book issued by a savings bank is not negotiable, and the assignee of it cannot sue the bank in his own name.[40]

§ **1186.** Any person not originally a party, but who has paid the bill *supra protest*, may sue all parties not subsequent to the party for whose honor he has paid;[41] but a banker who pays the acceptance of a customer, payable at his house, but unprovided for, does not stand on the footing of the party paying *supra protest*, and must sue for the consideration.[42]

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28. Stanwood v. Stanwood, 17 Mass. 57; Dean v. Richmond, 5 Pick. 461.

29. May v. Boisseau, 12 Leigh, 512; Perkins v. Clements, 1 Pat. & H. 151; Draper v. Jackson, 16 Mass. 480; Wells v. Moore, 68 Mo. App. 499.

30. Burroughs v. Moss, 10 B. & C. 558.

31. Philliskirk v. Pluckwell, 2 Maule & S. 393.

32. Young v. Ward, 21 Ill. 223.

33. Sweat v. Hall, 8 Vt. 187.

34. Richards v. Richards, 2 B. & Ad. 447.

35. Richards v. Richards, 2 B. & Ad. 447.

36. Barry Co. v. McGlothlin, 19 Mo. 397; Cramlington v. Evans, 2 Ventris, 307.

37. Nelson v. Wellington, 5 Bosw. 178.

38. McGregory v. McGregory, 107 Mass. 543.

39. Epting v. Jones, 47 Ga. 622. See also Ogilby v. Wallace, 2 Hall, 553; Pearce v. Austin, 4 Whart. 489.

40. Howard v. Windham County Sav. Bank, 40 Vt. 597.

41. Chitty on Bills [*537], 609.

42. Holroyd v. Whitehead, 5 Taunt. 444, 3 Campb. 530.

§ 1186a. Cause of action indivisible.— It is a general principle of law that a party cannot divide an entire demand or cause of action, and maintain several suits for its recovery; and a recovery for part of an entire demand will bar an action for the remainder, if due at the time that the first action was brought.[43] What constitutes an entire or single demand is often difficult to determine. When a note payable at a future day carries interest payable annually or semi-annually, the holder may, before its maturity, recover the interest as it matures without barring an action as to the principal or unaccrued interest.[44] If the interest be due by a coupon or other separate security, it can be sued for as an independent cause of action.[45] Whether when the principal of a note, and its interest (not payable by separate security), are both mature, separate actions may be maintained, for each is controverted, some cases holding that they are maintainable;[46] others the opposite.[47] The better opinion sustains the right to the separate actions.

SECTION II.

WHEN INSTRUMENT IS PAYABLE TO AN AGENT.

§ 1187. Who may sue upon instrument payable to an agent.— Upon the theory that the party entitled to sue is the one in whom the instrument shows the legal title to exist, it has been held that, when the bill or note is payable to a certain person by name, but describing him as agent of another person also named — as, for instance, "A. B., agent for C. D."— the suit must be brought in the name of the agent, and cannot be brought in the name of the principal;[48] and that *a fortiori* must the suit be so brought when the instrument is simply payable to "A.

43. Nickerson v. Rockwell, 90 Ill. 460. See McLeod v. Snyder, 110 Mo. 298, 19 S. W. 494.

44. Walker v. Kimble, 22 Ill. 537; Goodman v. Goodman, 65 Ill. 497.

45. See §§ 1509, 1510 *et seq.*

46. Dulaney v. Payne, S. C. Ill., Jan., 1882, Alb. L. J., April 1, 1882; Andover Sav. Bank v. Adams, 1 Allen, 28; Sparhawk v. Willis, 6 Gray, 163; Freeman on Judgments, § 238.

47. Howe v. Bradley, 19 Me. 31; Parsons on Contracts, 636, vol. II.

48. Cocke v. Dickens, 4 Yerg. 29, the note being payable to C. E. McEwing, agent for the executors of Joseph Branch; Shepherd v. Evans, 9 Ind. 260; Rutherford v. Mitchell, Mart. & Yerg. 261; Rose v. Laffan, 2 Speers, 424; Rice v. Rice, 106 Ala. 636, 17 So. 628.

B., agent," no principal being named.[49] But in either case, the better doctrine, as it seems to us, is that either the agent or the principal might sue. If suit were brought by the agent, the possession conforming to the express indication of the paper would clearly sustain the action. If suit were brought by the principal whose name is expressed in the instrument, possession by him would be evidence that he had received from his agent the instrument of which he was entitled to the beneficial interest; and there could be no good reason why it should be necessary for the principal to continue to use his agent's name, when it is clear from the face of the paper that if so used it would be as the representative of his own.[50] And where the principal is undisclosed on the face of the paper, he might also sue in his own name; but in such case mere possession of the paper would not be sufficient evidence that he was the principal intended, and it would be necessary for him to supply that element in his title to recover by parol proof.[51] In the case of instruments payable to bank cashiers it might be different. Delivery of a note to an agent without indorsement would not authorize him to sue.[52]

§ 1188. Official agents.— Numerous cases have arisen in which this question has been presented upon bills and notes payable to the official agents of corporations or States; and the authorities now greatly preponderate in favor of the doctrine, that where a bill or note is made payable or is indorsed to a certain person, designated by his official title, suit may be brought in his name, or it may be brought in the name of the principal whom he officially represents, when such principal is named; and if the principal be not named, that evidence *aliunde* is admissible to show

49. Alston v. Hartman, 2 Ala. 699; Horah v. Long, 4 Dev. & Bat. 274. But when bank takes draft merely for collection, action may be maintained in the name of the bank, although it has no interest in the draft. Regina Flour Mills Co. v. Holmes, 156 Mass. 11, 30 N. E. 176; Riddell v. Prichard, 12 Wash. 601, 41 Pac. 48; McDaniel v. Pressler, 3 Wash. 636, 29 Pac. 209.

50. Binney v. Plumley, 5 Vt. 500; Johnson v. Catlin, 27 Vt. 87; Arlington v. Hinds, 1 D. Chip. 431; Fairchild v. Adams, 16 Pick. 383. See Reporter's note to Lockwood v. Coley, 22 Fed. 193; Pacific Guano Co. v. Holleman, 12 Fed. 61, citing the text; Northern Nat. Bank v. Lewis, 78 Wis. 478, 47 N. W. 834; Coffin v. Hydraulic Co., 136 N. Y. 655, 32 N. E. 1076; Stinson v. Sachs, 8 Wash. 391, 36 Pac. 287.

51. See Rutland, etc., R. Co. v. Cole, 24 Vt. 38, 12 Fed. 61, citing the text; Blair v. Bank of Mansfield, 2 Flipp. 111.

52. Nicholls v. Gross, 26 Ohio St. 425.

who the principal is. Thus it has been held that a bill or note payable or indorsed to "A. B. C., cashier, or order," may be sued upon by the bank of which the payee is cashier, although it is not named.[53] *A fortiori* such would be the case if the bank were named.[54] But suit could also be sustained by the cashier in his own name.[55] So it has been held, that a note payable to "J. R., agent of the Southern Life and Trust Co.," might be sued upon by the corporation.[56] Where the payee "or his successor in office" is named, it is specially indicated that the corporation was intended; and it may sue in its own name.[57] And if the office is named without mention of the person, as, for instance, "payable to the cashier of the First National Bank," the same view would apply.[58] Where the note was indorsed to "C. J., President M. P. F.," it was held, the company could sustain suit by proving the note was intended to be transferred to it.[59] And a note payable to "D. P., Treasurer" of a county, could be sued on by his successor in office.[60]

§ **1189.** The contrary doctrine, that only the agent can sue, rests upon the view that the official station is merely mentioned to designate the person intended;[61] but the fact in actual busi-

53. Baldwin v. Bank of Newburg, 1 Wall. 239; Garton v. Union City Bank, 34 Mich. 279; First Nat. Bank of Angelica v. Hale, 44 N. Y. 395 (1871); Bank of New York v. Bank of Ohio, 29 N. Y. 619; Bank of Genesee v. Patchin Bank, 19 N. Y. 312; Watervliet Bank v. White, 1 Den. 609; Wright v. Boyd, 3 Barb. 523; Barney v. Newcomb, 9 Cush. 46; Rutland, etc., R. Co. v. Cole, 24 Vt. 38. See chapter XIII, on Corporations, § 417, vol. I; Pratt v. Topeka, 12 Kan. 570; United States Nat. Bank v. Burton (Vt.), 2 N. Eng. 206.

54. Commercial Bank v. French, 21 Pick. 486.

55. Fairchild v. Adams, 16 Pick. 381; Martin v. Lamb, 77 Ga. 252.

56. Southern Life Ins., etc., Co. v. Gray, 3 Fla. 262.

57. Trustees, etc. v. Parks, 10 Me. 441. In Board of Supervisors v. Hall, 42 Wis. 59, the note was made payable to "the Supervisors of Ocono County, or their successors in office." It was held a good note to the county, and that the board of supervisors might sue, the court saying: "A misdescription of the character of the payee will not vitiate, provided it can be collected who was the party intended."

58. Commercial Bank v. French, 21 Pick. 486.

59. Dupont v. Mount Pleasant Ferry Co., 9 Rich. (Law) 255.

60. Rollins v. Lashus, 74 Me. 218.

61. Bank of the United States v. Lyman, 20 Vt. 666. The Bank of the United States sued in the United States Circuit Court upon a note payable to "Samuel Jaudon, Esquire, cashier, or order." The court said, per Prentiss, J.: "The promise, therefore, is to pay him, or the person to whom he shall order it to be paid; and it would be repugnant to the terms of the instrument to

ness is generally otherwise, and a theory about commercial affairs opposed to commercial practice cannot be otherwise than injurious and impracticable.

§ 1189a. Cases of agent's name used by adoption for principal's.— It is undoubtedly a matter of daily practice to make notes, drafts, acceptances, and indorsements payable to the cashiers or treasurers of financial institutions by such abbreviations as, "to J. Smith, Cas.," or "J. S., Cash.," or "Cashier," or "Treas." When the corporation sues on such a paper, it is upon the theory and averment that it was made payable to it by the name of the official; and the production of the instrument in its possession is sufficient *prima facie* evidence to sustain its suit.

A distinction has been taken in some cases, to the effect that a bill or note payable to an agent or officer of a company not incorporated may be sued in his name; but if the company be incorporated its own name must be used.[62]

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allow the Bank of the United States, or any one else, without his order, to demand and enforce payment of it by suit." But a different view prevails in the State courts of Vermont. Rutland, etc., R. Co. v. Cole, 24 Vt. 38. It was held in the following cases that the agent alone could sue: Horah v. Long, 4 Dev. & Bat. 274, where the note was payable to "W. H. H., cashier, or order;" Rose v. Laffan, 2 Speers, 424, the note being payable to "A. G. Rose, Cashier;" so where the notes ran "to W. G., Treasurer of Third Parish in Dedham," Fisher v. Ellis, 3 Pick. 322; to "The Treasurer of the Proprietors of the new meeting-house in N., or his successor in office," Clap v. Day, 2 Greenl. 305. In Van Ness v. Forrest, 8 Cranch, 30, where a commercial company, consisting of four or five hundred members, sold merchandise, the property of the company, and took from the purchaser his note for the purchase money, payable to Joseph Forrest, president of the company, it was held that suit should be brought in the name of the promisee against the maker of the note and his dormant partner, notwithstanding such dormant partner was also a partner of the commercial company. And it was said by Marshall, C. J.: "Suit can be brought only in the name of Joseph Forrest. It can no more be brought in the name of the company than if it had been given to a person not a member, for the benefit of the company. The legal title is in Joseph Forrest, who recovers the money in his own name, as a trustee for the company. Upon the record, and technically speaking, he is the sole plaintiff, and the court can perceive no reasonable or legal objection to his sustaining an action on the note." See also Harrow v. Dugan, 6 Dana, 341; McConnell v. Thomas, 2 Scam. 313; Ramsey v. Anderson, 1 McMull. 300; 2 Parsons on Notes and Bills, 451; Shuey v. Adair, 18 Wash. 188, 51 Pac. 388, 63 Am. St. Rep. 879.

62. Southern Life Ins., etc., Co. v. Gray, 3 Fla. 262; McConnel v. Thomas, 2 Scam. 313; § 1188; Lookout Bank v. Aull, 93 Tenn. 645, 27 S. W. 1014, 42 Am. St. Rep. 934, citing text.

The like principle applies when the instrument is payable to the official agent of a State or country; and the State or country may sue upon it in its own name. It has been so held where the instruments were payable "to Levi Woodbury, Secretary of the United States, or his successors in office;" [63] to "T. T. Tucker, Treasurer of the U. S., or order;" [64] to "James Irish, Land Agent of Maine." [65]

SECTION III.

WHO MAY SUE UPON INSTRUMENTS PAYABLE TO ONE PARTY AND DISCOUNTED BY ANOTHER.

§ 1190. A nice question is presented when a note made to raise money is expressed as payable to a certain bank, and is then discounted by another party, the bank named as payee never having any interest in it. Thus suppose the "Cheshire Bank" is named as payee, and A. B. discounts the note, it has been held that in such case the plaintiff may declare upon the note as payable to him by the name of the Cheshire Bank.[66] It has also been held that suit might be brought in the name of the payee for the benefit of the holder. Should the payee expressly consent, or impliedly by receiving the note for the person advancing the money, his name might be used;[67] but otherwise we cannot see how a mere stranger can be unwillingly brought into a controversy to which he has no proper legal relation, and it has been held that if the payee refuse the use of his name, it cannot be used.[68] Some cases utterly deny the right to use the payee's name, even with his consent.[69]

Where an accommodation note is made payable and negotiable at a particular bank, it has been held that when not discounted

63. United States v. Boice, 2 McLean, 352.

64. Dugan v. United States, 3 Wheat. 172.

65. State of Maine v. Boies, 2 Fairf. 474. See chapter XIV, § 443, vol. I.

66. Hunt v. Aldrich, 7 Fost. 31; Elliott v. Abbot, 12 N. H. 549; Meeker v. Shanks, 112 Ind. 210, citing the text. *Quære*, if holder might not sue in equity in his own name. See Taylor v. Reese, 44 Miss. 89.

67. Bank of Chenango v. Hyde, 4 Cow. 567; Bank of Newbury v. Rand, 38 N. H. 169; Lime Rock Bank v. Macomber, 29 Me. 564; Granite Bank v. Ellis, 43 Me. 367; Utica Bank v. Ganson, 10 Wend. 314; Farmers & Mechanics' Bank v. Humphrey, 36 Vt. 557. See also Bank of Rutland v. Buck, 5 Wend. 66; Powell v. Waters, 17 Johns. 176; Marvin v. McCallum, 23 Johns. 288.

68. Bank of Middlebury v. Bingham, 33 Vt. 623.

69. Adams Bank v. Jones, 16 Pick. 574.

by it, but by another person, the latter acquires no right of action against the accommodation party, who must be taken to have limited the right of negotiation to the particular bank, and he cannot sue even in its name.[70] But the better opinion seems to be that this would not be such a diversion of the paper as to discharge the accommodation parties.[71]

When a note payable to a third person has not been negotiated by him, but is in the hands of another, who sues in the payee's name, it seems that it is *prima facie* evidence of an equitable assignment by the payee to the holder, which carries authority to use his name.[72]

SECTION IV.

WHO MAY SUE UPON INSTRUMENTS PAYABLE TO BEARER OR INDORSED IN BLANK.

§ **1191.** The law is now too well settled to admit of longer controversy that an action on a bill or note payable to bearer, or indorsed in blank, may be maintained in the name of the nominal holder who is not the owner by the owner's consent; and that possession by such nominal holder is *prima facie* sufficient evidence of his right to sue, and cannot be rebutted by proof that he has no beneficial interest, or by anything else but proof of *mala fides*.[73] And, as has been said in Maryland, by Chambers,

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70. Dewey v. Cochran, 4 Jones L. (N. C.) 184; Clinton Bank v. Ayres, 16 Ohio, 282. See Dixon v. Dixon, 31 Vt. 450; Quinn v. Hard, 43 Vt. 375.

71. Utica Bank v. Ganson, 10 Wend. 315; Commercial Bank v. Claiborne, 5 How. (Miss.) 301; Briggs v. Boyd, 37 Vt. 534; Farmers, etc., Bank v. Humphrey, 36 Vt. 557.

72. Harriman v. Hill, 14 Me. 127.

73. Demuth v. Cutler, 50 Me. 300; Patten v. Moses, 49 Me. 255; Rubelman v. McNichol, 13 Mo. App. 584. This rule will not apply where the holder is one of two or more joint owners. McNamee v. Carpenter, 56 Iowa, 276; Roberts v. Snow (Nebr.), 43 N. W. 241, citing the text; Bitzer v. Wager (Mich.), 47 N. W. 210; Mars v. Mars, 27 S. C. 133. But in Alabama a written indorsement or assignment is necessary to pass the legal title to a note payable to bearer so as to enable the holder to maintain suit thereon in his own name. Cobb v. Bryant, 86 Ala. 316; Manufacturers' Nat. Bank v. Thompson, 129 Mass. 438; Wheeler v. Johnson, 97 Mass. 39; Craig v. Twomey, 14 Gray, 486; Palmer v. Nassau Bank, 78 Ill. 380; Ticonic Nat. Bank v. Bagley, 68 Me. 249; Scionneaux v. Wagnerpack, 32 La. Ann. 288; Klein v. Buckner, 30 La. Ann. 680; McCallum v. Driggs, 35 Fla. 277, 17 So. 407, approving text; Threadgill v. Commissioners, 116 N. C. 616, 21 S. E. 425, furnishes an exception to the general rule stated in the text; Meadowcraft *et al.* v. Walsh, 15 Mont.

J.: "Courts will never inquire whether a plaintiff sues for himself or as trustee for another, nor into the right of possession, unless in an allegation of *mala fides*, and the blank indorsement may be filled up at the moment of trial." [74] If it were shown that the plaintiff, upon suing upon a note payable to bearer or indorsed in blank, has no interest in it, and in addition that he is suing against the will of the party beneficially interested, he could not recover, as his conduct would be in bad faith.[75]

§ **1192. Nominal holder may sue.**— It matters not that such nominal holder will receive the amount as trustee,[76] agent,[77] or pledgee.[78] The suit by him holding the paper shows his title to recover; and it cannot matter to the defendant who discharges the debt that the plaintiff is accountable over to a third party. Thus where the plaintiffs had bought a bill for a correspondent, and had been reimbursed the amount paid, Wightman, J., said: "They have been reimbursed, and the beneficial interest has been transferred, but the legal interest is in them, and they may still sue as trustee." [79] Evidence, however, that the plaintiff has no interest in the instrument will be competent when foundation has been laid for its introduction by offer to prove offset, or other defense, available against a third person who is its true owner.[80]

544, 39 Pac. 914; Krueger v. Klinger, 10 Tex. Civ. App. 576, 30 S. W. 1087; Keller v. Alexander, 24 Tex. Civ. App. 186, 58 S. W. 637; Brennan v. Brennan, 122 Cal. 440, 68 Am. St. Rep. 46.

74. Whiteford v. Burckmyer, 1 Gill, 127; Seeley v. Wickstrom, 49 Nebr. 730, 68 N. W. 1017; Scribner v. Hanke, 116 Cal. 613, 48 Pac. 714; Illinois Conference v. Plagge, 177 Ill. 431, 53 N. E. 76, 69 Am. St. Rep. 252.

75. Tonne v. Wason, 128 Mass. 517. See Reynolds v. Kent, 38 Mich. 248; Eggan v. Briggs, 23 Kan. 710; Alabama Terminal & Improvement Co. v. Knox, 115 Ala. 567, 21 So. 495.

76. Nicolay v. Fritschle, 40 Mo. 67; Lovell v. Evertson, 11 Johns. 52; Wells v. Schoonover, 9 Heisk. 805; Jenkins v. Sherman, 77 Miss. 884, 28 So. 726; Toby v. Railroad Co., 98 Cal. 490, 33 Pac. 550.

77. King v. Fleece, 7 Heisk. 274; Gregory v. McNealy, 12 Fla. 378; Boyd v. Corbitt, 37 Mich. 52; Klein v. Buckner, 30 La. Ann. (part 1) 680; § 1181. See Willison v. Smith, 52 Mo. App. 133.

78. Bowman v. Wood, 15 Mass. 534; Bank of Charleston v. Chambers, 11 Rich. 657; Whitteker v. Charleston Gas Co., 16 W. Va. 717; Tarbell v. Sturtevant, 26 Vt. 513; Logan v. Cassell, 88 Pa. St. 288.

79. Poirier v. Morris, 2 El. & Bl. 89; McPherson v. Weston, 64 Cal. 275; Seeley v. Wickstrom, 49 Nebr. 730, 68 N. W. 1017; Banister v. Kenton, 46 Mo. App. 462.

80. Logan v. Cassell, 88 Pa. St. 290; Lenneg v. Blummer, 88 Pa. St. 515; Bank of Piedmont v. Smith, 119 Ala. 57, 24 So. 589.

And if the indorsement be expressed "for collection," it has been held that the indorsee is not such a holder as may sue.[81]

§ **1192a. In England** it has been held that if the plaintiff has neither an interest in the bill or note, or right of possession at the time of suit brought, he cannot maintain the suit.[82] But an agent being in lawful possession of the bill or note under a blank indorsement, may maintain suit.[83]

An indorsement by the payee in blank will not affect his right to sue upon a note payable to his order, while it remains in his hands;[84] nor will the fact that he has stricken out a special indorsement to himself, thereby rendering it an indorsement in blank, alter his title and consequent right to sue.[85]

§ **1192b.** In a recent New York case, where the holder of a note under a blank indorsement of the payee sued makers and indorser of the note, and defendants pleaded that the note was not the property of the plaintiff, that the same was never trans-

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81. Rock County Nat. Bank v. Hollister, 21 Minn. 385. But see *contra*, Johnson v. Hollensworth, 48 Mich. 143; Wilson v. Tolson, 79 Ga. 137; Cummings v. Kohn, 12 Mo. App. 585; Roberts v. Parrish, 17 Oreg. 589; Roberts v. Snow (Nebr.), 43 N. W. 241.

82. Emmett v. Tattenham, 8 Exch. 884 (1853). In this case W. held a bill under a blank indorsement. W.'s executor requested E. to sue in his own name; but never delivered to him the bill until after suit brought, although a copy had been taken for E.'s use, and it was understood that E. could get the bill when he wanted it. It was held that this did not constitute a constructive delivery, and Pollock, C. B., said: "The case falls within the simple proposition that a person who has no interest in, or possession of, a bill of exchange cannot maintain an action on the instrument." The American cases upholding this doctrine, and those to the contrary, are cited in 1 Ames on Bills and Notes, 319 *et seq.*, to which excellent work reference is made. It may be that holder may ratify so as to sustain suit by bearer brought without consent. See Hovey v. Sebring, 24 Mich. 232; Ticonic Bank v. Bagley, 68 Me. 249.

83. In Law v. Parnell, 7 C. B. (N. S.) 282 (1859), Erle, C. J., said: "The bill being indorsed in blank the bank had a right to hand it over to a third person to sue upon it, without indorsing it; and therefore the plaintiff, if he was the lawful holder of the bill, and had authority from the bank to do so, had a perfect right to sue upon it. * * * In the case of Emmett v. Tattenham, 8 Exch. 884, the plaintiff was not indorsee, neither had he possession of the bill. He had no interest in the bill." See cases cited in 1 Ames on Bills and Notes, 323, 324; Coy v. Stiner, 53 Mich. 42.

84. Kerrick v. Stevens, 58 Mich. 297; Consolidated Nat. Bank v. Hayes, 112 Cal. 75, 44 Pac. 469.

85. Minor v. Bewick, 55 Mich. 491.

ferred to him, that he was not the real party in interest, and that the note was the property of the Saratoga County Bank, who was the real party in interest, it was held that under the Code of New York, which requires the real party in interest to sue, the defense was admissible; although production of the note indorsed by the payee made a *prima facie* case for the plaintiff.[86]

§ **1193.** An indorsement in blank confers a joint right of action to as many as agree in suing on the bill.[87] And, therefore, where three persons separately indorsed a bill for the accommodation of the drawer, which was afterward dishonored and returned to them, and they paid the amount among them, it was held that they might bring a joint action against a previous in-

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86. In Hays v. Hathorn, 74 N. Y. 486, reversing Hays v. Southgate, 10 Hun, 511, Hand, J., reviewed the New York decisions, and said: "From this glance at the cases it appears that it is ordinarily no defense to the party sued upon commercial paper, that the transfer under which the plaintiff holds it is without consideration or subject to equities between him and his assignor, or colorable and merely for the purpose of collection, or to secure a debt contracted by an agent without sufficient authority. It is sufficient to make the plaintiff the real party in interest, if he have the legal title either by written transfer or delivery, whatever may be the equities between him and his assignor. But to be entitled to sue he must now have the right of possession, and ordinarily be the legal owner. Such ownership may be as equitable trustee; it may have been acquired without adequate consideration, but must be sufficient to protect the defendant upon a recovery against him from a subsequent action by the assignee. As we understand the scope of the offer in the present case it went to entirely disprove any ownership or interest whatever, or even right of possession as owner in the plaintiff. It should, therefore, have been admitted. It may be true that the plaintiff, if this note had been delivered to him with the intent to transfer title, might have lawfully overwritten the blank indorsement with a transfer to himself; *it is also true that the production of the paper by him was prima facie evidence that it had been delivered by him to the payee and that he had title to it;* but the defendant's offer was precisely to rebut this very presumption, and for aught that we can know the evidence under it would have done so." The court distinguished and explained the cases of Cummings v. Morris, 25 N. Y. 625; City Bank v. Perkins, 29 N. Y. 554; Brown v. Penfield, 36 N. Y. 473; Allen v. Brown, 44 N. Y. 228; Eaton v. Alger, 47 N. Y. 345, and Sheridan v. Mayor, 68 N. Y. 30; and showed that Gage v. Kendall, 15 Wend. 640, had been affected and changed by the Code. See also Bell v. Tilden, 17 Hun, 346; Zimmer v. Chew, 34 App. Div. 504, 54 N. Y. Supp. 685; Meadowcraft *et al.* v. Walsh, 15 Mont. 544, 39 Pac. 914. See Robinson v. Powers, 63 Mo. App. 290; Bovard v. Dickenson, 131 Cal. 162, 63 Pac. 162; Dudley v. Board of Commissioners, 26 C. C. A. 82, 80 Fed. 672.

87. Ord v. Portal, 3 Campb. 239, Lord Ellenborough.

dorser.[88] But where a bill of exchange was, by the direction of the payee, indorsed in blank, and delivered to A., B. & Co., who were bankers, on the account of the estate of an insolvent, which was vested in trustees for the benefit of his creditors, Lord Ellenborough held that A. and B., two of the members of this firm, and also trustees, could not, conjointly with another trustee who was not a member of the firm, maintain an action against the indorser, without some evidence of the transfer of the bill to them as trustees by the firm, by delivery or otherwise.[89]

§ **1194. The holder of a note blank as to the payee** may fill it up with his own name and sue upon it.[90] If payable to a fictitious person, it may be sued on as payable to bearer.[91] The holder of such a paper, in transferring it, should not use the fictitious name, but pass it by delivery only, or by indorsement.[92]

§ **1195. The holder under an indorsement in blank** may fill it in his own name before bringing suit, or at the trial;[93] and even after the trial, where judgment has gone for the plaintiff under the impression that the indorsement had been filled up, the correction being made *nunc pro tunc*.[94]

But the filling up of the blank indorsement is formal merely, and it is not necessary that it should be filled up at all, for the mere act of suing upon it by the holder evidences his intention to treat the indorser as a transferrer and indorser to himself.[95]

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88. Low v. Copestake, 3 Car. & P. 300 (14 Eng. C. L.); Byles on Bills [*144], 262.

89. Machell v. Kinnear, 1 Stark. 499 (2 Eng. C. L.); Byles on Bills [*144], 262.

90. Crutchley v. Clarence, 2 Maule & S. 90. See chapter V, section III, vol. I, §§ 142, 145; Keller v. Alexander, 24 Tex. Civ. App. 186, 58 S. W. 637.

91. 2 Parsons on Notes and Bills, 448.

92. Maniort v. Roberts, 4 E. D. Smith, 83.

93. Lovell v. Evertson, 11 Johns. 52; Hance v. Miller, 21 Ill. 636; Edwards v. Scull, 8 Eng. (Ark.) 325; Olcott v. Rathbone, 5 Wend. 490; Kennon v. McRea, 7 Port. 175; Kiersted v. Rogers, 6 Harr. & J. 282; Fairfield v. Adams, 16 Pick. 381; Croskey v. Skinner, 44 Ill. 321; Lucas v. Marsh, Barnes, 453; Cope v. Daniel, 9 Dana, 415; Norris v. Badger, 6 Cow. 449; Pickett v. Stewart, 12 Ala. 202. See The Christian County Bank v. Goode, 44 Mo. App. 129; Illinois Conference v. Plagge, 177 Ill. 431, 53 N. E. 76, 69 Am. St. Rep. 252.

94. Whittier v. Hayden, 9 Allen, 408.

95. Rees v. Conococheague Bank, 5 Rand. 329; Poorman v. Mills, 35 Cal. 118; Habersham v. Lehman, 63 Ga. 383; Lakeside Land Co. v. Dromgoole (Ala.), 7 So. 444, citing the text.

This seems to us clearly the correct doctrine, and results from the principle stated by Lord Ellenborough, that the exercise of the power to fill up a blank indorsement so as to make it payable to the holder is only *expressio eorum quæ tacite insunt.*[96]

But it has been held absolutely necessary that the indorsement should be filled up before judgment, and that otherwise judgment would be bad.[97]

§ **1196. Striking out intervening indorsements.**—If the plaintiff omit to state in his declaration all the indorsements after the first indorsement in blank, he may strike out the intervening indorsements, and aver that the first blank indorser indorsed immediately to himself.[98] Abbott, C. J., has said on this subject: "All the indorsements must be proved or struck out, although not stated in the declaration. I remember Bailey, J., so ruling, and striking them out himself on the trial; and this need not be done before the trial;[99] but may be done after the plaintiff has finished his case." [1] So where the action is against an indorser, and there are several indorsements between the payee's indorsement and the defendant's, the plaintiff may state in his declaration that the payee indorsed to the defendant.[2] It seems doubtful, however, whether the plaintiff can avail himself of the title of an indorser whose name he has struck out.[3]

§ **1197. If the bill or note be not payable to bearer or indorsed in blank,** or indorsed specially to himself, the holder cannot (unless authorized by statute) sue in his own name, for although he

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96. Vincent v. Horlock, 1 Campb. 442. In this case the indorsement was filled up.

97. Hudson v. Goodwin, 5 Harr. & J. 115.

98. Byles on Bills [*149], 268; Rand v. Dovey, 83 Pa. St. 281; Mayer v. Jadis, 1 Moody & R. 247; Merz v. Kaiser, 20 La. Ann. 379. The plaintiff may strike out the names of all indorsers whose undertaking is secondary or collateral to that of the maker, without prejudice to his right of action against the maker. Morris v. Cude, 57 Tex. 337; Zimmer v. Chew, 34 App. Div. 504, 54 N. Y. Supp. 685; Grant v. Ennis, 5 Tex. Civ. App. 44, 23 S. W. 998; Middleton v. Griffith, 57 N. J. L. 442, 31 Atl. 405, 51 Am. St. Rep. 617, citing text.

99. Cocks v. Borradale, MS.; Chitty on Bills [*462], 719; Byles on Bills [*149], 268.

1. Mayer v. Jadis, 1 Moody & R. 247.

2. Chaters v. Bell, 4 Esp. 210.

3. Davies v. Dodd, 1 Wils. Exch. 110, 4 Price, 176; Byles on Bills [*149], 269.

may possess the entire beneficial interest, the legal title is still outstanding in his transferrer, and he must use his name in order to maintain the suit.[4] By leaving the instrument unindorsed, the transferrer necessitates and authorizes the use of his name to the recovery of the amount; and he cannot object to its use, or release the action when instituted.[5] If the transferrer indorses the paper, then his name cannot be used save by his own consent; for then the legal title and right to sue is vested in his indorsee.[6] But if suit is commenced without his consent, he may subsequently assent to it.[7]

§ 1198. Striking out subsequent indorsements.— When there appears upon a bill or note an indorsement by the plaintiff, and subsequent indorsements to his, the question has been raised whether or not he could sustain the suit without showing a retransfer of the paper to himself. The better opinion is that he can. The Supreme Court of the United States took an opposite view in an early case,[8] and there are cases concurring with it.[9] But the Supreme Court subsequently affirmed the doctrine of the text,[10] and it has also the authority of a number of State decisions.[11] And the holder may always strike out a special in-

4. Allen v. Newbury, 8 Iowa, 65; Farwell v. Tyler 5 Iowa, 535; Tuttle v. Becker, 47 Iowa, 486; Robinson v. Wilkinson, 38 Mich. 301; Marsh v. Hayford, 80 Me. 97; Fine v. Highbridge M. E. Church, 44 N. J. L. 150, citing the text; Parham v. Murphee, 16 Mart. 355; Allen v. Ayres, 3 Pick. 289; Hull v. Conover, 35 Ind. 372. It is held in Alabama, that if the transfer is by a separate instrument, the assignee may sue in his own name. Morris v. Poillon, 50 Ala. 403. In New York the transferee without indorsement may sue in his own name by statute. Van Riper v. Baldwin, 19 Hun, 344; School District v. Reeve, 56 Ark. 68, 19 S. W. 106.

5. Paese v. Hirst, 10 B. & C. 123; Amherst Academy v. Cowles, 6 Pick. 427; Royce v. Nye, 52 Vt. 372.

6. Bowie v. Duval, 1 Gill & J. 175; Bragg v. Greanleaf, 14 Me. 395; Mosher v. Allen, 16 Mass. 451; Skowhegan Bank v. Baker, 36 Me. 154; Coleman v. Biedman, 7 C. B. 871.

7. Golder v. Foss, 43 Me. 364.

8. Welch v. Lindo, 7 Cranch, 159.

9. Robson v. Earley, 13 Mart. 373; Sprigg v. Cuny, 19 Mart. 253; Southern Bank v. Mechanics' Savings Bank, 27 Ga. 253; Grant v. Ennis, 5 Tex. Civ. App. 44, 23 S. W. 998, citing text.

10. Dugan v. United States, 3 Wheat. 172.

11. Dollfuss v. Frosch, 1 Den. 367; Whittenhall v. Korber, 12 Kan. 618; Bank of Kansas City v. Mills, 24 Kan. 610; Wickersham v. Jarvis, 2 Mo. App. 280. See cases cited in chapter XX, on Presentment for Payment,

dorsement, and bring suit under any indorsement in blank.[12] Where there appears on the paper the plaintiff's own indorsement, it will be presumed either that he had not perfected his indorsement by delivery, or that the paper has been returned to him as his own property, and in either case he has the right to sue upon it;[13] and clearly, if his indorsement be to another "for collection," he would have the right to sue, for if paid the proceeds would belong to him.[14]

SECTION V.

WHAT CONSTITUTES THE RIGHT TO SUE, AND THE EVIDENCE THEREOF.

§ 1199. The right to sue in one's own name must exist at time of suit brought, if it be in that form;[15] and if a holder of a note delivered to him without indorsement, sue before obtaining an indorsement, in his own name, an indorsement made afterward, but before trial, will not avail;[16] he must allege in his declaration or complaint that he is the payee, indorsee, or holder of the bill or note.[17] And so the right to sue must continue during the suit; and if the plaintiff transfers the instrument pending the action, it has been held that it operates as a discontinuance; and

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§ 576, vol. I; also Caldwell v. Evans, 5 Bush, 380; Canton, etc., Assn. v. Weber, 34 Md. 669. See *post*, § 1229; Robb v. Letcher, 30 Mo. App. 46; Landauer v. Espenhain, 95 Wis. 169, 70 N. W. 287.

12. Wetherell v. Ela, 42 N. H. 295.

13. Middleton v. Griffith, 57 N. J. L. 442, 444, 31 Atl. 405, 51 Am. St. Rep. 617, citing text. See *ante*, § 1181; Royce v. Nye, 52 Vt. 375; Beeson v. Lippman, 52 Ala. 296; Pitts v. Keyser, 1 Stew. 154; Evans v. Gordon, 8 Port. 142; Wickersham v. Jarvis, 2 Mo. App. 280; Humphreyville v. Culver, 73 Ill. 435; Brady v. White, 4 Baxt. 382; Collins v. Panhandle Nat. Bank, 75 Tex. 255, citing the text; Texas Land Co. v. Carrol, 63 Tex. 53, citing the text; Black v. Strickland, 3 Ont. 217; Callow v. Lawrence, 3 Maule & S. 95; Spreckels v. Bender, 30 Oreg. 577, 48 Pac. 418; Anniston Pipe Works v. Furnace Co., 94 Ala. 606, 10 So. 259.

14. Locke v. Leonard Silk Co., 37 Mich. 479; Best v. Nakomis Nat. Bank, 76 Ill. 608; Reading v. Beardsley, 41 Mich. 123; Sawyer v. Macaulay, 18 S. C. 543.

15. Emmett v. Tattenham, 8 Exch. 884. See *ante*, § 1192.

16. Dowell v. Brown, 13 Smedes & M. 43; Alabama Terminal & Improvement Co. v. Knox, 115 Ala. 567, 21 So. 495.

17. Bank v. Hysell, 22 W. Va. 144; Hartzell v. McClurg, 54 Nebr. 313, 74 N. W. 625.

that although he may repurchase the paper, he cannot restore the right to prosecute an action which he has once abated by his own act.[18] But to lay an embargo upon a negotiable instrument merely because it is in suit would greatly impair its value, and embarrass the holder; and the better opinion is that the transfer may be made with the agreement that the action should continue for the benefit of the transferee; and that in the absence of evidence it would be presumed.[19] Where principal and surety are sued, and the latter pays the amount pending suit, it may be continued against the principal as commenced for his benefit.[20]

§ 1200. Possession is in itself prima facie evidence of the right of the party to sue and receive the money when he holds under a legal title, and also that the title, although not expressly, is actually vested in him. And, therefore, in order to defeat his suit, it must

18. Vila v. Weston, 33 Conn. 49; Curtis v. Bemis, 26 Conn. 1; Lee v. Jilson, 9 Conn. 94.

19. 2 Parsons on Notes and Bills, 454. In Alabama it is held that the effect of the transfer of a note pending suit "is to make the transferee the beenficiary of the nominal plaintiff," and that such transfer "does not violate the rights of the parties." Penn v. Edwards, 50 Ala. 63. See Ober v. Goodridge, 27 Gratt. 888, where no exception was taken to transfer pending suit, and § 728; Keyser v. Shepherd, 2 Mack. 66; Hartzell v. McClurg, 54 Nebr. 313, 74 N. W. 625.

20. Low v. Blodgett, 1 Fost. 121. Clearly a second action is not barred. Deuters v. Townsend, 5 Best & S. 117; Eng. C. L. 618 (1864), Crompton, J.: "Byles on Bills, p. 159 (8th ed.), and Chitty on Bills, p. 157 (10th ed.), are cited to show that if an indorser takes a bill with notice that an action is pending, it is a defense for the acceptor. If this means that that fact can be pleaded in bar against the maintenance of the second action, it is contrary to principle, and the authorities cited for it do not bear it out. In Marsh v. Newell, 1 Taunt. 109, the question was whether the court could under those circumstances stay the action; which was entirely a matter for their equitable jurisdiction. In Colombies v. Slim, 2 Chit. 637, the court decided that a plea of this sort was bad for want of an averment of notice of the bill being overdue. But they proceed to say that if there had been notice of indorsement, and the second action were brought to oppress the defendant, it would be otherwise. That very expression shows that that is not the substance of a plea in bar, for you could not introduce an averment that the action was brought with a view to oppress. But it is very good ground for an application to stay the proceedings on the first action. The only other authority is Jones v. Lane, 3 Y. & C. 281. All that amounts to is, that Alderson, B., threw out obiter, there might be a difference in consequence of an indorsee having notice of the former action; but he expressly says that it was not necessary to decide upon it, and that he should like to hear further argument."

be shown that he is a *mala fide* holder.[21] As said in a Maryland case by Chambers, J.: "A bill payable to bearer, or a bill payable to order and indorsed in blank, will pass by delivery, and bare possession is *prima facie* evidence of title; and for that reason possession of such a bill would entitle the holder to sue."[22]

Therefore, where a note was indorsed to "C. B. Austin, agent of the Union Glass Works," it was held that the suit might be brought in the agent's name, and the court said: "Here there is no allegation of *mala fides,* so that the case stands clear of that objection. The suit is brought by Austin, who is a trustee or agent for the company. Stating that he is the agent of the Union Glass Works, is equivalent to saying that the suit is for their use."[23] But if a note were payable "to the Stansbury Oyster Co.," possession by one Stansbury would not be evidence of title.[24]

And possession of the note or bill is *prima facie* evidence that the same was indorsed by the person by whom it purports to be indorsed;[25] and production at the trial is *prima facie* evidence that it remains unpaid.

§ 1201. **When actual possession not necessary to suit.**— Possession of the instrument is not always necessary in order to institute a suit.[26] If the holder has indorsed a note in blank and pledged it as collateral security, he may negotiate it to a third person, while

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21. Wheeler v. Johnson, 97 Mass. 39; Pettee v. Prout, 3 Gray, 502. And see cases cited in chapter XXIV, section VI, § 812, vol. I, and also chapter XX, § 573, vol. I; Osborn v. McClelland (Ohio), 1 West. 227; Wilson Sewing Mach. Co. v. Spears, 50 Mich. 534; Union Nat. Bank v. Barber, 56 Iowa, 562; Savings Assn. v. Barber, 35 Kan. 494; Pryce v. Jordan, 69 Cal. 569; Leitensdorfer v. Webb, 1 N. Mex. Ter. 34; Rising v. Teabout, 73 Iowa, 419; Schwind v. Hall, 129 Cal. 40, 61 Pac. 573; Middleton v. Griffith, 57 N. J. L. 442, 31 Atl. 405, 51 Am. St. Rep. 617, citing text; Pendelton v. Smissaert, 1 Colo. App. 508, 29 Pac. 521, citing text; Hartzell v. McClurg, 54 Nebr. 316, 74 N. W. 625; Brennan v. Brennan, 122 Cal. 440, 55 Pac. 124, 68 Am. St. Rep. 46; Griffith v. Lewin, 125 Cal. 618, 58 Pac. 205.

22. Whiteford v. Burckmyer, 1 Gill, 127; Crosthwait v. Misener, 13 Bush, 543; Wells v. Schoonover, 9 Heisk. 805; *In re* Estate of Wagner, 4 McArth. 395.

23. Pearce v. Austin, 4 Whart. 489; Spielberger v. Thompson, 131 Cal. 55, 63 Pac. 132, 678.

24. Redmond v. Stansbury, 24 Mich. 406.

25. Bank v. Mallan, 37 Minn. 404, in which case the indorsement was that of a corporation; Tarbox v. Gorman, 31 Minn. 62; First Nat. Bank v. Loyhed, 28 Minn. 396.

26. Hamblet v. Bliss, 55 Vt. 538.

still pledged, and such person may sue as indorsee while it is still in pledge, and maintain an action by discharging the lien and producing the note at the trial.[27]

The holder of a bill or note as collateral security for an indorsement by him of another bill or note, cannot recover if he gratuitously pays the paper indorsed by him, not being duly charged thereon.[28]

SECTION VI.

WHO MAY BE SUED.

§ **1202.** As a general rule, the holder may sue all the prior parties on the bill or note, but not any subsequent party. Thus a payee may sue the acceptor or maker. An indorsee may sue the acceptor or maker, and all prior indorsers.[29]

§ **1202a. When subsequent parties may be sued.**— Ordinarily an action cannot be maintained against a party subsequent to the plaintiff; for if it were otherwise, the defendant in such action might as indorsee recover back from the plaintiff the very amount recovered of him.[30] But if the plaintiff had originally indorsed the instrument to the defendant without recourse or without consideration, and the latter had indorsed back to him absolutely and for value, this view would not apply.[31] And there may be other special circumstances, which, when shown, would entitle the holder to recover against a subsequent party — as, for instance, where such party originally agreed to indorse the paper as security to him.[32] Where the payee of a bill indorsed it specially to the plain-

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27. Fisher v. Bradford, 7 Greenl. 28. See Richardson v. Lincoln, 5 Metc. (Mass.) 201; Marsh v. Newell, 1 Taunt. 109; City Elec. St. Ry. Co. v. First Nat. Bank, 65 Ark. 543, 47 S. W. 855; Alabama Terminal & Improvement Co. v. Knox, 115 Ala. 567, 21 So. 495; Seeley v. Wickstrom, 49 Nebr. 730, 68 N. W. 1017; Hartzell v. McClurg, 54 Nebr. 313, 74 N. W. 625.

28. Bachellor v. Priest, 13 Pick. 399.

29. An exception to this rule is presented by the case of an indorsee reindorsing to his indorser, the effect of which is to extinguish the liability of the former, and of which, when the indorsement is special before maturity, the purchaser will of necessity have notice from the face of the paper itself. Howe Machine Co. v. Hadden, 8 Biss. 208. See Hubbard v. University Bank, 125 Cal. 684, 58 Pac. 297.

30. Bishop v. Hayward, 4 T. R. 470; Britton v. Webb, 2 B. & C. 483; Adrian v. McCaskill (N. C.), 9 S. E. 284.

31. Bishop v. Hayward, 4 T. R. 470; 2 Parsons on Notes and Bills, 459.

32. Wilders v. Stevens, 15 M. & W. 208.

tiff, and then the defendant, and after him the plaintiff indorsed it, it was held that the plaintiff might sue him, as his indorsement was equivalent to a new drawing.[33]

§ **1203.** At common law, the holder of a bill or note might commence and prosecute several actions against each of the prior parties at the same time; and an action instituted against one would not preclude any other remedy against the others.[34] But satisfaction by any one would discharge all to the plaintiff from liability as to the principal sum.[35] Where a party was liable in the two characters of joint drawer and of acceptor, he might be sued jointly with the other drawers and separately as acceptor.[36]

But by statute in many of the States an action may be maintained and judgment given jointly against all the parties to a negotiable instrument, whether drawers, indorsers, or acceptors, or against any one, or any intermediate number of them.[37]

§ **1204.** The indorser of a bill or note cannot sue the acceptor or maker until he has paid or satisfied it.[38] But as soon as he does this he may sue the acceptor or maker.[39] And if one indorser sues a prior party, it is not necessary for him to show that he had received notice, provided it was duly received by such prior party.[40] Where there are a number of indorsers, any one may sue, by arrangement between them, all indorsements subsequent to his being stricken out.[41]

§ **1205. The right of drawer to sue acceptor.**—" The drawer," says Mr. Chitty, " may maintain an action on the bill against the acceptor, in case of a refusal to pay a bill already accepted, but not

33. Penny v. Innes, 1 Cromp., M. & R. 439. See Chitty on Bills [*242], 276–277, note *g*.

34. Chitty on Bills [*538–539], 610, 611; Williams v. Jones, 79 Ala. 119.

35. *Ex parte* Wildman, 2 Ves. Sr. 115; Farwell v. Hilliard, 3 N. H. 318.

36. Wise v. Prowse, 9 Price, 393.

37. Code of Virginia (1873), chap. 141, § 11. And in the District of Columbia under a provision of the Revised Statutes, it has been held that the makers and indorsers of a promissory note may properly be joined as parties defendant in an action by the holder and separate judgment may be taken against them. See Young v. Warner, 6 App. D. C. 433; Hoffecker v. Moon, 21 D. C. 263.

38. Hoyt v. Wilkinson, 10 Pick. 31; McCrady v. Jones, 44 S. C. 406, 22 S. E. 414.

39. M'Donald v. Magruder, 3 Pet. 470.

40. Ellsworth v. Brewer, 11 Pick. 316.

41. Walwyn v. St. Quintin, 1 Bos. & P. 652.

on a refusal to accept, in which latter case the action must be special on the contract to accept."[42] Certainly the drawer may sue the acceptor if he has had to pay the bill,[43] or may leave it in the hands of the indorsee to sue for his benefit;[44] but it has been held that he cannot recover without evidence that he has paid the bill.[45]

A receipt on the back of the bill, not stating who made payment, does not create the presumption that it was paid by the drawer, but rather that it was paid by the acceptor.[46]

§ 1206. Where the acceptance is for the drawer's accommodation, and the acceptor pays the bill, he cannot sue the drawer upon the bill, for it imports no liability to him, but he may sue for money paid at his request.[47] But an acceptor for honor of the drawer or indorser may sue such drawer or indorser upon the bill itself.[48] Production of a bill by the acceptor is not *prima facie* evidence of his having paid it, unless it is shown that it was in circulation after acceptance;[49] and if there be a receipt on the back of the bill, it must be shown to be in the handwriting of a person authorized to receive payment.[50]

SECTION VII.

WHEN RIGHT OF ACTION ACCRUES.

§ 1207. Whether or not suit may be instituted against the maker and indorsers of a note upon the last day of grace is a question upon which the authorities "are like Swiss troops, fighting on

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42. Chitty on Bills (13th Am. ed.) [*537], 608. See chapter XIX, vol. I.

43. Louviere v. Laubray, 10 Mod. 36; Symonds v. Parminter, 1 Wils. 185, 4 Brown's Parl. Cas. 604; Thurman v. Van Brunt, 19 Barb. 410; Chitty on Bills [*537].

44. Williams v. James, 15 Ad. & El. (N. S.) 69; Eng. C. L. 498 (1850).

45. Thompson v. Flower, 1 Mart. N. S. (La.) 301; 2 Parsons on Notes and Bills, 453.

46. Taylor v. Higgins, 3 East, 169; Bullock v. Lloyd, 2 Car. & P. 119; Chilton v. Whippin, 3 Wils. 13; Klopfer v. Levi, 33 Mo. App. 327, citing the text; Foerster, Succession of, 43 La. Ann. 190, 9 So. Rep. 17. See Bell v. Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505.

47. Bell v. Norwood, 7 La. 95; Chitty on Bills [*537], note; Stark v. Alford, 49 Tex. 260; § 1181. But see Bacchus v. Richmond, 5 Yerg. 109; 2 Parsons on Notes and Bills, 460.

48. 2 Parsons on Notes and Bills, 455.

49. Jewell v. Parr, 13 C. B. (76 Eng. C. L.) 909.

50. Pfiel v. Vanbatenberg, 2 Campb. 439; Erhart v. Dietrich, 118 Mo. 418, 24 S. W. 188.

both sides," it being contended by some that the maker has the whole of the last day of grace to make payment, and that, as the law knows no fraction of a day, suit cannot be instituted against him until the last day of grace has entirely elapsed. In respect to the indorser, it has also been held that suit cannot be instituted against him until sufficient time has elapsed for him to be in actual receipt of notice. While, on the other hand, it is confidently, and, as we think, justly, asserted that after demand and refusal on the last day of grace, action may be commenced against the maker; and after notice has been put in train to reach the indorser, it may also be commenced against him, whether he has actually received it or not.

§ **1208. Action lies against maker on day of maturity, after demand and refusal.**— In the case of ordinary contracts to be performed upon a certain day, they are really solvable within that day; and as the promisor has the whole of the day for their performance, suit cannot be commenced until that day has passed.[51] But when the maker of a note, or the drawer or acceptor of a bill, makes it payable on a day certain, his contract is to pay it on demand on any part of that day, if made within reasonable hours.[52] The protest must be made on that day, which presupposes a default already made; and whether it be the last day of grace, or the day of maturity, when there is no grace, it is clear, upon principle, that as soon as payment is refused, the action may be commenced.

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51. Webb v. Fairmaner, 3 M. & W. 473; Coleman v. Ewing, 4 Humphr. 241.

52. In Leftly v. Mills, 4 T. R. 170 (1791), Buller, J., said: "If the party has till the last moment of the day to pay the bill, the protest cannot be made on that day. Therefore, the usage on bills of exchange is established; they are payable at any time on the last day of grace, provided that demand be made within reasonable hours. A demand at a very early hour of the day, at two or three o'clock in the morning, would be at an unreasonable hour; but, on the other hand, to say that demand should be postponed until midnight, would be to establish a rule attended with mischievous consequences. If this case were to be governed by any analogy to the demand of rent, payment of a bill of exchange could not be demanded until sunset; and, if so, the situation of bankers would be extremely hazardous; for they would then be obliged to send out their clerks at night with bills to a very considerable amount, all of which must be presented within a short space of time, though to houses in different parts of the town." See also Greeley v. Thurston, 4 Greenl. 479; 1 Rob. Pr. (new ed.) 442; Chitty on Bills (13th Am. ed.) [*481], 544.

§ **1209.** We are not aware of any decision which determines that the maker may be sued on the day of maturity, if the note is payable without grace, though the affirmative opinion has been expressed; but if payment has been demanded and refused, we should say that the action would lie, for the contract to pay on demand within reasonable hours is then broken, and, in the language of Parsons: "He has declared he will not pay, and can want further delay only to arrange the means of avoiding payment." [53] This view has been recently adopted in Pennsylvania.[54] But there is still stronger reason to hold that the action may be commenced after demand and refusal on the last day of grace, for grace was originally matter of indulgence and courtesy, and not of contract, and it would seem unreasonable to extend indulgence after the maker has expressly refused to make the payment on the last day allowed him.[55] The weight of authority supports the view that suit may be commenced on the last day of grace against the maker;[56] but there are decisions of most respectable character to the contrary effect — that suit cannot be brought on the last day of grace,[57] nor on the last day of maturity, when there is no grace.[58]

53. 2 Parsons on Notes and Bills, 461, 462. This is said by Shaw, C. J., in Staples v. Franklin Bank, 1 Metc. (Mass.) 43; Veazie Bank v. Winn, 40 Me. 62, Tenney, J.: "A suit may be properly brought against the maker upon a negotiable promissory note on the last day of grace after a demand of payment, made at a reasonable hour of that day, and a refusal." See Ames on Bills and Notes, vol. II, p. 96. See also Crenshaw v. M'Kiernan, Minor, 295; Heise v. Bumpass, 40 Ark. 548.

54. Humphreys v. Sutcliffe, 192 Pa. St. 336, 43 Atl. 954, 73 Am. St. Rep. 819.

55. Staples v. Franklin Bank, 1 Metc. (Mass.) 43.

56. Staples v. Franklin Bank, 1 Metc. (Mass.) 43; Shed v. Brett, 1 Pick. 401; N. E. Bank v. Lewis, 2 Pick. 125; Greeley v. Thurston, 4 Greenl. 479; Flint v. Rogers, 3 Shepl. 67; Estes v. Tower, 102 Mass. 66; Veazie Bank v. Winn, 40 Me. 62; Vandesande v. Chapman, 48 Me. 262; Dennie v. Walker, 7 N. H. 201; Wilson v. Williman, 1 Nott & McC. 440; McKenzie v. Durant, 9 Rich. 61; Ammidown v. Woodman, 31 Me. 580; Coleman v. Ewing, 4 Humphr. 241.

57. Osborn v. Moncure, 3 Wend. 170 (1829). Suit commenced at 3 P. M. against the maker held premature. Reaffirmed in Smith v. Aylesworth, 40 Barb. 104, the only difference between the cases being, that, in the first, the note was payable generally, and in the latter, at a bank. The principle of Osborn v. Moncure was affirmed in the following cases, which are distinguishable, however, inasmuch as it does not appear that the notes were presented to the makers for payment before action was brought. Wells v. Giles, 2 Gale,

58. Davis v. Eppinger, 18 Cal. 381. See Moore v. Holloman, 25 Tex. Supp. 81; Hamilton Gin Co. v. Sinker, 74 Tex. 52; Kennedy v. Thomas (1894), 2 Q. B. 759; Farmers' Nat. Bank v. Salina Paper Mfg. Co., 58 Kan. 207, 48 Pac. 863.

§ 1210. It must be observed that when a demand is necessary, it must be made upon the maker prior to institution of the suit on the day of maturity, or last day of grace.[59] In Massachusetts it was said by Shaw, C. J.: "The rule in regard to notes like the one in question is, that the note is payable at any time, on actual demand, on the last day of grace; and if such actual presentment and demand is so made, and payment is not made, the maker is in default, and notice of dishonor may forthwith be given to the indorser. But if no presentment or demand is made by the holder upon the maker, the latter is not in default to the end of the business day."[60] The demand must be made within reasonable hours on the day of maturity (or last day of grace, when there is grace) to authorize suit on that day; and, accordingly, where suit was brought immediately after a demand made at 8 A. M., it was held premature.[61]

When the note is payable at a bank, the maker has until the expiration of business hours to pay it in; and suit should not be commenced until their expiration. But right of action accrues as soon as they have expired, if payment were demanded and refused.[62]

209; Walter v. Kirk, 18 Cal. 381 (*semble*); Cox v. Reinhardt, 41 Tex. 591 (*semble*); Randolph v. Cook, 2 Port. 286; Wiggle v. Thomasson, 19 Miss. 452; Hopping v. Quin, 12 Wend. 517; Thomas v. Shoemaker, 6 Watts & S. 179; Taylor v. Jacoby, 2 Barr, 495; Hinton v. Duff, 11 C. B. (N. S.) 724; Coleman v. Carpenter, 9 Barr, 198 (*semble*); Benson v. Adams, 69 Ind. 353. No demand was made, but suit was brought on last day of grace. Held, that maker had all day in which to pay the note, and that action was not maintainable. See Ames on Bills and Notes, vol. II, p. 86; 35 Am. Rep. 220; Wheless v. Williams, 62 Miss. 369, in which case it was also held that a note payable on a certain day, with "interest after maturity," draws interest from that day, and not from the last day of grace. Watkins v. Willis, 58 Tex. 521, in which case it was held, that suit brought on the fourth day after the expiration of four years from and after the day fixed for payment, was not barred by the Statute of Limitations. Holton & Winn v. Hubbard & Co. *et al.*, 49 La. Ann. 715, 22 So. 338; Humphreys v. Sutcliffe, 192 Pa. St. 336 43 Atl. 954, 73 Am. St. Rep. 819.

59. Greeley v. Thurston, 4 Greenl. 479; Veazie Bank v. Winn, 40 Me. 62.

60. Pierce v. Cate, 12 Cush. 190; Estes v. Tower, 102 Mass. 66, Corey, J., explaining Butler v. Kimball, 5 Metc. (Mass.) 94, where the writ was issued after sunset on the last day of grace, but not delivered to the officer until the next day.

61. Lunt v. Adams, 5 Shepl. 230.

62. See *ante*, § 1209; Citizens' Bank v. Lay, 80 Va. 440, citing the text. "Default of payment" of notes payable at a bank, is default of payment during banking hours. Osborn v. Rogers, 112 N. Y. 573.

§ 1211. Due-bills are payable immediately.—A due-bill, which is regarded in many States as a promissory note, is payable immediately, and upon principle there is no doubt, we think, that in such States action may be brought immediately on the very day of its date. The due-bill is predicated upon, and evidences the fact that the debt is then due — not to be due on that day (which in ordinary contracts means the same as within that day), nor to be due in business hours of that day if demanded, as is the case with respect to negotiable paper which has a period of time to mature. It is true that the due-bill could not be sued upon during that fractional part of the day preceding its making; but it does not follow that during the remainder of the day it is not mature for suit. For its very language and nature purport that it is instantly due; and as a breach of contract occurs by failure to pay it instantly, the creditor may sue instantly, indulgence for any time being mere matter of his discretion and pleasure. This view is sustained by well-considered authorities,[63] though not without dissent.

§ 1212. Action lies against indorser as soon as notice is put in train of transmission.— In respect to the indorser, it has been held in a number of cases that suit against him cannot be commenced until time has elapsed for notice to be actually received by him, upon the theory that the holder's title is not complete until the indorser is actually notified that he is looked to for payment, or at least that time for him to receive such notice has transpired.[64] But this is a misconception, as we think, of the law of notice. The holder must exercise due diligence to give the indorser notice. That duty is fulfilled when he puts it in train to reach him, by sending it to his business or dwelling-house, or depositing it in the post-office, as the case may be. And for him to be delayed

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63. Cammer v. Harrison, 2 McCord, 246; Dews v. Eastham, 2 Yerg. 403; Hill v. Henry, 17 Ohio, 9. See Fields v. Nickerson, 13 Mass. 130; 3 Parsons on Contracts, 91; Andress' Appeal, Sup. Ct. Pa., March, 1882, Cent. L. J., April 14, 1882, p. 298, vol. XIV, No. 15; Sheldon v. Heaton, 88 Hun, 536, 34 N. Y. Supp. 856.

64. Smith v. Bank of Washington, 5 Serg. & R. 318 (1819), where notice to an indorser of a note was put in the post-office on the 13th, and by due course of mail could not reach him before the 19th. Held, that suit commenced on the 16th was premature. Bevan v. Eldridge, 2 Miles, 353 (1840); Wiggle v. Thomasson, 11 Smedes & M. 452; McFarland v. Pico, 8 Cal. 626; Castrique v. Bernabo, 6 Q. B. 498 (1844).

until time for its actual reception had gone by would subject him to the hazards, vexations, and uncertainties of various circumstances which do not legitimately enter into the consideration of the indorser's liability.[65]

But in suits commenced on the last day of grace against an indorser, the plaintiff must prove that before the writ was sued out notice was deposited in the post-office, when he lives in a different place, or sent to his residence or place of business when he lives in the same.[66] If the notice precedes the suit ever so short a time, it suffices;[67] but if it does not, it seems the irregularity cannot be cured by the sending and reception of notice afterward.[68]

§ **1213. Action upon dishonor for nonacceptance.**— When a bill is dishonored for nonacceptance, right of action accrues at once against the drawer,[69] and also against the indorsers[70] as soon as the protest is made and notice put in train to reach the party, without waiting for the maturity of the bill. And if a note be payable in respect to principal or interest, in instalments, action will lie for each instalment as it falls due.[71]

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65. Bayley on Bills, chapter IX, section I, p. 217. In Shed v. Brett, 1 Pick. 401, Shaw, C. J., said: "It would be mischievous to decide otherwise; for every plaintiff's right of action would commence at different times, according to the distance of the party sued; and the time of suing must be conjectured, as it cannot be known when the notice will be actually received. Besides, if the object of waiting be to give the party opportunity to take up the note, there must be a sort of double usance; for the holder must wait until his letter is received, and for a reasonable time afterward 'for the party to come and pay the money.' Who would take a bill or note remitted from New Orleans if this doctrine be correct? And if the parties liable be beyond the sea, such instruments would be mere waste paper." New England Bank v. Lewis, 2 Pick. 125; Greeley v. Thurston, 4 Greenl. 479; City Bank v. Cutter, 3 Pick. 414; Boston Bank v. Hodges, 9 Pick. 420; Dennie v. Walker, 7 N. H. 201; Manchester Bank v. Fellows, 8 Fost. 302.

66. Manchester Bank v. Fellows, 8 Fost. 302.

67. New England Bank v. Lewis, 2 Pick. 125.

68. Ibid.; New England Bank v. Lewis, 8 Pick. 113, where it is held that if the first action, commenced without first sending notice, be prosecuted to judgment, it is no bar to a second action. In an earlier case it was not thought objectionable that the action was commenced before notice was sent. Stanton v. Blossom, 14 Mass. 116; Bayley on Bills, chapter IX, section I.

69. Robinson v. Ames, 20 Johns. 146.

70. Lenox v. Cook, 8 Mass. 460; Ballingalls v. Gloster, 3 East, 481; Bach v. Brown, 17 Utah, 435, 53 Pac. 991, citing text.

71. Tucker v. Randall, 2 Mass. 283; Cooley v. Rose, 3 Mass. 221; Ray v. Pease, 97 Ga. 618, 25 S. E. 360.

SECTION VIII.

WHEN RIGHT OF ACTION EXPIRES.

§ **1214.** At common law, when once a right of action accrued, it was immortal. But the disadvantages of permitting remedies to be sought at remote periods from the time the transactions occurred, and the desirability of having settlements while evidence was readily obtainable, led at an early date to the adoption of statutes fixing a limitation to actions. As early as A. D. 1270, an act was passed relating to limitation of actions concerning real estate; but personal property, and especially choses in action, were at that time of so little consequence, that no limitation of personal actions was prescribed until 1623. In this modern period, choses in action constitute a vast portion of the property of the country; and the time at which the right to reduce them into possession expires is a matter of prime importance. It is to be observed, in the first place, that statutes of limitation do not destroy the debt, but only bar the remedy. Therefore they must be specially pleaded, and cannot be given in evidence under a general issue.[72] And as they do not enter into the essence of the contract, they must be regulated entirely by the laws of the country where suit is brought.[73]

§ **1215. When statutes of limitation begin to run.**— The Statute of Limitations begins to run from the very day the right of action accrues. Thus upon a bill or note payable at so many days from the date, it begins to run from the day of payment, and not from the day of date, but the day of maturity is excluded in the computation of time. If payable at sight, the statute runs from sight. If so many days after sight, or after certain events, then from the time named after sight, or after the events have happened.[74] If the instrument be payable on demand, the statute begins to run immediately as payment might be immediately demanded, or suit

72. Chapple v. Durston, 1 Cromp. & J. 1.

73. See *ante*, § 884, vol. I.

74. Byles on Bills (Sharswood's ed.) [*331], 499; 1 Rob. Pr. (new ed.) 425. Default in payment of interest will not start the running of the Statute of Limitations against a note secured by a mortgage, containing a condition empowering the mortgagee to declare the entire debt due upon failure to pay any instalment of interest. See Insurance Co. of North America v. Martin, 151 Ind. 209, 51 N. E. 361; Brockway v. Gadsden Mineral Land Co., 102 Ala. 620, 15 So. 431.

brought without any previous demand.[75] "On demand after date" is the same as on demand.[76] But if payable at a certain time after demand,[77] or after notice,[78] an actual demand must be made, or notice given, in order to fix the period of maturity when the statute commences. When right of action on the instrument secured expires, all claim to enforce the security, which is a mere incident of the principal obligation, expires with it.[79] The indorsement of an overdue note is a new contract, and the statute

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75. Wheeler v. Warner, 47 N. Y. 519; Herrick v. Woolverton, 41 N. Y. 581; Mills v. Davis, 113 N. Y. 243; McMullen v. Rafferty, 89 N. Y. 458; Massie v. Byrd, 87 Ala. 681; Mobile Sav. Bank v. McDonnell, 83 Ala. 597; Jones v. Nicholl, 82 Cal. 32; Cousins v. Partridge, 79 Cal. 228; Bartholomew v. Leaman, 32 N. Y. S. C. 619. But in case of certificates of deposit it has been held that no cause of action accrues until a demand is made by the depositor. Smith v. Steen, 38 S. C. 361, 16 S. E. 1003; Dolan v. Mitchell, 39 App. Div. 361, 57 N. Y. Supp. 157; Sheldon v. Heaton, 88 Hun, 536, 34 N. Y. Supp. 856; Finch v. Skilton, 79 Hun, 531, 29 N. Y. Supp. 925; Wheeler v. Warner, 47 N. Y. 519, 7 Am. Rep. 478; Locklin v. Moore, 57 N. Y. 360; Traders' Nat. Bank v. Parker, 130 N. Y. 415, 29 N. E. 1094; Niemeyer v. Brooks, 44 Ill. 72, 92 Am. Dec. 149. A note, payable "one day after demand," is the same as a note payable on demand. See Smith v. Ijams, 70 Hun, 155, 24 N. Y. Supp. 202, citing text.

76. O'Neill v. Magner, 81 Cal. 631; Fenno v. Gay, 146 Mass. 118; Hitchings v. Edmunds, 13 Mass. 338; Crim v. Starkweather, 88 N. Y. 339. See §§ 88, 608. And it has been held in New York that a note "on demand, after three months' notice," is simply a demand note. Justice Barrett, in delivering the opinion of the court, said: "The words 'on demand' have a precise legal meaning. They do not limit the obligation to pay presently, but are used to show that the debt is due. Wenman v. Insurance Co., 13 Wend. 267. And the statute runs against a note payable on demand, whether with or without interest. Wheeler v. Warner, 47 N. Y. 519; Mills v. Davis, 113 N. Y. 243, 21 N. E. 68. The only question here is, whether the expression 'on demand' is so qualified by the words 'after three months' notice,' which immediately follow, as to take the contract out of the general rule with regard to demand notes. This is a close question, but upon the whole we think not. The notice required, as was said in Dickinson v. The Mayor, 92 N. Y. 591, 'was a condition of maintaining the action and not an essential part of it, upon which the inspection of a right is based and the cause of action founded.'" See Knapp v. Greene, 79 Hun, 264, 29 N. Y. Supp. 350.

77. Little v. Blunt, 9 Pick. 488; Wenman v. Mohawk Ins. Co., 13 Wend. 267; Massie v. Byrd, 87 Ala. 681; Cooke *et al.*, Receivers, v. Pomeroy, 65 Conn. 466, 32 Atl. 935.

78. Clayton v. Gosling, 5 B. & C. 360 (11 Eng. C. L.).

79. City of Fort Scott v. Schulenberg, 22 Kan. 658; Schmucker v. Sibert, 18 Kan. 176; Kulp v. Kulp, 51 Kan. 341, 32 Pac. 1118; Oppman v. Steinbrenner, 17 Mont. 369, 42 Pac. 1015; Eyermann v. Piron, 151 Mo. 107, 52 S. W. 229.

begins to run in favor of the indorser from the date of the indorsement.[80]

§ 1215a. Part payment by joint maker, joint and several maker or cosurety.— Whether a payment by one of the makers of a joint, or joint and several obligation while it is yet alive will prevent the bar of the statute is an exceedingly vexed question. There are many authorities which sustain the view that the statutory bar is removed upon the principle of mutual agency;[81] but the

80. Graham v. Robertson, 79 Ga. 72. And if a payment be indorsed upon a note, and was actually made by one of the makers, the Statute of Limitations commences to run anew from the date of such payment. See Bouton v. Hill, 4 App. Div. 252, 31 N. Y. Supp. 498. In order for payment of interest to have the effect of removing the bar of limitations, it must appear that the payment was in fact made by the debtor or by his authority. The mere indorsement on the back of the note, that interest has been paid from time to time, is not proof of the fact. See Cropley v. Eyster, 9 D. C. 373. And it has been held, that in an action against a maker by the assignee of certain promissory notes, where limitations are pleaded, an acknowledgment made by the defendant when giving his testimony in an equity cause, that he executed the notes in question, and that they have not been paid, is sufficient to remove the bar of the statute. See Babylon v. Duttera, 89 Md. 444, 43 Atl. 938. The bar of the Statute of Limitations cannot be removed merely because of a mutual mistake of law of the parties, as to the legal effect of a credit entered upon an evidence of debt to constitute a new promise from the date of which the statute would begin to run. Moore v. Moore, 103 Ga. 517, 30 S. E. 535. And to constitute a new point from which the Statute of Limitations will commence to run, a credit on a promissory note must be in writing and signed by the maker, or by some one by him authorized; or if unsigned, such credit must be in the handwriting of the maker himself. An unsigned credit, written by an agent of the maker, will not suffice. See Black v. Holland, 102 Ga. 523, 27 S. E. 671, affirming the case of Watkins v. Harris, 83 Ga. 680, 10 S. E. 474. Partial payments made by the principal of a note without the knowledge of the surety, do not operate to keep the note alive as to the surety, and the note, although kept alive as to the principal, may be barred as to the surety. See Meitzler v. Todd, 12 Ind. App. 381, 39 N. E. 1046, 54 Am. St. Rep. 53. While a new promise will revive a cause of action against the maker, when signed by him, it will not have that effect as against the surety, unless the surety signs a new promise. Drake v. Stuart, 87 Iowa, 342, 54 N. W. 223. A partial payment on a joint and several note by one of the several makers will not prevent the running of the Statute of Limitations as to the other makers. Cowhick v. Shingle, 5 Wyo. 87, 37 Pac. 689, 63 Am. St. Rep. 17; Beck v. Haas, 111 Mo. 264, 20 S. W. 19, 33 Am. St. Rep. 516; Briscoe v. Huff, 75 Mo. App. 288. Part payment in many States by statute constitutes a new promise from which the Statute of Limitations commences to run. Parks v. Brooks, 38 S. C. 300, 17 S. E. 22.

81. Whitcomb v. Whiting, 2 Doug. 652; Shepley v. Waterhouse, 22 Me. 497;

cases to the contrary are almost, if not quite as numerous.[82] The better view, upon sound principle, seems to be that if the obligation be joint, the payment will extend the statutory limitation, but if it be joint and several, it will not.

If one of two or more sureties make a payment upon the obligation before it is barred by the Statute of Limitations, such surety may maintain an action against his cosurety or cosureties for contribution after the bar of the statute as to the original obligation is complete, upon the principle that the right of action accrues only from the date of the payment by him.[83]

§ 1215b. Payment by indorser or other surety.— A part payment made by an indorser does not prevent the bar of the statute as against the maker.[84] On the other hand, a part payment by the maker will not render the indorser liable, but a payment by the principal will bind his surety.[85] But there are decisions which hold that if the note be a joint one of a principal and surety, a part payment by the principal will not bind the surety.[86] A payment made by a surety will not revive a note already barred by the Statute of Limitations as against the principal.[87]

Woonsocket Inst. for Saving v. Ballou, 16 R. I. 351, 16 Atl. 144; Ellicott v. Nichols, 7 Gill, 85; Schindel v. Gates, 46 Md. 604, 24 Am. Rep. 526; Turner v. Ross, 1 R. I. 88; Perkins v. Barstow, 6 R. I. 505; Carpenter v. McLaughlin, 12 R. I. 270, 34 Am. Rep. 638; Joslyn v. Smith, 13 Vt. 353; Bissell v. Adams, 35 Conn. 299.

82. Hallenbach v. Dickinson, 100 Ill. 427, 39 Am. Rep. 47; Shoemaker v. Benedict, 11 N. Y. 176, 62 Am. Dec. 95, note; Bell v. Morrison, 1 Pet. 612; Steele v. Soule, 20 Kan. 39; Coleman v. Forbes, 22 Pa. St. 156, 60 Am. Dec. 75; Lowenthal v. Chappell, 8 Ala. 353.

83. McCrady v. Jones, 44 S. C. 406, 22 S. E. 414; Singleton v. Townsend, 45 Mo. 379; 2 Parsons on Notes and Bills, 254, § 7; Brandt on Suretyship, § 259, and notes.

84. Byles on Bills and Notes, 358; Harding v. Edgecumbe, 28 L. J. Exch. 313; Randolph on Commercial Paper, 1629.

85. Hunter v. Robertson, 30 Ga. 479; Woodhouse v. Simmons, 73 N. C. 30; Wyatt v. Hodson, 8 Bing. 309; Hunt v. Bridgham, 2 Pick. 581; Zent v. Hart, 8 Pa. St. 337; Joselyn v. Smith, 13 Vt. 353; Glick v. Crist, 37 Ohio St. 388; Smith v. Caldwell, 15 Rich. 365.

86. Goudy v. Gillam, 6 Rich. 28; Faulkner v. Bailey, 123 Mass. 588; Burleigh v. Stott, 8 B. & C. 36.

87. Jones v. Jones, 23 Ark. 212; Randolph on Commercial Paper, 1629. But see *contra*, Whipple v. Stevens, 22 N. H. 219.

SECTION IX.

EVIDENCE.

§ **1216.** Under the various titles which have been already discussed, the general principles of evidence touching them respectively have been stated. And within the scope of this volume, which confines itself more particularly to the questions which peculiarly concern negotiable instruments, but little more remains to be said. The rule of the common law that a party interested should not testify in his own behalf has been generally abrogated in the United States by statute; and the question of competency of witnesses must be solved in the several States where it arises accordingly as they have continued or modified the common-law rule.

§ **1217. Whether party to instrument may be witness to impeach it.** — At one time there prevailed in England a peculiar rule of evidence respecting written instruments, that no party thereto should be permitted to impeach their validity. And in a leading case, where the indorser of a note was offered to prove it usurious, his testimony was held illegal, Lord Mansfield saying: "It is of consequence to mankind that no person shall hang out false colors to deceive them by first affixing his signature to a paper and afterward giving testimony to invalidate it." [88] But it was subsequently overruled.[89] The United States Supreme Court has, however, adopted it in so far as it applies to negotiable instruments,[90]

88. Walton v. Shelly, 1 T. R. 296.

89. Jordaine v. Lasbrooke, 7 T. R. 601; Rich v. Topping, 3 T. R. 27.

90. Scott v. Lloyd, 12 Pet. 145; United States v. Leffler, 11 Pet. 86; Bank of Metropolis v. Jones, 8 Pet. 12; Bank of United States v. Dunn, 6 Pet. 51; Saltmarsh v. Tuthill, 13 How. 229; Henderson v. Anderson, 3 How. 73. The United States Supreme Court held, in Bank of United States v. Dunn, 6 Pet. 57, that "it is a well-settled principle that no man who is a party to a negotiable note shall be permitted, by his own testimony, to invalidate," applying it to the case of an indorser. In Bank of Metropolis v. Jones, 8 Pet. 12, it was held that the drawer of a note is equally incompetent to prove facts which tend to discharge the indorser. In Henderson v. Anderson, 3 How. 73, an effort to overthrow these decisions proved unavailing; and in Saltmarsh v. Tuthill, 13 How. 229, it was held that a party to negotiable paper was as incompetent to prove facts which, taken in connection with others, would invalidate it, as to prove such as would, of themselves, invalidate it. The rule of exclusion, however, is limited by the Supreme Court to negotiable paper, and is not applied to other securities. United States v. Leffler, 11 Pet. 86.

and so also have some of the State courts.[91] But the better opinion is, that negotiable instruments enjoy no immunity from the general doctrines of evidence, and that any party to a written contract, negotiable or otherwise, is competent to testify as to its invalidity.[92]

The rule of exclusion, where applied, is generally limited to negotiable securities indorsed and put in circulation before maturity or dishonor.[93] In a recent decision, the United States Supreme Court has given its concurrence in the doctrine that the rule of exclusion applies "only to a case where a man, by putting his name to a negotiable security, had given currency and credit to it; and does not apply to a case between the original parties, where the paper has not been put into circulation, and each of the parties was cognizant of all the facts." [94]

§ 1218. **The identity of each party to the instrument** must be proved, and this requisition is satisfied by proof that the party has the same christian and surname.[95] The inconvenience of the contrary doctrine, which obtained in some cases, led to its being overruled. "The transactions of the world could not go on if such an objection were to prevail," is the language of Lord Denman, in answer to objection to the sufficiency of proof.[96] Further evi-

91. Gaul v. Willis, 26 Pa. St. 259, but now abolished in Pennsylvania by statute; State Bank v. Rhoads, 89 Pa. St. 353; Lincoln v. Fitch, 42 Me. 456; Webster v. Vickers, 2 Scam. 295; Drake v. Henly, Walk. 541; Rohrer v. Morningstar, 18 Ohio, 579; Strang v. Wilson, 1 Morris, 84; Smithwick v. Anderson, 2 Swan, 573 (overruling Stump v. Napier, 2 Yerg. 35); Shamburgh v. Commagere, 10 Mart. 139; Dewey v. Warrimer, 71 Ill. 198.

92. Taylor v. Beck, 3 Rand. 316; Baring v. Reeder, 4 Hen. & M. 424; Orr v. Lacey, 2 Doug. 230; Ringgold v. Tyson, 3 Harr. & J. 172; Jackson v. Packer, 13 Conn. 342; Gorham v. Carroll, 3 Litt. 221; Haines v. Dennett, 11 N. H. 180; Freeman v. Britton, 2 Harr. 191; St. John v. McConnell, 19 Mo. 38; Stafford v. Rice, 5 Cow. 23; Bank of Utica v. Hillard, 5 Cow. 153 (overruling Winton v. Saidler, 3 Johns. Cas. 185); Griffin v. Harris, 9 Port. 225; Parsons v. Phipps, 4 Tex. 341; Pecker v. Sawyer, 24 Vt. 459; Guy v. Hull, 3 Murph. 150; Bank of Missouri v. Hull, 7 Mo. 273; Knight v. Packard, 3 McCord, 71.

93. Parke v. Smith, 4 Watts & S. 287; Thayer v. Crossman, 1 Metc. (Mass.) 46, Shaw, C. J.; Smithwick v. Anderson, 2 Swan, 573.

94. Davis v. Brown, 94 U. S. (4 Otto) 427, Field, J. See Fox v. Whitney, 16 Mass. 118.

95. Greenshields v. Crawford, 9 M. & W. 314; Harrington v. Fry, Ryan & M. 90; Sewell v. Evans, 4 Q. B. 626; Roden v. Ryde, 4 Q. B. 629; Hamber v. Roberts, 7 C. B. 861; 2 Parsons on Notes and Bills, 479; Sears v. Moore, 171 Mass. 514, 50 N. E. 1027.

96. Sewell v. Evans, 4 Q. B. 626.

dence of identity may be required when the name is a very common one in the country;[97] and so, perhaps, if the party be a marksman.[98] Where the difference between the name of the payee and indorser consists only in the insertion of a middle initial, it will be presumed that they are the same person.[99] But the same presumption does not apply as to the identity of the maker and indorser, although the names be identical.[1] Where a party signs by initials, it must be shown whom they intended to signify.[2]

§ **1219. Proof of signature.**— In many of the States proof of the signature of any party sued upon a bond, bill, note, or other evidence of debt is dispensed with by statute, unless put in issue by denial supported by affidavit, or in some other manner prescribed. Where no such statute applies, evidence of handwriting is the most usual mode of proof. Persons familiar with the party's handwriting may testify as to their opinion of its genuineness. The witness is permitted in some jurisdictions to compare the signature with known genuine specimens of the party's handwriting, introduced for that purpose in order to form an opinion;[3] in others he is not.[4] In England, an expert was not by common law permitted to testify from comparison of signatures merely,[5]

97. Jones v. Jones, 9 M. & W. 75.

98. Whitelock v. Musgrove, 1 Cromp. & M. 511, 3 Tyrw. 541; 2 Parsons on Notes and Bills, 479.

99. Hunt v. Stewart, 7 Ala. 525.

1. Curry v. Bank of Mobile, 8 Port. 360.

2. Jones v. Turnour, 4 Car. & P. 204.

3. Farmers' Bank v. Whitehill, 10 Serg. & R. 110; Lyon v. Lyman, 9 Conn. 55; Moody v. Rowell, 17 Pick. 490; Hammond's Case, 2 Greenl. 33; Mortimer v. Chambers, 63 Hun, 335, 17 N. Y. Supp. 874; Miller v. Dill, 149 Ind. 326, 49 N. E. 272; Wines *et al.* v. State Bank of Hamilton, 22 Ind. App. 114, 53 N. E. 389; Keyser v. Pickrell, 4 App. D. C. 198; Gaunt v. Harkness, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 297; Grand Island Banking Co. v. Shoomaker, 31 Nebr. 124, 47 N. W. 696; Schroeder v. Seittz, 68 Mo. App. 233.

4. Rowt v. Kyle, 1 Leigh, 216; Jackson v. Phillips, 9 Cow. 94; Pope v. Askew, 1 Ired. 16 (this is the English rule); Macferson v. Thoytes, Peake, 20; Brooknard v. Woodley, Peake, 20 (overruling Allesbrook v. Roach, 1 Esp. 351); Kelly v. Keese, 102 Ga. 700, 29 S. E. 591; Talbott, Admr. v. Hedge, 5 Ind. App. 555, 32 N. E. 788. Held in this case, that a letter purporting to come from one and signed in his name will not furnish sufficient basis of knowledge to permit the one who received such letter to give an opinion respecting the genuineness of the putative writer to another instrument, unless the one whose name was signed to the letter, in some way, subsequently acknowledged the signature to be his. Bevan v. Atlanta Nat. Bank, 142 Ill. 302, 31 N. E. 679; Riggs v. Powell, 142 Ill. 453, 32 N. E. 482.

5. Gurney v. Langlands, 5 B. & Ald. 330; Rex v. Carter, 4 Esp. 117.

but by statute such evidence is now admissible.[6] Where genuine signatures are contained in papers which are in evidence, the jury is permitted to compare the contested signature with them.[7]

§ 1220. Admissions.—The admission of the party dispenses with further proof of his signature.[8] So a payment, or promise to pay, dispenses with proof of signature[9] or of agent's authority.[10] And as a general rule, the admission of a fact obviates the necessity of other proof thereof, or of any fact which is necessary to the existence of the fact admitted.

But an admission may be explained and shown to have been made under a mistake, it being *prima facie,* but not conclusive evidence. A written admission by an indorser that he received notice of dishonor, has been held not to estop him from showing that he made it under misapprehension or mistake as to the bill referred to, and that no notice had in fact been received.[11] The principle was well stated in an English case by Bayley, J.: "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him; but we think that he is at liberty to prove that such admissions were mistaken or untrue, and that he is not estopped or concluded by them, unless another person has been induced to alter his condition by them." [12]

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6. 17 & 18 Vict. 1854; The Queen v. Silverlock (1894), 2 Q. B. 766.

7. Doe v. Suckermore, 5 Ad. & El. 703; Doe v. Newton, 5 Ad. & El. 514; Crane v. Dexter Horton Co., 5 Wash. 479, 32 Pac. 223. Held, where signature in dispute, together with 500 admitted signatures are in evidence, photographs of admitted and disputed signatures are not admissible. Keyser v. Pickrell, 4 App. D. C. 198. But direct and positive evidence of a witness familiar with the signature of the alleged subscriber will ordinarily outweigh evidence of comparison of handwritings. See Jackson v. Adams, 100 Iowa, 163, 69 N. W. 427; Christman v. Pearson, 100 Iowa, 635, 69 N. W. 1055; Schroeder v. Seittz, 68 Mo. App. 233.

8. Hall v. Phelps, 2 Johns. 451; McCormick v. Stockton, etc., Co., 130 Cal. 100, 62 Pac. 267.

9. Helmsley v. Loader, 2 Campb. 450; Shaver v. Ehle, 16 Johns. 201.

10. Linders v. Bradwell, 5 C. B. 583.

11. Commercial Bank v. Clark, 28 Vt. 325. "When a promissory note is indorsed by the payee after it is overdue, admissions by the payee while owner of the note are admissible in evidence against the indorsee in an action by him against the maker." See Sears v. Moore, 171 Mass. 514, 50 N. E. 1027, 70 Am. St. Rep. 303, citing Sylvester v. Crapo, 15 Pick. 921, and Fisher v. Leland, 4 Cush. 456, 50 Am. Dec. 805; Wooten v. Outlaw, 113 N. C. 281, 18 S. E. 252.

12. Heane v. Rogers, 9 B. & C. 577; First Nat. Bank v. Chaffin *et al.*, 118 Ala. 246, 24 So. 80.

CHAPTER XXXVIII.

THE DISCHARGE OF BILLS AND NOTES BY PAYMENT.

SECTION I.

NATURE OF PAYMENT.

§ **1221.** By payment is meant the discharge of a contract to pay money by giving to the party entitled to receive it, the amount agreed to be paid by one of the parties who entered into the agreement. Payment is not a contract. It is the discharge of a contract in which the party of the first part has a right to demand payment, and the party of the second part has a right to make payment. A sale is altogether different. It is a contract which does not extinguish a bill or note, but continues it in circulation as a valid security against all parties. And it is necessary to constitute a transaction a sale that both parties should then expressly or impliedly agree, the one to sell, and the other to purchase the paper.[1] Whether the transaction is a purchase

1. Lancey v. Clark, 64 N. Y. 209, affg. 3 Hun, 575; Eastman v. Plumer, 32 N. H. 238. In this case the defendant signed a note as surety for the maker. The note was indorsed in blank, and the indorsee called on the maker for payment. The latter paid and received it. In fact the money used in payment had been placed in the hands of the principal by a third party, who sent it to purchase the note through him as agent, which fact, however, was unknown to the holder. This third party sued the surety; but it was held that he could not recover, the transaction being regarded as a payment by the maker, which extinguished the instrument, Perley, C. J., saying: "The contract of the defendant was to pay the note to Roby, the payee or order. By his indorsement in blank, Roby ordered the note to be paid to the indorsee, or to such other person as should become the holder of the note by transfer of the note from Roby. But the holder under Roby's indorsement has made no transfer of the note as an existing security. He has received the amount due on the note from the principal debtor, and given up the note to him as paid and discharged. Looking at the case, then, as a mere matter of contract, according to his original undertaking on the note, the defendant has not bound himself to pay it to this plaintiff, because Roby, the payee, has never ordered the contents to be paid to him. The holder of the note was not bound to assign it. He might insist that the note should be paid and discharged before

or a payment, is a question for the jury where the facts are in dispute,[2] to be resolved according to the intention of the parties, and looking to the substance of the matter rather than its form.[3]

Credit given by the drawee of a bill, or by a party to a bill or note, who is liable for its payment to the holder at his request, is equivalent to payment.[4] But if a bill accepted for the drawer's accommodation be sent to bank for collection, and be credited to the holder at maturity, it has been held that the bank, as its holder, may sue the acceptor.[5] "Payment of a debt is not neces-

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he delivered it out of his hand. If he transferred the note by delivery, his assignment would still be a contract involving certain liabilities on his part. He would, for instance, be held to warrant that the note was genuine. * * * This defendant was surety, and was interested that the note should be paid by the principal. The holder called on the principal to pay, and he came with the money, paid it over, and the note was given up to him by the holder, with the understanding on his part that it was paid and discharged. So far as the holder of the note and the surety had any information, the note was paid, and the surety was discharged, and had a right to rely on the transaction as a payment. But if the plaintiff can maintain this action, the surety might be called on to pay the debt at any time within six years after it fell due, in virtue of a secret arrangement between the plaintiff and the principal debtor, by which the principal would be enabled to deceive his surety with every appearance of having paid his debt and so relieved the surety from his liability." Approved in Greening v. Patten, 51 Wis. 150, and in Binford v. Binford, 104 Ind. 43; Binford v. Adams, 1 West. Rep. 912; Bardsley v. Sternberg, 17 Wash. 243, 49 Pac. 499, quoting and approving the text; Bunker v. Langs, 76 Hun, 543, 28 N. Y. Supp. 210; Stevenson v. Short *et al.*, 52 La. Ann. 967, 27 So. 350; City of Deadwood v. Allen, 8 S. Dak. 623, 67 N. W. 1150; Cowgill v. Robberson, 75 Mo. App. 412, text cited.

2. Dougherty v. Deeney, 45 Iowa, 443; Rand v. Barrett, 66 Iowa, 735. The facts in this case held to constitute a purchase; and *e converso*, a payment in Gammon v. Kentner, 55 Iowa, 508; Braden v. Lemmon, 127 Ind. 9, 26 N. E. 476; Craddock v. Dwight, 85 Mich. 587, 48 N. W. 644; Marquardt Sav. Bank v. Freund, 80 Mo. App. 657.

3. Swope v. Leffingwell, 72 Mo. 348. See Campbell, etc., Mfg. Co. v. Roeder, 44 Mo. App. 324; Ferree v. New York Security & Trust Co., 21 C. C. A. 83, 74 Fed. 769.

4. Savage v. Merle, 5 Pick. 83; First Nat. Bank of Indianapolis v. New, 146 Ind. 411, 45 N. E. 597; Beach v. Wakefield, 107 Iowa, 567, 76 N. W. 688, 78 N. W. 197; Murphy v. Phelps, 12 Mont. 531, 31 Pac. 64. Where a note is given for the purchase money of land and an agent is authorized by the payee to collect the rents and apply the same to the note, and the collection of such rents in an amount sufficient to discharge the note operated as a payment, whether such agent has accounted to the payee or not. Miller v. Wilson, 126 Mo. 48, 28 S. W. 640.

5. Pacific Bank v. Mitchell, 9 Metc. 297. But see chapter XI, vol. I, § 325 *et seq.*

sarily a payment of money; but that is payment which the parties contract shall be accepted as payment," [6] or which the law recognizes as such.[7]

Mere assumption of a note without assent of payee or maker cannot be regarded as payment.[8]

§ 1222. Payment cannot be converted into purchase.— When a party to the instrument produces the money and takes it in, he cannot show that he was acting as the secret agent of another, and convert that other into a purchaser.[9] And when a stranger calls upon the holder of an overdue note, inquires for it, asks if he is willing to receive the money upon it, and pays the amount

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6. Huffmans v. Walker, 26 Gratt. 315, Christian, J.; Fitch v. McDowell, 80 Hun, 207, 30 N. Y. Supp. 31; Davis v. Vice *et al.*, 15 Ind. App. 117, 43 N. E. 889. Held, in this case, that an acceptance of a note payable in bank for the amount of the purchase price of the land, operates *prima facie* as payment to the vendor. The acceptance of notes, not governed by the law merchant, from a retail dealer in settlement of an account for goods furnished by a manufacturing company, will not operate as payment of such account, nor supersede an agreement between the parties whereby the retail dealer was to hold goods, or the proceeds thereof, furnished by the manufacturing company in trust for such company until all the obligations were paid in full. Orner v. Sattley Mfg. Co., 18 Ind. App. 122, 47 N. E. 644; Kruse v. The Seffert & Weise Lumber Co., 108 Iowa, 352, 79 N. W. 118; Bradbury v. Van Pelt, 4 Kan. App. 571, 45 Pac. 1105; Williams v. Costello, 95 Ala. 592, 11 So. 9; Wetzstein v. Joy, 13 Mont. 444, 34 Pac. 876; Wagner v. Ladd, 38 Nebr. 161, 56 N. W. 891; National Ins. Co. v. Goble, 51 Nebr. 5, 70 N. W. 503; Harvey v. First Nat. Bank, 56 Nebr. 320, 76 N. W. 870; Northwestern Life Ins. Co. v. Sturdivant, 24 Tex. Civ. App. 331, 59 S. W. 61. See Watkins v. Spoull, 8 Tex. Civ. App. 427, 28 S. W. 356; Hayden v. Lauffenburger, 157 Mo. 88. See Alleman v. Manning, 44 Mo. App. 4; Rider v. Culp, 68 Mo. App. 527; Steinhart v. National Bank, 94 Cal. 362, 29 Pac. 717, 28 Am. St. Rep. 132; Savings & Loan Society v. Burnett, 106 Cal. 514, 39 Pac. 922; Dellapiazza v. Foley, 112 Cal. 380, 44 Pac. 727; Jurgens v. New York Life Ins. Co., 114 Cal. 161, 45 Pac. 1054, 46 Pac. 384; Savings Bank v. Central Market Co., 122 Cal. 28, 54 Pac. 273; Smith v. Peck, 128 Cal. 527, 61 Pac. 77; Dingley v. McDonald, 124 Cal. 90, 56 Pac. 790; McElwee v. Met. Lumber Co., 16 C. C. A. 232, 69 Fed. 302; Atlas Steamboat Co. v. Columbia Land Co., 42 C. C. A. 398, 102 Fed. 358; Wheelock v. Berkley, 138 Ill. 153, 27 N. E. 942; Cherry Valley Iron Works v. Florence Iron River Co., 12 C. C. A. 306, 64 Fed. 569; Capital Co. v. Merriam, 60 Kan. 397, 56 Pac. 757.

7. Lionberger v. Kinealy, 13 Mo. App. 4; Murphy v. Phelps, 12 Mont. 531, 31 Pac. 64; Dodson v. Clark, 49 Mo. App. 148.

8. Sterling v. Fleming, 53 N. J. L. 652, 24 Atl. 1001.

9. Eastman v. Plumer, 32 N. H. 238; Citizens' Bank v. Lay, 80 Va. 440, citing the text; City of Deadwood v. Allen, 8 S. Dak. 623, 67 N. W. 1150.

due, and receives the paper, but declines to have it canceled, and says nothing about a purchase — the transaction amounts to a payment, and cannot be regarded as a sale, though the paper be payable to bearer. In such a case it was said in New York, by Welles, J.: "It is true he (the stranger) declined having it canceled; but that circumstance was not enough to overcome the presumption arising from the facts proved, that it was paid and extinguished. It does not prove a purchase, and unless it was purchased by Riley (the stranger), it was satisfied." [10]

In Indiana it is considered that there can be no protest without the holder's assent.[11] The question is generally regarded as a question of fact;[12] and it has been said that "it is as difficult to see how there can be payment and entire extinguishment thereby of a debt without an intention to pay it as it is to see how there can be a sale without an authority to sell." [13] An action for money had and received lies against a party who fraudulently procures surrender of his note without payment; and limitation only commences when the fraud is discovered.[14]

In treating the subject of payment, we shall consider: (1) By whom and to whom payment may be made. (2) When payment may be made, and the effect of payment. (3) In what medium payment may be made. (4) Conditional and absolute payment; taking bill or note for or on account of debt. (5) Application of

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10. Burr v. Smith, 21 Barb. 262. But where the stranger asked for an assignment, which was refused for want of authority, it was held a purchase. Campbell v. Allen, 38 Mo. App. 30; Teberg v. Swenson, 32 Kan. 225. In Chappell v. McKeough, 21 Colo. 277, 40 Pac. 167, the court said: "It will in general be held to be a purchase, and not a payment" if the note is paid after maturity by a stranger. Riddle v. Russell, 108 Iowa, 591, 79 N. W. 363; Vanstandt v. Hobbs, 84 Mo. App. 628. See Marquardt Sav. Bank v. Freund, 80 Mo. App. 657.

11. Binford v. Adams, 104 Ind. 41, 3 N. E. 753.

12. Binford v. Adams, 104 Ind. 41, 3 N. E. 753; Capwell v. Machon, 21 R. I. 520, 45 Atl. 259; Runyon v. Clark, 4 Jones Law, 52, 72 Am. Dec. 577; Jones v. Babbitt, 90 N. C. 391; Fogarty v. Wilson, 30 Minn. 289, 15 N. W. 175; Dougherty v. Deeny, 45 Iowa, 443; Pacific Bank v. Mitchell, 9 Metc. (Mass.) 297; Ketchum v. Parker, 65 Conn. 544, 33 Atl. 499.

13. Ketchume v. Duncan, 96 U. S. 659. See also Wood v. Guarantee Co., 128 U. S. 416, 9 S. Ct. 131; Coykendall v. Constable, 99 N. Y. 309, 1 N. E. 884, and Capwell v. Machon, 21 R. I. 520, 46 Atl. 259, with its comments on Burr v. Smith, 21 Barb. 262, as resting on presumption of payment in the absence of a witness.

14. Penobscot R. Co. v. Mayo, 67 Me. 470.

payment. (6) Payment *supra protest*, or for honor. And shall also consider (7) other discharges.

SECTION II.

WHO MAY MAKE PAYMENT.

§ **1223. Any party to a bill or note may pay it**; and an indorser who has been discharged by failure of notice may still sue a prior indorser or other parties who were not discharged, because, although not compelled to pay it, he acquires the right of the holder from whom he took the instrument, or is remitted to his own rights as indorsee.[15] But it seems that if the indorser has another note given him to secure and indemnify him for his indorsement, and, not being notified, waives the defense, and voluntarily pays the bill or note, he cannot enforce the note given him as indemnity.[16] And a stranger has no right to pay or discharge the contract of another, and cannot pay a bill or note so as to acquire the rights of a holder, except *supra protest*, as hereinafter indicated.[17] But a stranger may always purchase a bill or note with the consent of the holder. Where the drawer, when discharged by the failure of the collecting agent of the holder to present in due time, nevertheless took up and paid his draft, but under protest, to protect his credit, he was held a mere volunteer with no right to recover against the collecting agent of the holder through whose default he was discharged from payment.[18]

And if a stranger takes up a bill payable at a banker's, it is not necessarily a payment by the acceptor, for it may be a purchase of the bill which gives him a right to require payment of the acceptor and others liable.[19] A personal representative of an indorser cannot purchase — he can only pay the note — as the policy of the law forbids his speculating on the subject of his trust, for his own benefit.[20]

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15. Ellsworth v. Brewer, 11 Pick. 316.

16. Bachellor v. Priest, 12 Pick. 399.

17. Edwards on Bills, 535. See §§ 1222, 1254; Burton v. Slaughter, 26 Gratt. 919; Moran v. Abbey, 63 Cal. 57. What constitutes a voluntary payment. See United States Trust Co. v. The Mayor, 77 Hun, 182, 28 N. Y. Supp. 344, and also Etna Ins. Co. v. Mayor, 7 App. Div. 145, 40 N. Y. Supp. 120.

18. Harvey v. Girard Nat. Bank, 119 Pa. St. 212.

19. Deacon v. Strodhart, 2 M. & G. 317; Byles on Bills (Sharswood's ed.) [*216], 354; Vanstandt v. Hobbs, 84 Mo. App. 628.

20. Burton v. Slaughter, 26 Gratt. 919.

§ 1224. **The indorser should assure himself before he makes payment that there was no laches** in respect to presentment, protest, or notice, which operated a discharge of prior parties, as well as himself; for if the holder had no right to enforce payment against him or his antecedents, his unnecessary payment could not revive their liability, and, unless made under circumstances of fraud or mistake, which entitled him to recover the amount back from the holder, the loss would fall upon him.[21] If he pays under mistake of fact when there was laches he may recover back the amount.[22]

§ 1225. **Payor should see that holder traces legal title.**— The maker of a note or the acceptor of a bill must satisfy himself, when it is presented for payment, that the holder traces his title through genuine indorsements; for if there is a forged indorsement, it is a nullity, and no right passes by it. And payment to a holder under a forged indorsement would be invalid as against the true owner, who might require it to be paid again.[23] But the maker or acceptor might recover back the money as paid under a mistake of fact.[24] When, however, the signature of the drawer is forged, should the drawee accept or pay the bill, he becomes absolutely bound, because it is his duty to know the drawer's handwriting; and if he pays the money he cannot recover it back.[25] But acceptance does not admit the signature of the drawer as indorser also;[26] nor the authority of an agent to indorse a bill drawn by him as agent of the drawer.[27] If an indorser pays a bill or note upon which there is a prior forged indorsement, he cannot recover back the amount, because his indorsement was in itself a warranty that the prior indorsements were genuine.[28] The payor should also satisfy himself of the identity of the holder; for he cannot defend himself against the

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21. Roscoe v. Hardy, 12 East, 434; Turner v. Leech, 4 B. & Ald. 451.

22. *Post*, § 1226.

23. Smith v. Chester, 1 T. R. 654; Canal Bank v. Bank of Albany, 1 Hill, 287; Goddard v. Merchants' Bank, 2 Sandf. 247; Beattie v. The Nat. Bank, 174 Ill. 571, 51 N. E. 602, 66 Am. St. Rep. 318, quoting text.

24. See chapter XLII, on Forgery, section IV.

25. Smith v. Mercer, 6 Taunt. 76; Price v. Neal, 3 Burr. 1354; Bank of United States v. Bank of Georgia, 10 Wheat. 333; Johnson v. Bank, 27 W. Va. 343.

26. Robinson v. Yarrow, 7 Taunt. 455. See *ante*, vol. I, § 538 *et seq.*

27. Story on Bills, § 412; *ante*, vol. I, § 539.

28. See chapter XXI, vol. I, § 672.

real payee by showing that he paid the amount of the bill or note to another person of the same name in good faith and in the usual course of business.[29]

§ 1226. Payments under mistake of law or fact.— It is a general principle that money paid with knowledge of facts, but under a mistake of law, cannot be recovered back.[30] But a party paying money under a mistake of the real facts may recover it back.[31] Therefore, where a bank paid a post-dated check to a holder who knew that the drawer was insolvent, and that the drawee had no funds, but was in expectation of them that day, and none were received by the bank, it was held that the amount might be recovered back.[32] So an indorser, discharged by laches, who pays a bill to the holder under a misrepresentation of facts, may

29. Graves v. American Exch. Bank, 17 N. Y. 205; Richards v. Waller, 49 Nebr. 639, 68 N. W. 1053; Beattie v. The Nat. Bank, 174 Ill. 571, 51 N. E. 602, 66 Am. St. Rep. 318, quoting text.

30. Adams v. Reeves, 68 N. C. 134; Alton v. First Nat. Bank of Webster, 157 Mass. 341, 32 N. E. 228, 34 Am. St. Rep. 285; Maledon v. Leflore, 62 Ark. 387, 35 S. W. 1102.

31. Merchants' Nat. Bank v. National Bank of the Commonwealth, 139 Mass. 513; *post*, § 1622; Phetteplace v. Bucklin, 18 R. I. 298, 27 Atl. 211; Quinlan v. Fairchild, 76 Hun, 312, 27 N. Y. Supp. 689. In Indiana held, that payment of interest on a note, in excess of the contract rate, under a mistake of fact, may be recovered back, whether or not the mistake was mutual. See Stotsenburg v. Fordice, 142 Ind. 490, 41 N. E. 313, 810; Parks v. Smith, 155 Mass. 26, 28 N. E. 1044; Martin v. Home Bank, 160 N. Y. 190, 54 N. E. 717; Monroe v. Bonanno, 16 App. Div. 421, 45 N. Y. Supp. 61. But in Georgia it has been held that if the parties to a note make an honest mistake of law, and it operates as a gross injustice to one and gives an unconscionable advantage to the other, the mistake will be relieved against in equity. See Loudermilk v. Loudermilk, 98 Ga. 780, 25 S. E. 927; Strauss v. Hensey, 9 App. D. C. 541; First Nat. Bank of Chattanooga v. Behan, 91 Ky. 560, 16 S. W. 368. Compare Hardison v. Davis, 131 Cal. 635, 63 Pac. 1005.

32. Martin v. Morgan, 3 Moore, 635. See Adams v. Reeves, *supra*. So, when drawer instructs bank not to pay a certain check, and through omission or inadvertence pays check, bank is entitled to enforce a return of the money, but, before bringing action for that purpose, must tender the check to the defendant. Northampton Nat. Bank v. Smith, 169 Mass. 281, 47 N. E. 1009, 61 Am. St. Rep. 283, citing Evans v. Gale, 21 N. H. 240; Cook v. Gilman, 34 N. H. 556; Estabrook v. Swett, 116 Mass. 303; Otisfield v. Mayberry, 63 Me. 197; Park v. McDaniels, 37 Vt. 594. But if the mistake of fact arises out of a matter equally open for the inquiry and judgment of both parties, the party paying the money cannot recover. See Alton v. First Nat. Bank, 157 Mass. 341, 32 N. E. 228, 34 Am. St. Rep. 285. Mistake of foreign law is mistake of fact. See Daley v. Brennan, 87 Wis. 36, 57 N. W. 963.

recover back the amount,[33] and so if such indorser pays the bill, relying on the notarial certificate of due presentment, when in fact no such presentment was made.[34]

§ **1227. Vouchers of payment.**— The party making payment should insist on the presentment of the paper by the party demanding payment, in order to make sure that it is at the time in his possession, and not outstanding in another. And if at the time he makes payment it is outstanding, and held by a *bona fide* holder for value, he will be liable to pay it again, and a receipt taken will be no protection.[35] The party making payment of the bill or note should also not fail to insist upon its being surrendered up, as a voucher that the party receiving the money was entitled to do so, and also that he has paid it to him.[36] The possession of the note by the maker is presumptive evidence that he has paid it;[37] and so, likewise, is the possession of the bill by the acceptor, provided it can be shown that it passed out of his

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33. Milnes v. Duncan, 6 B. & C. 671.

34. Talbot v. National Bank, 129 Mass. 67.

35. Wheeler v. Guild, 20 Pick. 545; Davis v. Miller, 14 Gratt. 1; Wilcox v. Aultman, 64 Ga. 544; McClelland v. Bartlett, 13 Ill. App. 236; Bank of the University v. Tuck, 96 Ga. 456, 23 S. E. 467; Mulhall Bros. v. Berg, 95 Iowa, 60, 63 N. W. 573; Klindt v. Higgins, 95 Iowa, 529, 64 N. W. 414; Richards v. Waller, 49 Nebr. 639, 68 N. W. 1053; Bull v. Mitchell, 47 Nebr. 647, 66 N. W. 632; White v. Kehlor, 85 Mo. App. 557; Hefferman v. Boteler, 87 Mo. App. 316.

36. See *post*, § 1228; Otisfield v. Mayherry, 63 Me. 197 (1874), Appleton, C. J., saying: "The maker of a note has a right to its possession upon payment. In his hands it is evidence of such payment. In the hands of a stranger it is *prima facie* evidence of indebtedness. If a suit is brought it imposes upon the maker the necessity of a defense — the procurement of testimony — the employment of counsel, and the delay, expense, and vexation of litigation. The possession of it by the maker is of importance to him. The conversion of it by another may become a source of indefinite injury. Accordingly it has been held in this State in Neal v. Hanson, 60 Me. 84; in Vermont in Buck v. Kent, 3 Vt. 99; Pierce v. Gilson, 9 Vt. 216, and in Spencer v. Dearth, 43 Vt. 98; and in New Hampshire in Stone v. Clough, 41 N. H. 290, that trover may be maintained by the maker against the payee for the conversion or wrongful withholding of his paid promissory note." Romero & Bayard v. Newman, 50 La. Ann. 80, 20 So. 493. See Kemble v. Logan, 79 Mo. App. 253.

37. Dugan v. United States, 3 Wheat. 172 (overruling Welch v. Lindo, 7 Cranch, 159); Norris v. Badger, 6 Cow. 449; Brinkley v. Going, 1 Breese, 288; Story on Notes, § 452; 2 Parsons on Notes and Bills, 220; Stephenson v. Richards, 45 Mo. App. 544. See Slade v. Mutrie, 156 Mass. 19, 30 N. E. 168, and cases there cited.

hands after he accepted it, though otherwise it would seem not.[38]

The mere production of a note by a comaker is regarded as consistent with the supposition that the payment was made jointly by him and his copromisor as with the idea that it was made solely by himself; and, therefore, it is not sufficient to entitle him to contribution.[39]

§ 1228. Receipts for payment.— It is better also for the acceptor or maker to take a receipt for the money written upon the back of the bill or note, which at once advertises payment to every person who might subsequently come into possession of the instrument by accident or fraud; and as almost incontestable proof of the fact. And it seems that such a receipt may be claimed by the party making payment;[40] and he is certainly entitled to demand the surrender of the instrument.[41] "The acceptor paying the bill," says Lord Tenterden, "has a right to the possession of the instrument for his own security, and as his

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38. Pfiel v. Vanbatenberg, 2 Campb. 439, Lord Ellenborough saying: "Show that the bills were once in circulation after being accepted, and I will presume that they got back to the acceptor's hands by his having paid them. But when he merely produces them, how do I know that they were ever in the hands of the payee, or any indorsee with his name upon them as acceptor. Prove the bills out of the plaintiff's possession accepted, and I will presume that they got back again by payment." Barring v. Clark, 19 Pick. 220; Chitty on Bills (13th Am. ed.) [*424], 478.

39. Bates v. Cain, 70 Vt. 144, 40 Atl. 36; Mills v. Hyde, 19 Vt. 59, 46 Am. Dec. 177; Heald v. Davis, 11 Cush. 319, 59 Am. Dec. 147, *contra*.

40. Chitty on Bills (13th Am. ed.) [*423], 477; Story on Notes, § 422; Edwards on Bills, 576; Thompson on Bills, 265; Matter of Waite, 43 App. Div. 296, 60 N. Y. Supp. 488. Held, in this case, that where notes have been sold and a receipt given to the purchaser for his payment for them, that the burden is upon the party claiming in contradiction to the terms of the receipt, to show that the notes had not been reduced to the sum mentioned in the receipt.

41. Crandall v. Schroeppel, 1 Hun, 558, 4 Thomp. & C. 78; Davis v. Miller, 14 Gratt. 1; Moses v. True, 21 Gratt. 556; Hansard v. Robinson, 7 B. & C. 90; Otisfield v. Mayberry, 63 Me. 197; *ante*, § 1227; Wheeler v. Guild, 20 Pick. 545; Freeman v. Boynton, 7 Mass. 486; Best v. Crall, 23 Kan. 482; 1 Parsons on Notes and Bills, 230, note; 2 Parsons on Notes and Bills, 215; Byles on Bills (Sharswood's ed.) [*217, 218], 357, 364; Story on Notes, § 422; Thompson on Bills, 265; Edwards on Bills, 576. [It has been said otherwise in Massachusetts; a doubt has been intimated. Baker v. Wheaton, 5 Mass. 509.] Read v. Marine Bank of Buffalo, 59 Hun, 578, 13 N. Y. Supp. 855; Romero & Bayard v. Newman, 50 La. Ann. 80, 23 So. 493.

voucher and discharge *pro tanto*, in his account with the drawer." [42] If it remain in the hands of the holder it may prove fatal to the defendant, as in a doubtful case its possession by the plaintiff would turn the scale in his favor.[43] But the debtor can impose no condition to his payment. And, therefore, where under the English Stamp Act it was provided that the person from whom the money is due may provide the stamp, and on payment require the receiver to give him a receipt, and pay him the amount of the stamp duty, and if the receiver refuses he becomes liable to a penalty of ten pounds, it was held, that under this statute a plea of tender was not sustained by proof that the defendant took a sum of money out of his pocket, and said to the plaintiff: "If you will give me a stamped receipt, I will pay you the money." [44] Possession of a note by the maker, or one who succeeds to his rights, raises the presumption of payment, but one that may be repelled by evidence that such possession was acquired without payment.[45] In like manner the possession of a canceled bank check by the drawer is *prima facie* evidence of the payment to the drawee of the amount therein named.[46]

§ **1229. Indorser should take receipt.**— When an indorser makes payment it is especially desirable that he should take a receipt, as well as require delivery of the instrument;[47] and in England an indorser, whose name was on a bill which had passed to several subsequent indorsees, was nonsuited in an action upon the

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42. Hansard v. Robinson, 7 B. & C. 90.

43. Brombridge v. Osborne, 1 Stark. 374; Turrentine *et al.* v. Grigsby, 118 Ala. 380, 20 So. 666.

44. In Laing v. Meader, 1 Car. & P. 257, Abbott, C. J., said: "This is no proof of a tender; the offer of the money must be unconditional."

45. Potts v. Coleman, 67 Ala. 221; Lipscomb v. De Lemos, 68 Ala. 593; Hollenberg v. Lane, 47 Ark. 399; Callahan v. Bank of Kentucky, 82 Ky. 231; Tuskaloosa Oil Co. v. Perry, 85 Ala. 158; Bowman v. St. Louis Times, 87 Mo. 191; Tedens v. Schumers (due-bill), 112 Ill. 268; Turner v. Turner, 79 Cal. 566; *post*, § 1229; Perez v. Bank of Key West, 36 Fla. 467, 18 So. 590; First Nat. Bank v. Harris, 7 Wash. 139, 34 Pac. 466; Anniston Pipe Works v. Furnace Co., 94 Ala. 606, 10 So. 259; Smith v. Gardner *et al.*, 36 Nebr. 741, 55 N. W. 245; Erhart v. Dietrich, 118 Mo. 418, 24 S. W. 188; Stephenson v. Richards, 45 Mo. App. 544; Grimes v. Hilleary, 150 Ill. 141, 36 N. E. 977; Griffith v. Lewin, 125 Cal. 618, 58 Pac. 205; Schwind v. Hall, 129 Cal. 40, 61 Pac. 573.

46. Peavey v. Hovey, 16 Nebr. 416; Riddle v. Russell, 108 Iowa, 591, 79 N. W. 363.

47. Story on Notes, § 452.

bill which he claimed to have paid because he produced no receipt and no extraneous proof of payment.[48] But now the mere possession of the instrument would be, in such a case, sufficient evidence of payment and ground of recovery.[49] And the presumption of payment arising from possession of the instrument may in any case be rebutted.[50] If there be a general receipt of payment on the back of the instrument, it will be presumed that it was made by the maker or acceptor, who was primarily liable;[51] and this presumption would exist even when the drawer had possession and sued the acceptor upon a bill indorsed with such a receipt.[52] But a receipt, while it is an admission, is not so conclusive between the parties (though it is as to a third party who has acted on the faith of it) as to exclude explanation by parol evidence.[53] Evidence of a party's pecuniary ability to pay for many years after judgment against him, does not tend to show that he has paid, and is considered immaterial;[54] and even when coupled with proof of the pecuniary distress of the holder of a note, the pecuniary ability of the party sued has been held irrelevant, and inadmissible as tending to prove payment.[55] But similar circumstances have been deemed sufficient to require proof of the holder that he gave value.[56]

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48. Mendez v. Carreroon, 1 Ld. Raym. 742 (1701).

49. Dugan v. United States, 3 Wheat. 172; Warren v. Gilman, 15 Me. 70; Bowie v. Duvall, 1 Gill & J. 175; Bank of Kansas City v. Mills, 24 Kan. 610; Wickersham v. Jarvis, 2 Mo. App. 280; Bond v. Storrs, 13 Conn. 412; Campbell v. Humphreys, 2 Scam. 478; Brinkley v. Going, 1 Breese, 228; Story on Notes, § 452. See vol. I, § 576, and vol. II, §§ 1198, 1230; Bobb v. Letcher, 30 Mo. App. 46; Kelly v. Forty-second St. R. Co., 37 App. Div. 500, 55 N. Y. Supp. 1096; Zimmer v. Chew, 34 App. Div. 504, 54 N. Y. Supp. 685; Spreckels v. Bender, 30 Oreg. 577, 48 Pac. 418; Johnson v. Lockhart, Admr., 20 Tex. Civ. App. 596, 50 S. W. 955.

50. Fellows v. Cress, 5 Blackf. 536; Erhart v. Dietrich, 118 Mo. 418, 24 S. W. 188.

51. Scholey v. Walsby, Peake Cas. 24; Jones v. Fort, 9 B. & C. 764.

52. Ibid.; Foerster, Succession of, 43 La. Ann. 190, 9 So. 17.

53. Scholey v. Walsby, *supra;* Chitty on Bills (13th Am. ed.), 478; Comptoir D'Escompte v. Duesbach, 78 Cal. 15.

54. Daby v. Ericsson, 45 N. Y. 786.

55. Alexander v. Dutcher, 7 Hun, 440.

56. Duerson v. Alsop, 27 Gratt. 229.

SECTION III.

TO WHOM PAYMENT MAY BE MADE.

§ **1230.** Payment of a bill or note should be made to the legal owner or holder thereof, or some one authorized by him to receive it.[57] If it be payable to bearer or indorsed in blank, any person having it in possession may be presumed to be entitled to receive payment, unless the payor have notice to the contrary;[58] and a payment to such person will be valid, although he may be a thief, finder, or fraudulent holder.[59]

§ **1230a. Whether payment may be made to party in possession of instrument payable to order and unindorsed.**— If the instrument be payable to a particular party or order, and unindorsed by him, it

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57. Stevenson v. Woodhull, 19 Fed. 575. Authority to sell property as agent to take a note therefor in the name of the principal, does not include authority to receive payment of the note after it has been delivered to the principal. Draper v. Rice, 56 Iowa, 114. As to the implied authority to collect money arising from the reliance of an indorsee upon the original holder, where the latter is a factor or commission merchant making advances to producers, as his agent for that purpose, see Exchange Nat. Bank v. Johnson, 30 Fed. 589. In Lester *et al.* v. Snyder, 12 Colo. App. 331, 55 Pac. 613, it was held, that "the fact that an agent is authorized to collect interest does not authorize him to collect the principal of the note," nor will authority "to receive payment of principal and interest authorize him to receive payment before maturity so as to bind the payee." See also Barstow v. Stone, 10 Colo. App. 396, 52 Pac. 48; Sage v. Burton, 84 Hun, 267, 32 N. Y. Supp. 1122; Dodge v. Birkenfeld, 20 Mont. 115, 49 Pac. 590; Reid v. Kellogg *et al.*, 8 S. Dak. 596, 67 N. W. 687; Cummings v. Hurd, 49 Mo. App. 139; Weldon v. Tollman, 15 C. C. A. 138, 67 Fed. 986, text cited.

58. Chappelear v. Martin, 45 Ohio St. 132, citing the text; Brennan v. Merchants' Bank, 62 Mich. 343; Samples v. Samples, 2 N. M. Ter. 239. *Semble*, that in an action brought on a promissory note by the holder thereof, payment of the same to a third person after he had parted with the possession thereof, is no defense to the action, even though the parties suing upon the note paid no consideration therefor, and received it after maturity. See Harpending v. Gray, 76 Hun, 351, 27 N. Y. Supp. 762; Tucker v. National Bank of Athens, 108 Ga. 446, 33 S. E. 983, 75 Am. St. Rep. 69.

59. Mauran v. Lamb, 7 Cow. 174; Bachellor v. Priest, 12 Pick. 406; Bank of the United States v. United States, 2 How. 711; Dugan v. United States, 2 Wheat. 172; Bank of Utica v. Smith, 18 Johns. 230; Adams v. Oakes, 6 Car. & P. 70; Owen v. Barrow, 4 Bos. & P. 101; Goodman v. Harvey, 4 Ad. & El. 870; Story on Bills, § 415; Story on Notes, § 454; Edwards on Bills, 537; Merritt v. New York, etc., R. Co., 14 Hun, 324; Alexander v. Rollins, 14 Mo. App. 118.

has been held that a payment to any person in actual possession will still be valid, because, although he may have no legal title, he may be the agent of the actual owner.[60] But this doctrine, it seems to us, goes too far. Such person in actual possession may perhaps be presumed to be agent of the holder *prima facie*. But even this is doubtful, and to us seems wrong, for nothing is more common than to indorse negotiable instruments to agents for collection; and if the bill or note be unindorsed in blank, or specially to the party having it in possession, it might be that the owner had withheld his indorsement for the very purpose of preventing collection by a person not entitled to receive the money; and if this were so, the presumption of agency (if, indeed, it be at all admitted) would be rebutted.[61]

The contrary doctrine destroys a great and salutary safeguard to the rights of proprietors of negotiable instruments, and to a large degree breaks down the distinction between those payable to order and those payable to bearer. Payment may be safely made to one who is a special indorsee, although there may be subsequent uncanceled indorsements of himself and others on the paper.[62] If the holder held and exhibited extraneous evi-

60. Bachellor v. Priest, 12 Pick. 406. The instrument was indorsed: "Pay to J. Flewelling, Esq., Treasurer." Presentment was made by Dunscombe, and payment to him held good. Paulman v. Claycomb, 75 Ind. 64. And accordingly if one trustee allows his cotrustee to retain possession of a note payable to them, the maker of the note is justified in paying the amount due at maturity to the trustee in possession, who surrenders the note to him, and is not responsible for the misappropriation of the proceeds by such trustee. See Barroll v. Foreman, 88 Md. 188; Bank of Laddonia v. Friar, 88 Mo. App. 39.

61. Porter v. Cushman, 19 Ill. 572; Doubleday v. Kress, 50 N. Y. 413, overruling 60 Barb. 181. See chapter XX, vol. I, §§ 573, 574. Payment to a mere custodian is insufficient. Lochenmayer v. Fogarty, 112 Ill. 581. On the other hand, a deposit of funds at a bank at which a note was made payable, has been held a valid payment discharging the debtor in the event of the failure of the bank without accounting to the creditor. Lazier v. Horan, 55 Iowa, 643. But see *ante*, § 326; Hefferman v. Boteler, 87 Mo. App. 316; Weldon v. Tollman, 15 C. C. A. 138, 67 Fed. 986, text cited.

62. Dugan v. United States, 3 Wheat. 172. See chapter XX, on Presentment for Payment, vol. I, § 576. In the case of Mendez v. Carreroon, 1 Ld. Raym. 742, G., the fourth indorsee of a bill, brought suit and recovered of the first indorser, D. D. then sued B., the drawer, and though he produced the bill and protest, yet because he could not produce a receipt for the money paid by him to G., upon the protest, as was the custom according to the testimony of several merchants, he was nonsuited. This is no longer law. Chitty, Jr., 216. See also *ante*, § 1198.

dence of his right to receive payment, it would suffice, without special indorsement to him, or indorsement in blank.[63] Payment clearly should not be made save to a party in possession; and if made to the payee it is no discharge if he had parted with the instrument.[64]

§ **1231.** Payment may be made to the assignee of a bankrupt;[65] the representative of a dead owner;[66] to the guardian of an infant or insane person;[67] or the husband whose wife is payee.[68] And if the payor should pay the bankrupt, with knowledge that the amount was due his assignee;[69] or the ward in person, instead of his guardian;[70] or the married woman, after knowledge of her marriage, without concurrence of her husband, it would be invalid.[71] If the instrument be payable to A. for the use of B., payment must be made to A.[72]

Payment must also be made to a member of a firm; the duly constituted officer of a corporation; the receiver of a court, or any ministerial officer authorized by law to collect the money.

§ **1232.** It seems that if a single woman who holds a bill or note, marries, payment to her after marriage will not exonerate the acceptor, even if he does not know of her marriage;[73] and that, if the holder make payment to his former agent, without knowledge of revocation by death of the principal, it will not be valid.[74] Payment to one of two joint payees extinguishes the debt.[75]

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63. Pease v. Warren, 29 Mich. 9.

64. Paris v. Moe, 60 Ga. 90; City Bank v. Taylor, 60 Iowa, 66; Fortune v. Stockton, 182 Ill. 454, 55 N. E. 367; Jenkins v. Shinn, 55 Ark. 347, 18 S. W. 240. See First Nat. Bank v. Chilsom, 45 Nebr. 257, 63 N. W. 362; Williams v. National Bank of Baltimore, 72 Md. 441, 20 Atl. 191; Dodge v. Birkenfeld, 20 Mont. 115, 49 Pac. 590; Burns v. True, 5 Tex. Civ. App. 74, 24 S. W. 338; Cummings v. Hurd, 49 Mo. App. 139; Bacon v. Pomeroy, 118 Mich. 145, 76 N. W. 324.

65. Bayley on Bills (2d Am. ed.), 320; 2 Parsons on Notes and Bills, 211.

66. Ibid.; Chitty on Bills [*393], 444.

67. Ibid.

68. Chitty on Bills [*393–394], 444. Or to a cotrustee having possession of a note payable to them. See Barroll v. Foreman, 88 Md. 188, 40 Atl. 883.

69. Chitty on Bills, 447; Story on Bills, § 413; Kitchen v. Bartsch, 7 East, 53.

70. Leonard v. Leonard, 14 Pick. 280; White v. Palmer, 4 Mass. 147.

71. Barlow v. Bishop, 1 East, 432.

72. Cramlington v. Evans, 2 Vent. 307. **73.** Story on Bills, § 413.

74. Story on Bills, § 413. **75.** Lyman v. Gedney, 111 Ill. 406.

SECTION IV.

WHEN PAYMENT MAY BE MADE.

§ **1233.** Payment can only be made before maturity by consent of both debtor and creditor.[76] And it can only be made with perfect safety at or after the maturity of the instrument, unless the payor receives it in his hands and cancels it; for a payment before maturity is not in the usual course of business; and should the bill or note afterward, and before maturity, reach the hands of a *bona fide* holder for value, without notice, such holder could enforce a second payment.[77]

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76. Ebersole v. Ridding, 22 Ind. 232; Skelly v. The Bristol Sav. Bank, 63 Conn. 83, 26 Atl. 474, 38 Am. St. Rep. 340. In this case a demand note had been given, the holder took from the maker interest for six months in advance and maker then paid principal before expiration of six months. The note in question was payable on demand with interest payable semi-annually in advance. Held, that "the taking of interest on a demand note in advance is *prima facie* evidence to forbear collecting note during the time for which interest is taken." And further that the maker was not entitled to a return of the unearned interest." Haug v. Riley, Admr., 101 Ga. 372, 29 S. E. 44, quoting and approving text; Burns v. True, 5 Tex. Civ. App. 74, 24 S. W. 338, citing text.

77. Burbridge v. Manners, 2 Campb. 193; Morley v. Culverwell, 7 M. & W. 174; Da Silva v. Fuller, Chitty on Bills [*395], 446; Wheeler v. Guild, 20 Pick. 545. In this case it appeared W., the indorsee in blank of a note, delivered it to B. & G., attorneys in partnerships, as collateral security for certain debts due them and others, and the note was placed among the private papers of G., by whom the business was transacted. The debts for which the note was transferred as collateral security were paid, and afterward, but before the note matured, the maker paid the amount to B., and took a receipt from him in his own name alone. The note was not delivered to the maker, being with the private papers of G. It was held that, as the note was not delivered up, and as the right of B. & G. to transfer and collect it ceased upon payment of the debts for which it was pledged, and as the note was paid before maturity, the payment to B. did not operate as a discharge of the note, and that the plaintiff could recover of the maker. Ayer v. Hutchinson, 4 Mass. 372; Griswold v. Davis, 31 Vt. 390; Story on Bills, § 415; Thompson on Bills, 246; Byles on Bills (Sharswood's ed.) [*217], 356; Chitty on Bills (13th Am. ed.) [*395, 397], 446–448. But the holder must be without notice of payment. White v. Kebling, 11 Johns. 128; Edwards on Bills, *548, *549. If a party lose a draft, and it be paid by the bank before due, the loser may require it to be paid again. Da Silva v. Fuller, *supra;* Henley v. Holzer, 19 Mo. App. 248, citing the text; Trustees of I. I. Fund v. Lewis, 34 Fla. 424, 16 So. 325, 43 Am. St. Rep. 209, citing and approving text; Biggerstaff v. Marston, 161 Mass. 101, 36 N. E. 785; Haug v. Riley, Admr., 101 Ga. 372,

§ 1233a. **Payment at or after maturity to legal holder extinguishes the instrument.**— If, however, the instrument be paid at or after maturity to the holder, the case is different. The instrument is not only extinguished, but should the holder fail to deliver it up, and transfer it to another party, such party would receive it with notice upon its face that it was overdue, and he could acquire no better right or title than his transferrer; and the plea that it was paid before the transfer would be available against him. Still, the payor, in making payment after maturity, must be sure that it is made to the then holder. For, if it should have been transferred after maturity, and before payment, to a third party, a payment to the transferrer would be invalid, and the transferee holding the instrument could himself enforce payment.[78]

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29 S. E. 44, quoting and approving text; Dodge v. Birkenfeld, 20 Mont. 115, 49 Pac. 590. See Yenney *et al.* v. Central City Bank, 44 Nebr. 402, 62 N. W. 872; Williams v. Keyes, 90 Mich. 290, 51 N. W. 520, 30 Am. St. Rep. 438; Fogg v. School District, 75 Mo. App. 159, text cited; Weldon v. Tollman, 15 C. C. A. 138, 67 Fed. 986, text cited.

78. In Davis v. Miller, 14 Gratt. 1, it appeared that suit was brought by Miller & Mayhew against Davis on his promissory note to E. L. Fant & Co., who had indorsed it to them on August 6, 1850, after it had fallen due and been protested for nonpayment. Miller & Mayhew sent Davis notice of the transfer to them on the 9th of August, but he did not receive it until afterward; and he had already on that day paid the note and taken the receipt of Fant & Co. for the money. This payment was held no defense to the action, Moncure, J., rendering an elaborate and able opinion, in the course of which he cited with approval the *obiter dictum* of Shaw, C. J., in Baxter v. Little, 6 Metc. (Mass.) 7, and adverting to the circumstance that no decision had been referred to holding that it was not a good defense, he added: "On the other hand, however, it may be answered that no case can be found in which it has been decided, or even said, that payment to an indorser after an indorsement is a good defense against the indorsee. That no decision can be found the other way is well accounted for by the fact that payment of a negotiable note is very rarely made without taking in the note, or having the payment, if partial, indorsed thereon, and no occasion has, therefore, occurred for a decision of the question. That no such occasion has occurred is itself an argument in favor of the defendants in error. * * * There is, at least, as much reason in holding the maker of a note responsible for want of caution in making a payment as for holding a purchaser responsible for want of caution in making a purchase. Indeed, there is more. For due caution will always protect the former against an improper payment; while the greatest caution may not protect the latter against an improper purchase. The former is always safe in making payment to the legal holder of the note, which he may thereupon require to be produced and surrendered to him; while the latter is often deceived by a false possession, and must at his peril

If the holder refuse to deliver up the instrument after payment, keeping it in his possession and claiming still to own it, the maker may maintain a suit in equity for its cancellation, notwithstanding he has a complete defense at law.[79]

§ 1234. Debtor cannot compel payment before maturity.— The debtor may, of course, pay the bill or note to any one who is the holder under an indorsement to himself personally, or an indorsement in blank, at any time before maturity, provided the holder consents to receive payment. But if the debtor, from the prospect of some benefit by the rate of exchange, or otherwise, should offer payment before the term arrives, the creditor is not bound to take it, since the term of payment is a condition of the bill or note fixed equally for behoof of both parties.[80]

§ 1235. Time of day for payment.— Payment may be demanded at any time after the commencement of business hours on the day of maturity of the bill or note. And if payment be then refused,[81] or if the house at which the instrument is payable be shut up, and no one is there to answer,[82] it may be treated as dishonored, notice given, and resort taken upon the drawer and indorsers. But the maker or acceptor has the whole day in which he is privileged to make payment, and though he should in the course of the day refuse payment, yet if he subsequently on the same day makes payment, it is good, and the notice of dishonor becomes of no avail.[83]

A payment after action brought will not prevent the holder from proceeding for his costs, unless they be included or released.[84]

look to the title, which may be separate from the possession." See also Coppman v. Bank of Kentucky, 41 Miss. 212; Elgin v. Hill, 27 Cal. 373; Adair v. Lenox, 15 Oreg. 493, approving the text.

79. Fitzmaurice v. Mosier, 116 Ill. 363.

80. Forbes, 108; Thompson on Bills, 247; Bainbridge v. City of Louisville, 83 Ky. 285, citing the text; Bowen v. Julius, 141 Ind. 310, 40 N. E. 700.

81. *Ex parte* Moline, 1 Rose, 303; Burbridge v. Manners, 1 Campb. 193; Haynes v. Birks, 3 Bos. & P. 599; Chitty on Bills (13th Am. ed.) [*397], 448; Edwards on Bills, 549; Byles on Bills (Sharswood's ed.) [*216], 355.

82. Hine v. Allely, 4 B. & Ad. 624.

83. Hartley v. Case, 1 Car. & P. 555, 4 B. & C. 339; Citizens' Bank v. Lay, 80 Va. 440, citing the text. Hence it has been held that a suit on the note cannot be commenced after banking hours on the day it falls due. Sutcliffe v. Humphreys, 58 N. J. L. 42, 36 Atl. 1129.

84. Toms v. Powell, 6 Esp. 40; Goodwin v. Creamer, 16 Eng. L. & Eq. 90; Kemp v. Balls, 28 Eng. L. & Eq. 498, 10 Exch. 607; Tarin v. Morris, 2 Dall. 115; Thame v. Boast, 12 Ad. & El. (N. S.) 808; Story on Bills (Bennett's ed.), § 423*a*.

Payment to a wrong party of a bill or note long dishonored, or of a check long after it was drawn, or of a check which had been torn into pieces and pasted together, does not discharge the payor,[85] for the circumstances convey reasonable notice that the instrument has been canceled.[86]

SECTION V.

THE EFFECT OF PAYMENT, AND WHO MAY REISSUE A BILL OR NOTE.

§ **1235a. Cancellation or obliteration of paid note or bill.**— When a bill or note is paid it should either be destroyed, or some memorandum should be made upon it unequivocally indicating that it has been canceled. This may be done either in writing, or by stamping lines upon its face. For, unless payable at a specific time, the fact that it was overdue might not be apparent from its face, and the parties to it would incur risk of liability to a *bona fide* purchaser without notice.[87]

§ **1236.** The maker of a note and the acceptor of a bill are the principal parties bound for its payment, the drawer and indorsers being liable as sureties; and hence a payment by the maker or acceptor discharges the drawer or indorsers and cancels the instrument and the obligation.[88] When the bill is accepted for accommodation of the drawer, the latter is bound to refund the amount, should it be paid by the acceptor, and satisfy him for all damages.[89] But the acceptor cannot sue him on the bill which is his own obligation, canceled by his payment,[90] though it is an item of evidence to show the amount on settlement with the drawer.[91] It has been

85. Scholey v. Ramsbottom, 2 Campb. 485.

86. Byles on Bills (Sharswood's ed.) [*214], 352.

87. District of Columbia v. Cornell, 130 U. S. 659; Burbridge v. Manners, 3 Campb. 193; Watson v. Wyman, 161 Mass. 96, 36 N. E. 692. Following this principle, the Supreme Court of Massachusetts has held that "Payment of the mortgage note on the day when it falls due is performance of the promise, and very possibly would discharge the note given as against the one who took it for value and without notice later on the same day. But payment before the day, or a satisfaction like that in the present case, is a defense which binds only the party receiving payment and those who stand in his shoes."

88. Suydam v. Westfall, 2 Den. 205; Eastman v. Plumer, 32 N. H. 238; First Nat. Bank v. Maxfield, 83 Me. 576, 22 Atl. 479.

89. Baker v. Martin, 3 Barb. 634.

90. See chapter XXXVII, on Action, §§ 1181, 1206; Griffith v. Reed, 21 Wend. 502.

91. Bank of Vergennes v. Cameron, 7 Barb. 143.

held that where a bill was drawn by one person as principal, and another as surety, the undertaking of the latter is with the payee or subsequent holder that the bill shall be accepted and paid, but that he incurs no obligation to the drawee who accepts and pays it for accommodation.[92] But this doctrine has been overruled on the ground that all the parties signing a bill are responsible as for money paid at their request.[93]

§ **1236a. Effect of payment by a comaker.**— It is true as a general principle, that a note or bill is extinguished by payment when made by the maker of the one, or the acceptor of the other. But when made by one of several accommodation makers of a note, the instrument is kept alive in his hands as the evidence of his right to contribution from his cosureties. This, it has been held, he may transfer to a purchaser for value, who will succeed to his rights, with power to maintain an action for contribution against the cosureties.[94]

And whenever a joint maker has paid the note, and has a claim against his comaker for contribution, he may assign the note not indeed as a live security, but as evidence of his right to recover contribution.[95]

§ **1237. Effect of payment by drawer.**—If the drawer of a bill pay part of it to the holder, the better opinion is that the holder may nevertheless sue and recover of the acceptor the whole amount, in which case he would receive that portion already paid by the drawer or trustee for him, and would be liable to him, *pro tanto,* for money

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92. Griffith v. Reed, 21 Wend. 502.

93. Suydam v. Westfall, 4 Hill, 211, 2 Den. 205; Edwards on Bills, 534, 535; Story on Bills, § 420.

94. Dillenbeck v. Dygert, 97 N. Y. 303; Hodgson v. Shaw, 3 Mylne & K. 183. But in North Carolina, it has been decided that payment of a note by a surety without having it transferred to a trustee for his benefit, is a discharge of the debt and an extinguishment of a lien by which it was secured, and, therefore, where a surety, on a purchase-money note for a house retaining title and duly recorded, paid it and did not have it transferred to a trustee for his benefit, and the principal debtor, after mortgaging the house to another person, delivered it to the surety, the mortgagee has a first lien and is entitled to possession. Browning v. Porter, 116 N. C. 62, 20 S. E. 961; Truss *et al.* v. Miller, 116 Ala. 494, 22 So. 863. *Contra,* Williams v. Gerber, 75 Mo. App. 18.

95. Conrad v. Smith, 91 Va. 292, 21 S. E. 501, in which the note was indorsed by the cashier of the bank to whom it was paid, as " paid by W. G. K.," who was one of the comakers.

had and received to his use.[96] Even if the drawer has paid the whole amount to the holder, yet if he have left the bill in his possession, and he should sue the acceptor, it would be no defense as to him.[97] For while on the one hand it may be contended that payment by the drawer, who is a surety for the acceptor, is an entire extinguishment of the instrument, yet if this were so, the drawer himself could not sue the acceptor upon it, but would have to sue him for money paid at his request.[98] It is more correct to regard the payment as a mere extinguishment of the drawer's liability. And it cannot matter, nor be good ground of defense to the acceptor who is bound to pay the bill, and may discharge that obligation by payment to any holder who sues. It seems, however, that if the acceptance were for accommodation, and the drawer accommodated were to pay the bill, it would operate as an absolute extinguishment, there being no person in existence entitled to receive the money of the acceptor.[99] In England, where the drawer paid part of a bill and went into bankruptcy, the acceptor on being sued for the whole amount by the holder was sustained to the extent of the partial payment made in an equitable plea as set-off of an amount due him by the drawer,— the holder being regarded as suing as trustee for the drawer as to the part paid by him.[1] If a guarantor make payment with an agreement that the instrument be kept alive, the maker is not discharged from liability upon it.[2]

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96. Johnson v. Kennion, 2 Wils. 262; Walwyn v. St. Quintin, 1 Bos. & P. 652; Jones v. Broadhurst, 9 C. B. 173, in which case the whole subject is elaborately and ably discussed; Callow v. Lawrence, 3 Maule & S. 95; Hubbard v. Jackson, 1 Moore & P. 11 (17 Eng. C. L.); Byles on Bills (Sharswood's ed.), 354; 2 Parsons on Notes and Bills, 218; Story on Bills, § 422. *Contra*, Bacon v. Searles, 1 H. Bl. 88, now overruled; Conrad v. Smith, 91 Va. 292, 21 S. E. 501, in which case the note was indorsed by the cashier of the bank to whom it was paid as "paid by W. G. K." who was one of the comakers.

97. Jones v. Broadhurst, 9 C. B. 173; Thornton v. Maynard, L. R., 10 Com. Pl. 695, Moak's Eng. Rep. 522. The principle announced in the text is equally applicable to indorsers. Madison Square Bank v. Pierce, 137 N. Y. 444, 33 N. E. 557.

98. 2 Parsons on Notes and Bills, 218, note *k;* Byles on Bills (Sharswood's ed.) [*214], 353, note *k*.

99. Lazarus v. Cowie, 3 Q. B. 459 (43 Eng. C. L.). See Walwyn v. St. Quintin, 1 Bos. & P. 652; Bacon v. Searles, 1 H. Bl. 88; Redf. & Big. Lead. Cas. 350, 351; Story on Bills, § 422; Byles on Bills (Sharswood's ed.) [*215], 354.

1. Thornton v. Maynard, L. R., 10 Com. Pl. 695 (1875).

2. Granite Nat. Bank v. Fitch, 145 Mass. 567.

§ **1238. Who may reissue a bill or note.**— As a bill or note when paid at maturity by the acceptor or maker is thereby utterly extinguished, it is clear that if he were to reissue it, and it were to pass into the hands of even a *bona fide* holder, he could not hold the drawer or indorsers liable, for its being overdue would in itself be sufficient notice of payment.[3] It is equally clear that if the last of several successive indorsers were to pay the bill or note to his indorsee, he could reissue the instrument with or without his own indorsement remaining upon it, and that all parties claiming under his second transfer could sue and recover from all prior parties who remain liable to him; and from him also if his indorsement were upon the instrument.[4]

§ **1238a. Whether drawer may reissue bill.**— Differences of opinion have arisen as to the right of a drawer to reissue a bill. Thus, if A. were to draw a bill upon B., payable to the order of C., and C. were to indorse it to D. after its acceptance, and then A. were to pay it to D.— query arises whether or not A. could reissue the bill to E., so as to give him the right to sue the acceptor upon it. Clearly E. could not sue C., for C. was the surety of the drawer, and was discharged by the payment made by him.

§ **1239. Cases in which drawer cannot reissue bill; acceptance for drawer's accommodation.**— There are two cases in which the drawer who has taken up a bill at maturity cannot sue the acceptor, and in which he cannot, consequently, so reissue the bill as to enable the holder to sue the acceptor.

First: When the acceptance was for the drawer's accommodation; for in that case the acceptor was under no liability to the

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3. Gordon v. Wansey, 21 Cal. 77; Gardner v. Maynard, 7 Allen, 456; Stevens v. Hannan, 88 Mich. 13, 49 N. W. 874.

4. St. John v. Roberts, 31 N. Y. 441; French v. Jarvis, 29 Conn. 348; Kirksey v. Bates, 1 Ala. 303; Montgomery R. Co. v. Trebles, 44 Ala. 258. See Fenn v. Dugdale, 40 Mo. 63; Coleman v. Dunlap, 18 S. C. 595, approving the text; Columbia Falls Brick Co. v. Glidden, 157 Mass. 175, 31 N. E. 801. Held, that payment by one indorser operates as a transfer of the old debt to him and does not create a new debt. "The undertaking of the maker to the surety is one of indemnity against any loss or damage which he may suffer in consequence of the failure of the maker to pay the note. It is an implied, and not an express, contract. The contract of the maker, on the other hand, with the payee or indorser, is an express contract." Kelly v. Staed, 136 Mo. 430, 37 S. W. 1110, 58 Am. St. Rep. 648, citing text.

drawer when the latter reissued the bill. And, as after the bill became due, the drawer could only negotiate it subject to equitable defenses, the acceptor could defend himself on this ground.[5] An early case may be referred to as authority for this view. Brown drew the bill upon Robley, payable to Hodson or order, and it was accepted by Robley and indorsed by Hodson. Not being paid by the acceptor at maturity, Brown, the drawer, paid it and took it up with Hodson's indorsement remaining thereon. And then Brown gave the bill to Beck as security for money, not telling him whether or not there were effects in Robley's hands; and Beck sued Robley as acceptor. It was held that the action could not be maintained, on the ground, as found by the jury, that "the acceptor was discharged by Brown's taking up the bill, and that there was an end of its negotiability," from which it would seem that the bill was made for accommodation of the drawer.[6] So understood, this case is unassailable; and so it has been construed and approved.[7] It has been said to be "no longer law" by an English compiler,[8] but without assignment of reason or authority for the statement. And in Massachusetts it has been said that "it has never been overruled or denied." [9]

§ **1240. Second: When drawer is liable to an indorser.**— The drawer could not reissue the bill if the name of any indorser to whom he himself was liable remained upon it. For in that event the holder could not trace title against the acceptor, the indorsements having been discharged. Besides, the indorser, whose name remains upon the bill, would be exposed to liability to a holder, and, therefore, such a bill is held to be not negotiable.[10] The same principle would apply to forbid the reissue of a bill or note by an intermediate indorser, when the names of subsequent indorsers remained upon it, the general doctrine being that a bill or note cannot be indorsed or negotiated after it has once been paid, if such

5. Jones v. Broadhurst, 9 C. B. 173.

6. Beck v. Robley, 1 H. Bl. 89, note (1774); approved in Gardner v. Maynard, 7 Allen, 456 (1863).

7. Jones v. Broadhurst, 9 C. B. 173. See opinion of Cresswell, J. But the fact that it was an accommodation bill is not noticed in Gardner v. Maynard, 7 Allen, 456. See Byles on Bills [*166], 290.

8. Chitty, Jr., on Bills, vol. I, p. 390.

9. Gardner v. Maynard, 7 Allen, 457, Metcalf, J.

10. Gardner v. Maynard, 7 Allen, 456 (1863). See also Beck v. Robley, 1 H. Bl. 89; Jones v. Broadhurst, 9 C. B. 173.

indorsement or negotiation would make any of the parties liable apparently who have been already discharged.[11]

§ 1241. Cases in which drawer or indorser may reissue bill or note. — In all other cases a drawer or indorser may reissue the bill or note.[12] Thus, where A. drew a bill upon B., who accepted it, and it was payable to the drawer's order, and by him indorsed to C., and by C. to D., and on being dishonored by the acceptor was paid by the drawer to D., who struck out his own and C.'s indorsements, it was held that A. might reissue the bill, and the holder could recover against the acceptor.[13] In the event that the bill were drawn by A. payable to C.'s order, and C.'s indorsement were canceled, it might be contended that a holder could not trace title against the acceptor. But if the bill were paid by the drawer upon C.'s order, the title would then be in him; and by virtue of his position, any holder under him, we should say, could recover. The payee and indorser of a note to whom it is afterward transferred before maturity, in the usual course of business may negotiate it again, and all parties to it at the time it is renegotiated would be liable to the holder.[14]

§ 1242. Parties negotiating instrument after payment are bound. — It is to be observed that while after payment the parties thereby discharged cannot be bound by its reissue, still bills and notes may remain negotiable after payment, so far as respects the parties who shall knowingly negotiate the same afterward, for in such a case the negotiation cannot prejudice any other persons, and will only

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11. Gardner v. Maynard, 7 Allen, 457; Chitty on Bills (13th Am. ed.) [*224], 255; Story on Notes, § 180.

12. French v. Jarvis, 29 Conn. 348. See Sater v. Hunt, 66 Mo. App. 527.

13. In Callow v. Lawrence, 3 Maule & S. 95 (1814), Lord Ellenborough said: "It does not prejudice any of the other parties who have indorsed the bill that the holder should be at liberty to sue the acceptor. The case would be different if the circulation of the bill would have the effect of prejudicing any of the indorsers. In Beck v. Robley, if the bill had been negotiable it would have had the effect of rendering Hodson liable on his indorsement, which, in point of law, was discharged by Brown's taking up the bill. That, I think, is the distinction, and disposes of that case." The drawer of a bill who pays it to an indorsee may leave it in his hands to be sued upon by him for the drawer's benefit. Williams v. James, 15 Ad. & El. (N. S.) 499; Stevens v. Hannan, 88 Mich. 13, 49 N. W. 874.

14. West Boston Sav. Inst. v. Thompson, 124 Mass. 506; Stevens v. Hannan, 88 Mich. 13, 49 N. W. 874.

charge themselves.[15] But the indorsement of a negotiable bill after its dishonor has been held to be a new and independent contract, and in its effect between indorser and indorsee distinct from the negotiable character of such a bill; so that if indorsed to a particular person by name, without adding the words "or order," or equivalent words of negotiability, he cannot transfer it by indorsement so as to enable his indorsee to sue upon it in his own name.[16]

It has been held that if an indorser who pays a bill reissues it, he is bound by his first or second indorsement according to intention; if as one already fixed he need not have notice.[17]

§ **1243. Agreement to retire bill.**— Sometimes an agreement is made to "retire" a bill. It should be construed according to the circumstances of the case. The word "retire" is susceptible of various meanings according as it applies in various circumstances. "If the acceptor retires a bill, he takes it out of circulation — then the bill is paid; but if an indorser retires it, he only withdraws it from circulation so far as he himself is concerned, and may hold the bill with the same remedies as he would have had, had he been called upon in due course, and paid the amount to his immediate indorsee. This is the ordinary meaning of the word; and we think it was used in that sense in the letter in question." [18]

If a note be surrendered by mistake, the whole amount being supposed to have been paid, whereas only a part had been, the balance may be recovered.[19] But in the absence of fraud, illegality, or mistake, it could not be.[20]

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15. Hubbard v. Jackson, 4 Bing. 390; Callow v. Lawrence, 3 Maule & S. 95; Guild v. Eager, 17 Mass. 615; Mead v. Small, 2 Greenl. 207; Story on Bills, § 223.

16. Leavitt v. Putnam, 1 Sandf. 199; Story on Bills (Bennett's ed.), 199.

17. Montgomery R. Co. v. Trebles, 44 Ala. 258. See *ante*, § 997.

18. Elsom v. Denny, 25 Eng. L. & Eq. 423, Jervis, C. J.

19. Banks v. Marshall, 23 Cal. 223; Locke v. Locke, 166 Mass. 435, 44 N. E. 346. And it has likewise been held that as between the original parties a note which is shown to have been delivered under misapprehension or mistake of fact, such defense, if established, is good. Quinlan v. Fairchild, 76 Hun, 312, 27 N. Y. Supp. 689. See authorities cited in notes to § 1226.

20. Kent v. Reynolds, 8 Hun, 559.

SECTION VI.

IN WHAT MEDIUM PAYMENT MAY BE MADE — THE LEGAL TENDER CASES.

§ 1244. The money to be paid is that which is current at the place where payment is to be made.[21] — But in construing the terms of the bill or note, it is to be interpreted according to the meaning of the words used at the time when, and the place where, the instrument was drawn or made. And accordingly, if the coin which is expressly agreed to be paid be alloyed by the government between the time of contract and the time of payment, the debtor should be required to make good the full value of the coin at the time of the contract. And so, if the name of the coin be changed so as to apply to a lesser value, the amount to be paid should be estimated according to the value at the time of the drawing of the instrument, for payment in that coin then of higher value was contemplated.[22] On this subject the authorities exhibit great contrariety of opinion.[23] We have simply stated the conclusions which seem to us just and right.[24]

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21. Chitty on Bills (13th Am. ed.) [*399], 450; Story on Bills, § 418; Williamson v. Smith, 1 Coldw. 1.

22. In the case of "The Mixed Monies," Sir John Davies' Reports, a different view was taken. In a subsequent case (Da Costa v. Cole, Holt, 465, Skin. 272 [1688]), it was held that a bill drawn in England, on Portugal, for 1,000 mille rees could not be satisfied by tender of mille rees which had been depreciated 20 per cent. by the King of Portugal eight days after the bill was drawn. Holt, C. J., said: "This case differs from the case of Mixed Monies, for there the alteration was by the King of England, who has such a prerogative, and this shall bind his own subjects."

23. See Story's Conflict of Laws, §§ 313, 313*a*, *et seq.*

24. Sir William Grant, in the case of Pilkinton v. Commissioners of Claims, 2 Knapp, 17, states the view which we have adopted very clearly. In the course of his opinion he said: "Vinnius, whose authority was quoted the other day, certainly comes to a conclusion directly at variance with the decision in Sir John Davies' Reports. [The case of the 'Mixed Monies' above cited.] He takes the distinction that, if, between the time of contracting the debt and the time of its payment, the currency of the country is depreciated by the State, that is to say, lowered in its intrinsic goodness, as if there were a greater proportion of alloy put into a guinea or a shilling, the debtor should not liberate himself by paying the nominal amount of his debt in the debased money; that is, he may pay in the debased money, being the current coin, but he must pay so much more as would make it equal to the sum he borrowed. But, he says, if the nominal value of the currency, leaving it unadulterated, were to be increased, as if they were to make the guinea pass

§ **1245. Party bound must pay in money.**— The party bound to make payment has no right to do so in any other medium than that expressed on the face of the instrument — that is, he must make payment in money.[25] And an agent, holding the instrument for payment, can take nothing else but money.[26] Sometimes checks or drafts are offered by the debtor in discharge of the debt, and the effect of giving and receiving them is elsewhere considered.[27]

But where a bill or note is expressed to be payable "in currency" (in which case, however, it would not be negotiable), there is no specification of a particular value which is to be paid; but only a designation of quantity in nominal value. "One hundred dollars in currency" does not mean the value of one hundred gold dollars to be paid by as much currency as will amount to that value; but means "one hundred dollars of currency"— that is, one hundred currency dollars.[28] Any currency in circulation at

for thirty shillings, the debtor may liberate himself from a debt of one pound ten shillings by paying a guinea, although he had borrowed the guinea when it was worth but twenty-one shillings."

25. Story on Bills, § 419; Edwards on Bills, 550; Corbett v. Hughes, 75 Iowa, 282. When the creditor's own paper was thrust upon him by a party who had obtained possession of a note offered by the creditor for sale, under the pretense of examining it with a view of purchasing it, it was held no payment. Vancleave v. Beach, 110 Ind. 269. But where a depositor tendered his check to the assignee of an insolvent bank in part payment of paper held by the bank against him, and cash for the balance, it was held in effect a valid payment. Lionberger v. Kinealy, 13 Mo. App. 4; Hall v. Appel, 67 Conn. 585, 35 Atl. 524. Unless creditor assents to settlement and discharge of the obligation in something else (*i. e.*, checks, drafts, other notes, etc.). See cases cited in notes to § 1623. A check certified is not currency and does not strictly possess the character of money, although it may pass current from hand to hand. See Dike v. Drexel, 11 App. Div. 77, 42 N. Y. Supp. 979; Cowgill v. Robberson, 75 Mo. App. 412, text cited.

26. Ibid. See chapter XI, § 335, vol. I; Herrimon v. Shomon, 24 Kan. 387; Bank of Kansas City v. Mills, 24 Kan. 610; Chapman v. Cowles, 41 Ala. 103; De Mets v. Dagson, 53 N. Y. 635; Maddur v. Bevan, 39 Md. 485; Speurs v. Lederberger, 56 Mo. 465; Davis v. Lee, 20 La. Ann. 248; Moye v. Cogdell, 69 N. C. 93; Wilcox Organ Co. v. Lasley, 40 Kan. 521; McCormick v. Peters, 24 Nebr. 70; Cedar County v. Jenal, 14 Nebr. 254; Foster v. Rincker, 4 Wyo. 484, 35 Pac. 470; Scott v. Gilkey, 153 Ill. 168, 39 N. E. 265.

27. See chapter XLIX, on Checks, § 7. But usage of the collecting bank to the contrary has been held to be binding upon the customer. See Farmers' Bank & Trust Co. v. Newland, 97 Ky. 464, 31 S. W. 38.

28. But see *ante*, § 57 and the cases of Bull v. Bank of Kassen, 123 U. S. 112, 8 Sup. Ct. Rep. 62, and Woodruff v. Mississippi, 162 U. S. 292, 16 Sup.

the time of payment would then satisfy the terms of the contract — would be the identical thing contracted to be paid — and, however much depreciated, would be a good tender in discharge of the debt.[29]

§ **1246. The legal tender cases.**— It is provided by the Constitution of the United States (art. I, § 9), that "No State shall coin money, emit bills of credit, or shall make anything but gold and silver coin a tender in payment of debts;" and thus any interference of the State governments with the money of the country is forestalled and prevented. It is also provided that Congress shall have power "to coin money and regulate the value thereof," but no power is conferred upon it to make anything but coined money "legal tender" in discharge of debts, nor is anything said on that subject. The Constitution, however, declares by article X of its amendments, that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." During the war between the Confederate States and the United States, and as a means of raising revenues for its prosecution, Congress, on the 25th day of February, 1863, passed an act providing for the issue of treasury notes, and declaring that they "should be receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except du-

Ct. Rep. 820, which hold that a check payable "in current funds" is negotiable, revolutionizing the law as the States generally interpret it — since all currency, whether gold, silver, national bank notes or treasury notes are now preserved at par, all are of equal commercial value; and as matter of fact the form of expression is temporarily immaterial and may possibly continue immaterial indefinitely. But it would seem that as legal and commercial conditions are subject, in the nature of things, to change it in time, that jurisprudence should stand by the ancient land marks and construe words according to their settled meaning, rather than according to transient consequences.

29. In Rucker v. Dearing, 18 Gratt. 438, Joynes, J., said: "A contract for the payment of so many dollars in Confederate notes was a contract to pay so many dollars of Confederate notes, or so many Confederate dollars. The specification of dollars served only to measure the quantity of the notes, so that, in every such contract, the quantity of notes to be delivered was ascertained, though their value was uncertain. The contract was for quantity only, and not for value." Huston v. Noble, 4 J. J. Marsh. 130; David v. Phillips, 7 Mont. 632; McCord v. Ford, 3 Mont. 166; Chambers v. George, 5 Litt. 335; Dillard v. Evans, 4 Ark. 175; Trebilcock v. Wilson, 12 Wall. 694; Taup v. Drew, 10 How. 218. But see Johnson v. Dooley, 65 Ark. 71, 44 S. W. 1032.

ties on imports, and of all claims and demands against the United States, of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin; and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid."

§ **1246a.** It has been contended that power granted to a corporation by the Legislature to borrow money and issue bonds therefor would authorize the issue of securities for money and not for a particular kind of money, such as "gold coin," and this was the view taken in Mississippi by the Supreme Court of that State, but the Supreme Court of the United States, overruling this view, considers that power to borrow money means power to borrow whatever is money according to the Constitution of the United States and the laws passed in pursuance thereof, and that the power to issue negotiable bonds therefor includes the power to make them payable in such money, as for instance in gold coin.[30] Where the corporation is of a public nature, such as a municipality dependent upon taxation, which must rest on all forms of money, the power to borrow would seem correlative with the general nature of the funds to be looked to for payment; and it would seem to strain the natural import of legislative authority to extend it to permit a particular kind of money to be expressed in the obligation when not expressed in the granting power.

§ **1247. Effect of Legal Tender Act and decisions respecting it.**— The United States Supreme Court has decided that where contracts were made before the passage of this act to pay certain amounts "in gold or silver coin," they were not affected by it; and according to its opinion and reasoning no contract, whether made before or after the passage of the act, expressed to be payable in coin or specie, can be satisfied by the tender of treasury notes. The result of the Legal Tender Act is that there are now two descriptions of lawful money in use, both of which are legal tender in payment of debts. The statute denomination of both descriptions is dollars, but they are essentially unlike in nature. The one is coined out of a precious metal, and possesses an intrinsic value. The other is a promise of the United States to pay a coined dollar, and is without intrinsic value; and the two dollars differ in their purchasing value. When bills, notes, checks, or

30. Woodruff v. Mississippi, 162 U. S. 302, 16 Sup. Ct. Rep. 820.

other contracts payable in coin are sued upon, judgments should be entered for coined dollars and parts of dollars; and when payable in dollars generally, without specifying in what description of currency payment is to be made, judgments may be entered generally without such specification.[31] No distinction is made as to the time when such contracts to pay gold may have been entered into, and the above views apply to contracts made payable in gold, entered into after the Legal Tender Acts were passed, as well as those entered into before.[32] If the paper be payable "in gold

31. In Bronson v. Rhodes, 7 Wall. 245 (1868); Butler v. Horwitz, 7 Wall. 259 (1868), contract to pay "£15 current money in Maryland, payable in English golden guineas, weighing five pennyweights and six grains, at thirty-five shillings each;" Dewing v. Sears, 11 Wall. 379 (1870), lease bearing yearly rent "of four ounces, two pennyweights, and twelve grains of pure gold in coined money," Strong, J., said: "Judgment should have been entered for coined dollars and parts of dollars instead of treasury notes equivalent in market value to the value in coined money of the stipulated weight of pure gold." In Trebilcock v. Wilson, 12 Wall. 687 (1871), Field, J., said: "The note of the plaintiff is made payable, as already stated, in specie. The use of these terms 'in specie' does not assimilate the note to an instrument in which the amount stated is payable in chattels; as, for example, to a contract to pay a specified sum in lumber, or in fruit, or grain. Such contracts are generally made because it is more convenient for the maker to furnish the articles designated than to pay the money. He has his option of doing either at the maturity of the contract, but if he is then unable to furnish the articles, or neglects to do so, the number of dollars specified is the measure of recovery. But here the terms 'in specie' are merely descriptive of the kind of dollars in which the note is payable, there being different kinds in circulation recognized by law. They mean that the designated number of dollars in the note shall be paid in so many gold or silver dollars of the coinage of the United States. They have acquired this meaning by general usage among traders, merchants, and bankers, and are the opposite of the terms in currency, which are used when it is desired to make a note payable in paper money. These latter terms, in currency, mean that the designated number of dollars is payable in an equal number of notes which are current in the community as dollars. This being the meaning of the terms 'in specie,' the case is brought directly within the decision of Bronson v. Rhodes, where it was held that express contracts, payable in gold or silver dollars, could only be satisfied by the payment of coined dollars, and could not be discharged by notes of the United States, declared to be a legal tender in payment of debts." To same effect, see Luck v. Faulkner, 25 Cal. 404; Higgins v. B. R. & Aw. & M. Co., 27 Cal. 158; Smith v. Wood, 37 Tex. 620; Phillips v. Dugan, 21 Ohio (N. S.) 466; McGoon v. Shirk, 54 Ill. 408 (overruling Humphrey v. Clement, 44 Ill. 299, and Whetstone v. Colley, 36 Ill. 328). But see Wood v. Bullens, 6 Allen, 518; Killough v. Alford, 32 Tex. 457; Woodruff v. Mississippi, 162 U. S. 302, 16 Sup. Ct. Rep. 820.

32. McGoon v. Shirk, 54 Ill. 408.

coin or the equivalent thereof in United States legal tender notes," it has been held that a payment in legal tender notes, dollar for dollar, discharges it.[33]

§ **1248. Constitutionality of Legal Tender Act.**— In the first case that came before the United States Supreme Court in which the question of the constitutionality of the Legal Tender Act was raised, it was declared that Congress had no power to make anything but coined money a legal tender in payment of debts, and that accordingly the note in suit, dated June 20, 1862, and which was expressed to be payable in "dollars" on February 20, 1862, could not be discharged by a tender of treasury notes.[34] This decision, however, was subsequently overruled, the court in the meantime having been changed by the resignation of one member and the appointment of two new ones.[35] But this reversal of what was deemed a just judgment was made under circumstances which divested it of that sanction and acquiescence which have usually attended the decisions of that high tribunal. And it may be well said of it (in the language used by Lord Brougham on an occasion which excited his indignation) that it was a "decision which went forth without authority, and will go back without respect." [36]

§ **1249. Creditor's acceptance of depreciated currency is absolute.** — If the debtor tenders a depreciated currency in full satisfaction of his debt, or any other currency than gold when it is specifically payable in gold, the creditor cannot by protest accept the medium tendered, and then recover the amount that gold exceeded it in value. He must refuse the tender or accept it; and if he accepts it without special agreement, he will be considered to have taken it as offered in full satisfaction.[37] And the same rule applies in all cases where bank bills are tendered in discharge of debts payable in money.[38] In like manner, though the instrument be payable

33. Killough v. Alford, 32 Tex. 457.

34. Hepburn v. Griswold, 8 Wall. 604 (1869), Chase, C. J.

35. The Legal Tender Cases, noted in 11 Wall. 682 (Knox v. Lee and Parker v. Davis), and reported in full in 12 Wall. 457 (1870); reaffirmed in Dooley v. Smith, 13 Wall. 605 (1871); Bigler v. Waller, 14 Wall. 298 (1871); Railroad Co. v. Johnson, 15 Wall. 195 (1872).

36. When judgment was reversed in the case of O'Connell v. McQueen.

37. Gilman v. County of Douglas, 6 Nev. 27.

38. See chapter L, on Bank Notes; Wright v. Robinson & Co., 84 Hun, 172, 32 N. Y. Supp. 463.

in bank notes, legal tender notes, or other medium less valuable than coin, yet, if the creditor tender gold or silver coin, without there being any contract as to the rate at which it is to be taken, and it be received, he cannot require it afterward to be applied otherwise than a dollar of coin for each dollar of the amount due, nor make any counterclaim for the value of the coin in excess of the value of the medium of payment expressed in the contract.[39]

SECTION VII.

APPROPRIATION OF PAYMENT.

§ 1250. When a debtor is indebted to the same creditor in several items of account, and pays him a sum of money in part liquidation of his entire indebtedness, it often becomes a nice and important question, not only between debtor and creditor, but also as to third parties, to what item the credit shall be applied. With certain limitations and exceptions, the following general principles apply in such cases:

(1) First: The debtor making payment may appropriate it to whatever item he pleases when the payment is not under compulsion of law.[40]— And this right on the part of the creditor continues as between him and his debtor until suit is brought or a dispute arisen; though in respect of third parties who are concerned by the time of application, he must not delay an unreasonable time.[41] And after he has once made it he is bound by it, and cannot change

39. Bush v. Baldrey, 11 Allen, 367.

40. Chitty on Bills (13th Am. ed.) [*402], 453; Edwards on Bills, 554; 2 Parsons on Notes and Bills, 222; Taylor v. Sandford, 7 Wheat. 13; United States v. January, 7 Cranch, 572; Pindall v. Bank of Marietta, 10 Leigh, 484, Cabell, J.; Miller v. Trevillian, 2 Rob. (Va.) 1; Simson v. Ingham, 2 B. & C. 72; Hooper v. Keay, 1 Q. B. Div. 178 (1875); Howard v. McCall, 21 Gratt. 205; Lingle v. Cook, 32 Gratt. 272; Harding v. Wormley, 8 Baxt. 578; Chapman v. Commonwealth, 25 Gratt. 721; Whittaker v. Pope, 48 Ga. 13; Sprinkile v. Martin, 72 N. C. 92; Clarke v. Scott, 45 Cal. 86; Craig v. Miller, 103 Ill. 605; Mackey v. Fullerton, 7 Colo. 556. Application of funds by creditor, in violation of debtor's instruction, does not bind debtor where debtor has no knowledge of such violation. Bank v. Roberts *et al.*, 2 N. Dak. 195, 49 N. W. 722; Heaton v. Ainley, 108 Iowa, 112, 78 N. W. 798; Steiner & Lobman v. Jeffries *et al.*, 118 Ala. 573, 24 So. 37; Fargo *et al.* v. Jennings, 8 S. Dak. 99, 65 N. W. 433. See California Bank v. Ginty, 108 Cal. 149, 41 Pac. 38.

41. Mayor of Alexandria v. Patten, 4 Cranch, 317; United States v. Kirkpatrick, 9 Wheat. 720; Pattison v. Hull, 9 Cow. 747; Johnson v. Johnson, 30

it.[42] He may even apply it in prejudice of the rights of a party who is security for one of the debts.[43]

There can be no election as to application of payment when there was but one debt in existence at the time of payment,[44] nor can there be any election after the controversy as to the application has begun.[45]

§ 1251. (2) Second: If the debtor do not make application of payment, the creditor may apply it as he pleases.[46]—In such case the silence of the debtor is construed as leaving the matter to the payee, provided it is not an application peculiarly injurious to him, or against his implied intention.[47] The creditor could not apply

Ga. 857; Philpott v. Jones, 2 Ad. & El. 41; Chitty on Bills (13th Am. ed.) [*404], 456. In accordance with the principle announced in the text, it has been held that all payments on a debt should be first applied to the principal and legal interest, and so long as any part of the principal and legal interest remains unpaid, the debtor may elect to have any payments he has made on the debt, at any time in the past, applied in that way, although the money was paid as usury. See Neal v. Rouse, 93 Ky. 151, 19 S. W. 171.

42. Mayor, etc. v. Patten, *supra;* Hill v. Southerland, 1 Wash. (Va.) 128. Even though he has applied it to an illegal claim. Hubbell v. Flint, 15 Gray, 550.

43. Goddard v. Cox, 2 Stra. 1194; Kirby v. Duke of Marlborough, 2 Maule & S. 18; Chitty on Bills [*402], 454; Trentman v. Fletcher, 100 Ind. 110. The doctrine of application of payments to the earliest items of an account does not apply where the debtor gives notes in part payment of running account, and are transferred by the creditor, and said notes are by the transferee reduced to judgment and remains unpaid. See Donovan v. Frazier, 15 App. Div. 521, 44 N. Y. Supp. 533. See Sturgeon Sav. Bank v. Riggs, 72 Mo. App. 239; Risher v. Risher & Crump, 194 Pa. St. 164, 45 Atl. 71.

44. Donally v. Wilson, 5 Leigh, 329.

45. United States v. Kirkpatrick, 9 Wheat. 720.

46. Pattison v. Hull, 9 Cow. 747; Chapman v. Commonwealth, 25 Gratt. 721; Lingle v. Cook, 32 Gratt. 272; Harding v. Wormley, 8 Baxt. 578; Bennell v. Wilder, 67 Ill. 327; Allen v. Culver, 3 Den. 284; Bean v. Brown, 54 N. H. 395; Woods v. Sherman, 71 Pa. St. 100; Wellman v. Miner, 179 Ill. 326, 53 N. E. 609; Anderson v. Perkins, 10 Mont. 154, 25 Pac. 92; Heaton v. Ainley, 108 Iowa, 112, 78 N. W. 798; Marshall Mfg. Co. v. Harkinson, 84 Iowa, 117, 50 N. W. 559; Rosenbaum *et al.* v. Meridian Nat. Bank, 73 Miss. 267, 18 So. 549; Beck v. Haas, 111 Mo. 264, 20 S. W. 19, 33 Am. St. Rep. 516; Boggess v. Goff, 47 W. Va. 149, 34 S. E. 741; Cox v. Sloan, 158 Mo. 411, 57 S. W. 1052; Murdock v. Clarke, 88 Cal. 384, 26 Pac. 606.

47. Smith v. Screven, 1 McC. 368. "If he (the debtor) does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money." Hooper v. Keay, 1 Q. B. Div. 178, Blackburn, J.; Wood v. Callaghan, 61 Mich. 402; Blair v. Carpenter, 75 Mich. 167. In Adams v. Tucker, 6 Colo. App. 393, 40 Pac. 783,

it to debts not due, if there were debts already due.[48] The privilege does not apply to compulsory payments;[49] nor to an unlawful demand, as for usurious interest;[50] and if appropriation is once made by the creditor, he cannot change it.[51] If the debtor deny one of the debts, the creditor cannot apply payment to it in exclusion of one acknowledged.[52] And though the creditor refuse, yet if he receive the money, he must apply it as directed.[53] And if a general credit of a payment be made at the time thereof by the creditor on general account against the debtor, he cannot afterward make a particular application thereof to subserve his interests subsequently developed.[54]

§ 1252. (3) Third: When neither party appropriates the payment, the law will apply it according to equitable principles, and with regard to the probable intention of the parties.[55]— It will impute the payment to interest before principal;[56] and where the interest it-

held, where a person is the maker of a note, and joint maker of another, a payment by him should, in the absence of a designation of its application, be credited to his individual indebtedness. Its application by payee as a payment on the joint note would not suspend the running of the Statute of Limitations. Moose v. Marks, 116 N. C. 785, 21 S. E. 561; Walton & Whann Co. v. Davis, 114 N. C. 104, 19 S. E. 159, in the last case R. & Co., holding a mortgage to secure a note and advances made and to be made, transferred the note before maturity to the plaintiff as collateral security, and thereafter made an assignment to the defendants of all their property, including the mortgage, for the benefit of creditors. The mortgagor delivered a part of the crop covered by the mortgage to the defendant, who converted the same into money, which he claimed he had the right to apply in part payment of the account due for advances. Plaintiff, however, contended that such proceeds should be credited on the note. Shepard, C. J., held that the assignee in this case succeeded only to the rights of his assignors, M. Rountree & Co., and that plaintiff, assignee of the note, is entitled to have the money applied on the note in preference to the account for advances.

48. Bobe v. Stickney, 36 Ala. 482.

49. Blackstone Bank v. Hill, 10 Pick. 129.

50. Brown v. Lacy, 83 Ind. 436. See Tomblin v. Higgins, 58 Nebr. 336, 78 N. W. 620.

51. Tooke v. Bonds, 29 Tex. 419; Hill v. Southerland, 1 Wash. (Va.) 128; Mayor of Alexandria v. Patten, 4 Cranch, 317; White v. Trumbull, 3 Green (N. J.) 314; Bank of North America v. Meredith, 2 Wash. C. C. 47; Harding v. Wormley, 8 Baxt. 578. If the debtor were not notified, it is otherwise. Hankey v. Hunter, Peake Ad. Cas. 107.

52. Tayloe v. Sandiford, 7 Wheat. 13.

53. Reed v. Boardman, 20 Pick. 441; Wetherell v. Joy, 40 Me. 325; Wipperman v. Hardy, 17 Ind. App. 142, 46 N. E. 537.

54. Lane v. Jones, 79 Ala. 161.

55. See Chitty on Bills [*403, 404], 455, 456; Lingle v. Cook, 32 Gratt. 272.

56. Lash v. Edgerton, 13 Minn. 210. If payment is made before maturity

self bears interest, it will impute it, first, to interest on interest; secondly, to interest on principal; and thirdly, to the principal.[57] It will also impute payment to those debts which are prior in date;[58] and to unsecured in preference to secured debts,[59] unless the latter are secured by a surety, in which case the appropriation will be made for his relief.[60]

So it will apply payment to the debt most burdensome to the debtor, especially to one bearing interest, or subjecting him to a penalty or criminal charge, rather than to those which are less burdensome.[61] So to a debt which is still binding in law rather than to one barred by the Statute of Limitations.[62] It has been thought, however, that a creditor may apply payment to a debt barred by limitation when the debtor makes no election.[63] But this is doubtful at least. The debtor only would be permitted to apply it to an illegal demand.[64] If one of two demands becomes

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of a debt drawing interest, it will be appropriated to principal instead of interest. Starr v. Richmond, 30 Ill. 276. It will not be applied to unearned or unaccrued interest. Monroe v. Fohl, 72 Cal. 568. But if the interest be usurious, payments will be applied to the principal. First Nat. Bank v. Turner, 3 Kan. App. 352, 42 Pac. 936; First Nat. Bank of Hutchinson v. McInturff, 3 Kan. App. 536, 43 Pac. 839.

57. Anketel v. Converse, 17 Ohio St. 11; Anderson v. Perkins, 10 Mont. 154, 25 Pac. 92.

58. Mills v. Fowlkes, 5 Bing. N. C. 461; United States v. Kirkpatrick, 9 Wheat. 720; Bobe v. Stickney, 36 Ala. 482; Smith v. Loyd, 11 Leigh, 512; Wendt v. Ross, 33 Cal. 650; Horne v. Planters' Bank, 32 Ga. 1; Goetz v. Piel, 26 Mo. App. 634; National Bank of Battle Creek v. Dean, 86 Iowa, 656, 53 N. W. 338.

59. Lash v. Edgerton, 13 Minn. 210; Moss v. Adams, 4 Ired. Eq. 42; Baine v. Williams, 10 Smedes & M. 113; Burch v. Tebbutt, 2 Stark. 74; Cole v. Withers, 33 Gratt. 204; Trullinger v. Kofold, 7 Oreg. 228. But see Gwinn v. Whitaker, 1 Harr. & J. 754; Goetz v. Piel, *supra;* Plain v. Roth, 107 Ill. 594; Blackmore v. Granbery, 98 Tenn. 277, 39 S. W. 229, citing text; Moose v. Marks, 116 N. C. 785, 21 S. E. 561; Wipperman v. Hardy, 17 Ind. App. 142, 46 N. E. 537.

60. Marryatts v. White, 2 Stark. 101.

61. Wright v. Laing, 3 B. & C. 165; Meggot v. Mills, 1 Ld. Raym. 286; Peters v. Anderson, 5 Taunt. 596; Spiller v. Creditors, 16 La. Ann. 292. *Contra,* Mills v. Fowlkes, 5 Bing. N. C. 455, 7 Scott, 444; Stone v. Seymour, 15 Wend. 29.

62. Nash v. Hodgson, 6 De G., M. & G. 474.

63. Armistead v. Brooke, 18 Ark. 521; Mills v. Fowlkes, 5 Bing. N. C. 455; Beck v. Haas, 111 Mo. 264, 20 S. W. 19, 33 Am. St. Rep. 516.

64. Kidder v. Norris, 18 N. H. 532; Rohan v. Hanson, 11 Cush. 44; Stone v. Talbot, 4 Wis. 442.

barred by limitation before any appropriation of payment is made, then the law will appropriate payment to the barred debt.[65]

If payment is made to a party who holds a debt due to himself, and another due to himself and the plaintiff, he is bound to apply the payment ratably between the two debts.[66]

§ 1253. Payments by partners and joint debtors.— If a partner owes a debtor, of whom his firm is debtor also, and pays the money of the firm, it will be appropriated by law to the debt of the firm;[67] and if he pays such debtor his own money, it will be appropriated to his own debt.[68] And no appropriation will be allowed which has the effect of paying one man's debt with another man's money.[69] When a person owes the same debtor on joint and on individual account, and simply pays an amount, without appropriating it specifically, or it appearing whether it came from his individual or his joint funds, the creditor may apply it to either account.[70] "Where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firms in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt."[71]

SECTION VIII.

PAYMENT SUPRA PROTEST OR FOR HONOR.

§ 1254. There is a peculiar kind of payment sometimes made after protest, and which is called accordingly payment *supra protest*. It is a general principle of the common law, that a stranger cannot voluntarily, and without the request of another, pay his

65. Robinson's Admrs. v. Allison, 36 Ala. 525.

66. Colby v. Copp, 35 N. H. 434. And if a note drawing interest is payable in whole or in part before due at the option of the maker, the interest on each payment up to the time it was made should be cast up and the payment applied, first to the reduction of the interest, and then to the reduction of the principal. See Jacobs v. Ballenger, 130 Ind. 231, 29 N. E. 782.

67. Thompson v. Brown, Moody & M. 40.

68. Fairchild v. Holly, 10 Conn. 175.

69. Thompson v. Brown, Moody & M. 40.

70. Van Rensselaer's Exrs. v. Roberts, 5 Den. 570; Baker v. Stackpole, 9 Cow. 420.

71. Simon v. Ingham, 2 B. & C. 72, Bayley, J.; 3 Dowl. & R. 249; Hooper v. Keay, 2 Q. B. Div. 178.

debt and acquire a right to reimbursement.[72] But an exception is made in respect to bills of exchange, and for the benefit of trade, which is not extended even to negotiable notes.[73] When the bill has been protested for nonpayment, and not before,[74] a stranger may pay it for the honor of the drawer, or acceptor (if it has been accepted), or of any indorser, or he may pay it for the honor of all the parties — for honor generally, as such a payment is termed. And such a payment does not, like a simple payment by the original drawee, operate as a satisfaction of the bill, but itself transfers the holder's rights to the party paying, unless the party paying limits and narrows them.[75] If the payment is made for the honor of a particular indorser, the party paying may sue such indorser, and all parties prior to him whom he could have resorted to, but not subsequent indorsers, for it stands like a payment made at the request of the indorser, for whose honor it is made, and the payor *supra protest* narrows and limits his right to recover against them only.[76] But if he pays for honor of the bill generally, it is the same as payment for the honor of the last indorsee, and he may recover against all parties to the bill,[77] declaring specially upon the bill, according to the custom of merchants,[78] or generally upon a count for money paid for defendant's use.[79] But Mr. Chitty says "it is considered safer to declare specially."[80]

§ 1255. Payor supra protest is subrogated to rights of party for whose honor he pays.— As the party paying *supra protest* becomes substituted, as against parties anterior to the one for whose honor he pays, to the rights and remedies which such party for whose honor he pays would have had against them, had he himself paid, it follows that the right of one who pays for the honor of the drawer to sue the acceptor depends upon whether or not the ac-

72. Story on Notes, § 453.

73. Smith v. Sawyer, 55 Me. 141.

74. Vandewall v. Tyrrell, Moody & M. 87; Bayley on Bills (2d Am. ed.), 328; Chitty on Bills [*508, 509], 575; Byles on Bills [*262], 409.

75. Chitty on Bills (13th Am. ed.) [*509], 576.

76. Mertens v. Withington, 1 Esp. 112; Chitty on Bills [*509], 577.

77. Fairley v. Roch, Lutw. 891; Chitty on Bills [*509], 576, 577; Byles on Bills (Sharswood's ed.) [*261], 408; Edwards on Bills, 441.

78. Cox v. Earle, 3 B. & Ald. 430; Fairley v. Roch, Lutw. 891.

79. Vandewall v. Tyrrell, Moody & M. 87; Smith v. Nissen, 1 T. R. 269 (*semble*).

80. Chitty on Bills [*510], citing Reid v. Smart.

ceptance was for value.[81] In England it was at first held that he could sue the acceptor, whether he had effects of the drawer in his hands or not;[82] but this view was subsequently overruled, and the doctrine of the text established.[83]

§ **1256. When acceptor may pay supra protest.**— The acceptor, if he have previously made a simple acceptance, cannot pay for honor of an indorser, because, as acceptor, he is already bound in that character.[84] But if he has accepted the bill for the drawer's accommodation, without being in possession of effects, and no provision is made by the drawer for its payment, he may pay it *supra protest,* and acquire a remedy against the drawer on the bill.[85] But this is unnecessary, except as a precaution in regard to evidence, for without it the acceptor might, in an action for money paid, recover back the amount, though he could not without such ceremony recover on the bill.

§ **1257.** The person who desires to pay a bill for the honor of another, must be ready and offer to do so at the time and place of payment, otherwise he will have no right to insist on that privilege.[86]

No person should make a payment *supra protest* without ascertaining that the signatures of those for whose honor he pays are genuine; for should it turn out otherwise, he would have no remedy against them. Nor could he recover back the amount from the party to whom he has paid it, unless he discovers the mistake, and gives notice to him in time to prevent any loss.[87] And it has been held that the forgery must be discovered, and the notice thereof given, on the very day of payment, so as to enable the

81. Byles on Bills (Sharswood's ed.) [*260], 407, 408; Chitty on Bills [*508], 575.

82. *Ex parte* Wackerbath, 5 Ves. 574 (1800), the Lord Chancellor saying: "I have talked to one or two persons in trade upon this, who answered that the persons accepting for the honor of the drawer have a right to come upon the acceptor. I put the case, that the drawer had no effects in the hands of the acceptor. The answer is, they accept for the honor of the drawer, but they accept an accepted bill. The justice of the case is, that if there were no effects they should go in the first place against the drawer, but they should not be altogether without remedy."

83. *Ex parte* Lambert, 13 Ves. Jr. 179 (1806).

84. Chitty on Bills (13th Am. ed.) [*508], 575.

85. Chitty on Bills (13th Am. ed.) [*508], 575.

86. Denston v. Henderson, 13 Johns. 322; Bayley on Bills (2d Am. ed.), 329.

87. See chapter XLII, on Forgery, section IV.

party who holds the bill to give the promptest notice of dishonor, and secure the liability of all prior parties.[88]

§ 1258. The formal mode of making payment supra protest is this: The party proposing to make such payment goes before a notary public after the bill has been noted for protest[89] (though it is not necessary that the protest should have been formally extended),[90] and makes a declaration for whose honor he makes payment, which declaration should be recorded by the notary, either in the protest or in a separate instrument.[91] He must then, in a reasonable time, notify the party for whose honor he pays, otherwise such party will not be bound to refund.[92]

It is observed by Byles, that "the most obvious and advantageous course to be pursued by a man desiring to protect the credit of any party to a dishonored bill is simply to pay the amount to the holder, and take the bill as an ordinary transferee. But the holder may possibly object; for example, the bill may not have been indorsed in blank, and the holder may refuse to indorse even *sans recours*. In such an event a payment *supra protest* becomes essential." [93]

The privilege of payment *supra protest* is not extended by the law merchant to promissory notes, which are not designed for such general circulation as bills of exchange, and the party making such payment acts at his peril.[94]

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88. Wilkinson v. Johnson, 3 B. & C. 428, 5 Dowl. & R. 403. See chapter XVIII, on Acceptance, § 528, note, vol. I; Chitty on Bills [*509], 575.

89. Vandewall v. Tyrrell, Moody & M. 87. See chapter XVIII, section VI, § 522, vol. I.

90. Geralopulo v. Wieler, 10 C. B. 690 (70 Eng. C. L.).

91. Byles on Bills (Sharswood's ed.) [*260], 407; Chitty on Bills [*509], 575, 576; Edwards on Bills, 441.

92. Wood v. Pugh, 7 Ham. 164.

93. Byles on Bills (Sharswood's ed.) [*261], 408.

94. Byles on Bills (Sharswood's ed.) [*262]; Story on Notes, § 453.

CHAPTER XXXIX.

CONDITIONAL AND ABSOLUTE PAYMENT.— TAKING BILL OR NOTE FOR OR ON ACCOUNT OF DEBT.

SECTION I.

WHEN THE PRESUMPTION OF PAYMENT ARISES FROM TAKING A BILL OR NOTE.

§ **1259.** When a bill or note is taken for or on account of a debt, the question arises whether it was taken in absolute discharge of it, and operates as a complete merger, or simply as a collateral security, or in suspension of the debt, during its currency. The intention of the parties is the controlling element.[1] And if there be any distinct agreement on the subject all controversy is silenced. But when no particular intention is manifested, and no express or implied agreement appears, the question is to be solved by principles of law which make presumptions as to the intention of the parties according to the circumstances of each particular case. Sometimes the debt is antecedent to the giving of the bill or note; sometimes contemporaneous. And the debtor may give (1) his own bill or note; or (2) transfer the bill or note of another without indorsement; or (3) transfer it with indorsement.

§ **1260. Debtor's bill or note for precedent debt.**— *Firstly,* let us consider the case when the debtor gives his own bill or note for or

1. Bolt v. Dawkins, 16 S. C. 214; Weaver v. Nixon, 69 Ga. 700; Stewart v. Life Ins. Co., 155 N. Y. 257, 49 N. E. 876. The giving and acceptance of a note is *prima facie* evidence of the settlement of account between the parties at the time. The ordinary presumption is that the demands between the parties were then liquidated, and the note was given for the balance found to be due from the maker. Wright v. Wright, 74 Hun, 138, 26 N. Y. Supp. 238; Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; Parks v. Smith, 155 Mass. 26; Matter of Utica Nat. Brewing Co., 154 N. Y. 268, 48 N. E. 521; Orcutt v. Rickenbrodt, 42 App. Div. 238, 59 N. Y. Supp. 1008; McCullough v. Kervin, 49 S. C. 445, 27 S. E. 456; Witte v. Weinberg, 37 S. C. 579, 17 S. E. 681; Continental Ins. Co. v. Dorman, 125 Ind. 189, 25 N. E. 213; Kirkland v. Dreyfus & Rich, 103 Ga. 127, 29 S. E. 612; Wipperman v. Hardy, 17 Ind. App. 142, 46 N. E. 537; State *ex rel.* Crider v. Wagers, 47 Mo. App. 431; Hadden v. Dooley, 34 C. C. A. 338, 92 Fed. 274, citing text.

on account of a precedent debt. It is a general principle of law that one simple executory contract does not extinguish another for which it is substituted, and negotiable securities form no exception.[2] And by the general commercial law, as well of England,[3] as of the United States,[4] a bill of exchange drawn or promissory note made by the debtor does not discharge the precedent debt

2. Keller v. Singleton, 69 Ga. 703; Rhodes *et al.* v. Webb-Jameson Co. *et al.*, 19 Ind. App. 195, 49 N. E. 283; Combs v. Bays, 19 Ind. App. 263, 49 N. E. 358; Brown *et al.* v. Shelby, 4 Ind. App. 477, 31 N. E. 89.

3. Dowse v. Master, Style, 263; Smith v. Chester, 1 T. R. 655; Richardson v. Rickman, 5 T. R. 517; Price v. Price, 16 M. & W. 232.

4. The Kimball, 3 Wall. 45; Bank of the United States v. Daniel, 12 Pet. 32; Peters v. Beverley, 10 Pet. 532; Downey v. Hicks, 14 How. 240; Clark v. Young, 1 Cranch, 181; Sheehy v. Mandeville, 6 Cranch, 253; Lewis v. Davison, 29 Gratt. 226; McCluny v. Jackson, 6 Gratt. 96; McGuire v. Gadsby, 3 Call, 324; Armistead v. Ward, 2 Pat. & H. 515; Middlesex v. Thomas, 5 C. E. Green, 39; Glenn v. Smith, 2 Gill & J. 512; Clopper v. Union Bank, 7 Harr. & J. 120; Walton v. Bemiss, 16 La. 140; McLaren v. Hall, 26 Iowa, 298; Steamboat Charlotte v. Hammond, 9 Mo. 63; Yarnell v. Anderson, 14 Mo. 619; Doebling v. Loss, 40 Mo. 150; Archibald v. Argall, 53 Ill. 307; Miller v. Lumsden, 16 Ill. 161; Logan v. Attix, 7 Iowa, 77; Davis' Estate, 5 Whart. 537; Jones v. Strawhan, 4 Watts & S. 261; McIntyre v. Kennedy, 29 Pa. St. 448; Hutchinson v. Woodwell, 107 Pa. St. 510; Lee v. Green, 83 Ala. 491; Keel v. Larkin, 72 Ala. 501; Day v. Thompson, 65 Ala. 269; McGuire v. Bidwell, 64 Tex. 43; Henry v. Conley, 48 Ark. 271, citing the text; Hopkins v. Detwiler, 25 W. Va. 748; Hornbrooks v. Lucas, 24 W. Va. 493; Reeder v. Nay, 95 Ind. 164; Warring v. Hill, 89 Ind. 501; Silby v. McCullough, 26 Mo. App. 67; Sturdevant Bank v. Peterman, 21 Mo. App. 512; Commiskey v. Pike, 20 Mo. App. 82; Wiles v. Robinson, 80 Mo. 47; Cheltenham Stone Co. v. Gates Iron Works, 124 Ill. 626; Riverside Iron Works v. Hall, 64 Mich. 168; Geib v. Reynolds, 35 Minn. 331; Segrist v. Crabtree, 131 U. S. 287; Brill v. Hoile, 53 Wis. 538; Stanley v. McElrath (Cal.), 25 Pac. 16, citing the text; Dougal v. Cowles, 5 Day, 511; Merrick v. Boury, 4 Ohio St. 60; Sutliff v. Atwood, 15 Ohio St. 186; Burdick v. Green, 15 Johns. 249; Cole v. Sackett, 1 Hill, 516; Winsted Bank v. Webb, 39 N. Y. 325; Hawley v. Foote, 19 Wend. 516; Frisbie v. Larned, 21 Wend. 450; Syracuse R. Co. v. Collins, 3 Lans. 29; Smith v. Miller, 43 N. Y. 171; Board of Education v. Fonda, 77 N. Y. 350. Nor even operate as an extension of the time of payment of the debt for which it was given. Graham v. Negus, 62 N. Y. S. C. (55 Hun) 440; Gordon v. Price, 10 Ired. 385; McNeil v. McCamley, 6 Tex. 163; Union Bank v. Smiser, 1 Sneed, 501; Marshall v. Marshall, 42 Ala. 149; Myatts v. Bell, 41 Ala. 222; Guion v. Doherty, 43 Miss. 538; Stam v. Kerr, 31 Miss. 199; Welch v. Allington, 23 Cal. 322; Smith v. Owens, 21 Cal. 11; Edwards on Bills, 203; Breitung v. Lindauer, 37 Mich. 217; Poole v. Rice, 9 W. Va. 73; Feamster v. Withrow, 12 W. Va. 611; *In re* Hurst, 1 Flipp. C. C. 462; Walsh v. Lennon, 98 Ill. 27; Wilbur v. Jernegan, 11 R. I. 113; Nightingale v. Chafee, 11 R. I. 609; Crawford v. Roberts, 50 Cal. 236; Brown v. Olmsted, 50 N. Y. 163; Caldwell v. Hall, 49 Ark. 508; Fry v. Patterson, 49 N. J. L. 612. And if the paper be

for which it is given, unless such be the agreement of the parties. The creditor may return the bill or note when dishonored by non-acceptance or nonpayment, and proceed upon the original debt. The acceptance of the instrument by the creditor is considered as accompanied by the condition of its payment. Thus, it was said, in the time of Lord Holt: "A bill shall never go in discharge of a precedent debt, except it be a part of the contract that it shall be so." [5] Such has been the rule in England ever since; and it proceeds upon the obvious ground that nothing can be justly considered as payment in fact but that which is in truth such, unless something else is agreed to be received in its place; and that a mere promise to pay ought not to be regarded as an effective payment is manifest.

It is to be regretted that any exception should be found in the adjudicated cases to the adoption of a principle so generally prevalent and so well founded in reason. But the courts of Massachusetts, Maine, Vermont, Indiana, and Louisiana have held that the taking of a bill or note on account of a precedent debt is to be presumed to be a satisfaction of it; but they admit parol evidence to rebut this presumption, by proof of an express or implied contract that the debt should only be suspended, not discharged.[6] And

expressly accepted as payment, it will not so operate if it was such as the maker had no capacity to execute. Godfrey v. Crisler, 121 Ind. 203. See cases cited in notes to § 1245 and § 1623. See also Delafield v. Construction Co., 118 N. C. 105, 24 S. E. 10; National Bank v. Jose, 10 Wash. 185, 38 Pac. 1026, and cases cited in notes to § 1623; Walsh v. Cooper, 10 Wash. 513, 39 Pac. 127; Taylor v. Slater, 16 R. I. 93, 12 Atl. 727.

5. Clark v. Mundal, 1 Salk. 124. Where note in payment of debt is received by creditor subject to approval within reasonable time — question of such reasonable time one for jury. Cutler v. Parsons, 13 App. Div. 377, 43 N. Y. Supp. 187; Novelty Mfg. Co. v. Connell, 88 Hun, 254, 34 N. Y. Supp. 717; Matter of Callister, 88 Hun, 88, 34 N. Y. Supp. 628; Fitch v. McDowell, 80 Hun, 207, 30 N. Y. Supp. 31; Metzger v. Carr, 79 Hun, 258, 29 N. Y. Supp. 410; Johnston v. Barrills, 27 Oreg. 251, 41 Pac. 656, 50 Am. St. Rep. 717, citing and approving text; Brantley Co. v. Lee, 109 Ga. 478, 34 S. E. 574; Kirkland v. Dryfus & Rich, 103 Ga. 127, 29 S. E. 612; Orner v. Sattley Mfg. Co., 18 Ind. 122; Rhodes *et al.* v. Webb-Jameson Co. *et al.*, 19 Ind. App. 195, 49 N. E. 283; Combs v. Bays, 19 Ind. App. 263, 49 N. E. 358; McCormick v. Altneave & Co., 73 Miss. 86, 19 So. 198; National Ins. Co. v. Goble, 51 Nebr. 5, 70 N. W. 503; State *ex rel.* Crider v. Wagers, 47 Mo. App. 431. See Steinhart v. National Bank, 94 Cal. 362, 29 Pac. 717, 28 Am. St. Rep. 132; Savings & Loan Society v. Burnett, 106 Cal. 514, 39 Pac. 922.

6. O'Connor v. Hurley, 147 Mass. 149; Ely v. James, 123 Mass. 36, and held presumably the same in Maine; Parkham Sewing Machine Co. v. Brock, 113 Mass. 194; Dodge v. Emerson, Mass. S. C., Oct., 1881, Alb. L. J., vol. XXV,

when the old note is secured by mortgage the presumption of payment does not arise as in other cases.[7] So if there be other security for the old debt and it is retained.[8]

§ 1261. Secondly: Debtor's note for contemporaneous debt.—When a person contracts a debt or purchases goods, and contemporaneously executes his own note for the amount, Story,[9] considers it *prima facie* conditional payment only; while Parsons says:[10] "It seems to be substantially selling a note by barter, or exchanging it for goods." "And we can hardly conceive," he adds, "of a bill being taken at the time of the sale, unless it be the understanding of the parties to regard it as payment. The remedy on the note

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No. 8 (Feb. 25, 1882), p. 155; Appleton v. Parker, 15 Gray, 173; Thatcher v. Dinsmore, 5 Mass. 302; Whitcomb v. Williams, 4 Pick. 231; Chapman v. Durant, 10 Mass. 51; Goodenow v. Tyler, 7 Mass. 38; Wood v. Bodwell, 12 Mass. 289; Varner v. Nobleborough, 2 Greenl. 124; Gooding v. Morgan, 37 Me. 619; Gilmore v. Bussey, 12 Me. 418; Ward v. Bourne, 56 Me. 161; Titcomb v. McAllister, 81 Me. 399; Bunker v. Barron, 79 Me. 62; Granite Nat. Bank v. Fitch, 145 Mass. 567; Nixon v. Beard, 111 Ind. 141. But if non-negotiable, acceptance as payment in Indiana must be affirmatively proved. Olvay v. Jackson, 106 Ind. 286; Schierl v. Baumel, 75 Wis. 69; Hutchins v. Olcutt, 4 Vt. 549; Torrey v. Baxter, 13 Vt. 452; Dickinson v. King, 28 Vt. 378; Farr v. Stevens, 26 Vt. 299; Gaskins v. Wells, 15 Ind. 253; Smith v. Bettger, 68 Ind. 254; Hunt v. Boyd, 2 La. 109; Mehlberg v. Fisher, 24 Wis. 607. The learned editors of American Leading Cases attribute the departure of these cases from the general rule to a variation in the course of business, which attaches a different meaning to the same acts and declarations. Vol. II, 250; Forbes v. The Union Central Life Ins. Co., 151 Ind. 89, 51 N. E. 84; Wipperman v. Hardy, 17 Ind. App. 142, 46 N. E. 537; Keck v. State *ex rel.* Nat. Cash Register, 12 Ind. App. 119, 39 N. E. 899.

7. See § 1266*a*, and Taft v. Boyd, 13 Allen, 84; Parkham Sewing Machine Co. v. Brock, 113 Mass. 194; Bunker v. Barron, 79 Me. 62; Dodge v. Emerson, Mass. S. C., Oct., 1881, Alb. L. J., Feb. 25, 1882, p. 155.

8. Titcomb v. McAllister, 81 Me. 399.

9. Story on Notes, § 104; Hoodless v. Reid, 112 Ill. 110; Kirkham v. Bank of America, 26 App. Div. 110, 49 N. Y. Supp. 767, citing text. The court held, in this case, that where the agent of a bank in which a draft has been deposited for collection, surrenders the draft to the drawee, and accepts a draft for its amount, drawn by the drawee upon a third person, the first-mentioned draft is thereby paid, the presumption being that the drawee's draft was accepted in payment of the draft received for collection; in any event the collecting bank is bound either to return to its customer the draft received for collection, properly protested, so as to charge the drawer, or to pay him the money.

10. 2 Parsons on Notes and Bills, 157. See also Manning v. Lyon, 70 Hun, 345, 24 N. Y. Supp. 265.

or bill, which is more convenient to the creditor, is all that should be allowed him, for there is no sufficient reason for allowing resort to be had to the original."

There is certainly great force in the reasoning of Parsons. But, on the other hand, the debtor has broken his contract to pay when his bill or note is dishonored; and if the creditor who has parted with value, sues for the original consideration, the authorities predominate in favor of allowing him to recover;[11] though the views of Parsons are sustained by some of the adjudicated cases. And were the question of new impression, we should be inclined to adopt them.

§ 1262. Thirdly: Stranger's bill or note for precedent debt indorsed or unindorsed.— If A. be indebted to B. in the sum of one hundred dollars, and when applied to for the money, he gives him the draft of C. on D., payable to his (A.'s) order, and himself indorses it, he would, of course, be liable as indorser in the event of its dishonor, and of due presentment and notice. But suppose he simply passes to B., by delivery, the draft of C. on D. payable to bearer, and that, when due, it is dishonored, does the precedent indebtedness revive? In England, where goldsmiths' and bankers' notes are so passed by delivery for precedent debts, it is considered that, if not paid after due diligence taken in presenting them, the creditor may sue on the original consideration, provided he gives timely notice of their dishonor;[12] and it has been considered that the same rule governs the transfer by delivery of ordinary bills and promissory notes of private persons.[13] High Ameri-

11. In 2 Am. Lead. Cas. 263, it is said: "There is much less reason for supposing that payment for a contemporaneous sale on the bills or notes of an individual is absolute, than where it is made in bank notes; and it would seem that this effect cannot be ascribed to it, as a matter of law, and apart from the agreement of the parties. The cases fully establish that, in the absence of such an agreement, the vendor may sue for goods sold and delivered, when the instrument is drawn and indorsed by the vendee, and is dishonored by the party primarily liable for its payment, as maker or acceptor." See Sheehy v. Mandeville, 6 Cranch, 253.

12. Ward v. Evans, 2 Ld. Raym. 928; Moore v. Warren, 1 Stra. 415; National Ins. Co. v. Goble, 51 Nebr. 5, 70 N. W. 503, citing text.

13. Camidge v. Allenby, 6 B. & C. 373; Swinyard v. Boyes, 5 Maule & S. 62; Van Wart v. Woolley, 3 B. & C. 439, 5 Dowl. & R. 374; *Ex parte* Blackburne, 10 Ves. 204; Story on Bills, § 225; Wipperman v. Hardy, 17 Ind. App. 142, 46 N. E. 537.

can authorities support this view,[14] and it is earnestly advocated and may be justly regarded as the wisest and best view, and more consistent with the general principles which are accepted as applicable to conditional and absolute payments; but it must be contended that there is great force in the reply that, as such instruments may be indorsed, and generally are indorsed, when the transferrer assumes any liability for their payment, the more natural presumption, however easily overthrown, would be that when the transferee takes them without indorsement, he takes the risk on himself.[15] If the party indorses that note, it will operate as absolute payment, unless he has due notice of dishonor.[16] A refusal of the debtor to indorse the note would be evidence that it was received as payment.[17]

§ **1263.** In an English case, where it appeared that in the morning A. sold B. a quantity of corn, and at three o'clock in the afternoon of the same day, B. delivered to A., in payment, certain promissory notes of the bank of C., which had then stopped payment, but which circumstance was not at the time known to either party, Bayley, J., said: "If the notes had been given to A. at the time when the corn was sold, he could have had no remedy upon them against B. A. might have insisted on payment in money, but if he consented to receive the notes as money, they would have been taken by him at his peril." And it was held that B. was bound, as the notes were given after the debt was contracted.[18] But this distinction has been much criticised.[19]

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14. M'Lughan v. Bovard, 4 Watts, 315, Gibson, C. J.; Leaugue v. Wasing, 85 Pa. St. 244; Gordon v. Price, 10 Ired. L. R. 388, Ruffin, C. J.; Downey v. Hicks, 14 How. 249 (a certificate of deposit), Taney, C. J.; Gibson v. Tobey, 53 Barb. 195; Crane v. McDonald, 45 Barb. 355; Noel v. Murray, 13 N. Y. 169, 1 Duer, 388; Glenn v. Burrows, 44 N. Y. S. C. (37 Hun) 605; Malpas v. Lowenstine, 46 Ark. 552; Hunt v. Higman, 70 Iowa, 407; Hopkins v. Detwiler, 25 W. Va. 748; Gallagher v. Roberts, 2 Wash. C. C. 193; Philadelphia v. Stewart, 195 Pa. St. 314, 45 Atl. 1093; Collins v. Busch, 191 Pa. St. 549, 43 Atl. 378.

15. Dennis v. Williams, 40 Ala. 633. Payee surrendered a note, and took note of stranger from debtor, without indorsement. Held, absolute payment.

16. Soffe v. Gallagher, 3 E. D. Smith, 507; Stam v. Kerr, 31 Miss. 199. *Contra*, Cook v. Beach, 10 Humphr. 413.

17. Breed v. Cook, 15 Johns. 241.

18. Camidge v. Allenby, 6 B. & C. 373. See chapter XXII, § 740, vol. I, and also chapter on Bank Notes; 2 Parsons on Notes and Bills, 156, note *m*.

19. Timmins v. Gibbins, 18 Q. B. 722, 14 Eng. C. L. & Eq. 64; Corbet v. Bank of Smyrna, 2 Harr. 235.

§ 1264. Fourthly: Stranger's note for contemporaneous debt unindorsed.— When the debtor transfers the bill or note of a third party for a contemporaneous debt, without indorsing it, there is certainly strong reason for presuming the transaction to be an exchange of the bill or note for the consideration moving to the debtor. The debtor parts with his property in the instrument, and the party with whom he is dealing parts with his goods, undertakes to do something, or otherwise gives him value. The instrument transferred, in the absence of an express or implied agreement, would seem to constitute in itself the consideration moving from the vendee, and there would be no debt merged in it, or capable of revivor by its dishonor. This view is well sustained by authority,[20] but not without dissent.

§ 1265. Fifthly: Stranger's note for contemporaneous debt indorsed.— When the debtor transfers and indorses the bill or note of a third party for a contemporaneous debt, the view is generally adopted that there is a presumption of conditional payment only. The indorsement is like the drawing of a new bill by the debtor, and as his contract is broken by its dishonor, the creditor may sue, as in the first case, for the amount of the consideration. The indorsement by the debtor, by which he incurs personal liability, rebuts the presumption of a mere exchange of the paper for the goods or other consideration, which arises when there is mere transfer of a third party's bill or note by delivery, or indorsement without recourse.[21]

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20. In Bank of England v. Newman, 1 Ld. Raym. 442 (1699); Chitty, Jr., on Bills, 207, Holt, C. J., said: "If a man give such a bill (a bill payable to himself or bearer) for money not due before without indorsement, it is a sale of the bill." *Ex parte* Blackburne, 10 Ves. 204; Fydell v. Clark, 1 Esp. 447. A banker discounting a bill gave his customer bills and notes without indorsing them. Lord Kenyon said (the bills turning out bad): "Having taken them without indorsing them, he hath taken the risk on himself." Whitbeck v. Vanness, 11 Johns. 409; Breed v. Cook, 15 Johns. 242; Tobey v. Barber, 5 Johns. 68; Noel v. Murray, 1 Duer, 388, Oakley, C. J.; Camidge v. Allenby, 6 B. & C. 373; 2 Parsons on Notes and Bills, 156, 183; Byles on Bills (Sharswood's ed.) [*154, 372, 373], 275, 552; Edwards on Bills, 204; Gibson v. Toby, 53 Barb. 195 (1869). But presumption may be rebutted. Porter v. Talcott, 1 Cow. 381; Rew v. Barber, 3 Cow. 279; Torrey v. Hadley, 27 Barb. 196; Gordon v. Price, 10 Ired. L. R. 388, Ruffin, C. J.; Manning v. Lyon, 70 Hun, 345, 24 N. Y. Supp. 265; Challoner v. Boyington, 83 Wis. 399, 53 N. W. 694, citing text.

21. Monroe v. Huff, 5 Den. 369; Boyd v. Hitchcock, 20 Johns. 76; Soffe v. Gallagher, 3 E. D. Smith, 507; Shriner v. Keller, 25 Pa. St. 61, 2 Am. Lead.

§ 1266. Presumptions as to, and effect of, renewals.— Where a new bill or note is given in renewal of another bill or note, and the original is retained, the new bill or note operates only as a suspension of the debt evidenced by the original, and is not a satisfaction of it until paid. Such at least is the weight of authority.[22] And in England it has been held that if the new bill or note, though paid at maturity, be not large enough to cover the principal and interest of the dishonored bill, the latter revives and may be sued on.[23] But there are cases in which it is held that the old note is merged in the new one.[24] Where a note is renewed, it is said by

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Cas. 263; 2 Parsons on Notes and Bills, 159; Cushwa v. Improvement, etc., Assn., 45 W. Va. 490, 32 S. E. 259.

22. Kendrick v. Lomax, 2 Cromp. & J. 405; Bishop v. Rowe, 3 Maule & S. 362; Cumber v. Wane, 1 Stra. 426; Woods v. Woods, 127 Mass. 141. In McGuire v. Gadsby, 3 Cal. 234, eleven small notes for fifty dollars each were given to the plaintiff McGuire by Gadsby, who owed him five hundred and fifty dollars on his original note for that amount. Three of the small notes were paid, and eight remaining unpaid, McGuire brought suit on the note for $550, and the defendant pleaded payment and gave these facts in evidence. Roane, J., said: "Do the smaller notes extinguish the former? On this subject we take the law to be settled, that, in order to make one instrument an extinguishment of another, the latter must be of a higher dignity than the former, or must put the plaintiff in a better condition, neither of which is the case of these notes, all precisely of the same tenor, and not sealed; nor do the latter place the plaintiff in a better condition than the former. They benefit the defendant, indeed, by giving him a further day of payment, which he did not avail himself of, and cannot now turn that favor to the prejudice of the plaintiff, who did not sue until three months after the most remote payment was to have been made." East River Bank v. Butterworth, 45 Barb. 476; Gregory v. Thomas, 20 Wend. 17; Waydell v. Luer, 5 Hill, 448; Cole v. Sackett, 1 Hill, 516; Moses v. Price, 21 Gratt. 556; Hobson v. Davidson, 8 Mart. 431; Godfrey v. Crisler, 121 Ind. 205; McMorran v. Murphy, 68 Mich. 246; First Nat. Bank v. Newton, 10 Colo. 162; Beals v. Lewis (Ohio), 1 West. Rep. 66; Kimberly's App. (Pa.), 5 Cent. 460. In *Ex parte* Barclay, 7 Ves. 597, the new bills were given "in lieu" of the originals, but the latter being left with the plaintiff, it was held he could sue upon them. Byles on Bills (Sharswood's ed.) [*229], 373; Chitty on Bills (13th Am. ed.) [*181], 207; Benjamin's Chalmers' Digest, 253, 254; Anniston Loan & Trust Co. v. Stickney, 108 Ala. 146, 19 So. 63.

23. Lumley v. Musgrave, 4 Bing. N. C. 9, 5 Scott, 230.

24. Nichol v. Bate, 10 Yerg. 429; Hill v. Bostick, 10 Humphr. 410; Slaymaker v. Gundacker, 10 Serg. & R. 75, *per* Tilghman, C. J. In Maine, Massachusetts, and Vermont, where a note is presumed to be payment, the new note is of course presumed to discharge the old. Cornwall v. Gould, 4 Pick. 444; Huse v. Alexander, 2 Metc. (Mass.) 157. But otherwise if the old note were secured by mortgage. See §§ 1260, 1266*a*.

eminent authority that, according to the general custom and understanding of the mercantile world, the new note cancels the old note for which it is given, and which is taken up, as it is termed;[25] but no precedent clearly in point is cited, and the distinction is not recognized in the adjudicated cases.[26]

In a number of cases it is held to depend upon the intention of the parties,[27] and, of course, an express agreement would control the effect of giving the new note.[28] But it should be shown that it was expressly agreed that the old one should be extinguished, in order to have the effect of extinguishment.[29]

§ 1266a. Surrender of old security.— The delivery or surrender to the maker of the old note upon its being renewed, does not in itself raise a presumption of its extinguishment by the new, it being considered as a conditional surrender, and that its obligation is restored and revived if the new note be not duly paid,[30] and the

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25. 2 Parsons on Notes and Bills, 203; Bank of Commonwealth v. Letcher, 3 J. J. Marsh. 195, *obiter*. Denied, and the authority of the text in the next section sustained in Bank v. Good, 21 W. Va. 466.

26. Moses v. Price, 21 Gratt. 556; Olcott v. Rathbone, 5 Wend. 490. See vol. I, § 205, and vol. II, § 1272; Bank of New Hanover v. Bridgers, 98 N. C. 67. See the dissenting opinion of Craig, J., in Belleville Savings Bank v. Bornman, 124 Ill. 214, sustaining the text. The term "renewal," as applied to promissory notes, says the Supreme Court of Indiana, means the re-establishment of the particular contract for another period of time. See Kedey v. Petty, 153 Ind. 179, 54 N. E. 798.

27. Weakly v. Bell, 9 Watts, 273; Morriss v. Harvey, S. C. of Va., Sept., 1881, Va. L. J., Jan., 1882, p. 21; Healey v. Dolson, 8 Cent. 698, citing the text; Flannagan v. Hambleton, 54 Md. 223; Compton v. Patterson, 28 S. C. 117; Williams v. National Bank of Baltimore, 72 Md. 441, 20 Atl. 191.

28. Northern Liberty Market Co. v. Kelley, 113 U. S. 199.

29. Crockett v. Trotter, 1 Stew. & P. 446; Chamberlain Banking House v. Woolsey, 60 Nebr. 516, 83 N. W. 729; Cushwa v. Improvement, etc., Assn., 45 W. Va. 490, 32 S. E. 259.

30. Olcott v. Rathbone, 5 Wend. 490; Jagger Iron Co. v. Walker, 76 N. Y. 522; Parrott v. Colby, 71 N. Y. 597 (affirming 6 Hun, 55; overruling Fisher v. Marvin, 47 Barb. 159); Edwards on Bills, 200; 2 Parsons on Notes and Bills, 164; 5 Rob. Pr. 848; Abb. Tr. Ev. 447. *Contra*, Morgan v. Creditors, 1 La. 527; Smith v. Harper, 5 Cal. 329; Morriss v. Harvey, S. C. of Va., Sept. 3, 1881 (*semble*), Va. L. J., Jan., 1882, p. 17; 2 Parsons on Notes and Bills, 203. See *ante*, vol. I, § 205; First Nat. Bank v. Case, 63 Wis. 506; Jansen v. Grimshaw, 125 Ill. 476; Bank of Malvern v. Burton, 67 Ark. 426, 55 S. W. 483; Anniston Loan & Trust Co. v. Stickney, 108 Ala. 146, 18 So. 939, citing text; Bonesteel v. Bowie, 128 Cal. 511, 61 Pac. 78.

same rule applies when the new note has been carried to judgment, but without satisfaction.[31]

Professor Parsons says, however, as we have already seen in the preceding section, that the general custom and understanding of the commercial world would seem to demand a contrary ruling when the old note is surrendered.[32]

§ **1266b. When debt would be lost, renewal not deemed payment.** — Even where a note is considered as paid and discharged by one given for it, as a general rule, the case is excepted where the debt would by such construction be lost, because then the intention to receive the second as a discharge would be *prima facie* rebutted.[33] This view would apply where the first note is secured by mortgage,[34] and when the renewal is forged or altered.[35]

§ **1266c. Renewals of notes in bank.**— In a recent New York case, Andrews, J., said: "It may well be, that by common understanding and usage, when a note is discounted by a bank to take up a prior note held by the bank against the party procuring the discount and the avails are credited to him, the transaction is to be regarded as an extinguishment of the prior note, although it

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31. In First Nat. Bank v. Morgan, 6 Hun, 348, suit was brought on a note dated September 8, 1869. On November 8, 1869, a renewal note was given in place of the preceding, which had been delivered up; and upon the renewal note judgment was obtained, but execution thereon was returned unsatisfied. Bockes, J., said: "Now did the acceptance of this note of November 8th, and the subsequent proceedings thereon to enforce its payment, discharge the debt as against Morgan's estate? The giving of the note of November 8th did not satisfy or discharge the debt evidenced by the note of September 8th. Cole v. Sackett, 1 Hill, 516; Elwood v. Deifendorf, 5 Barb. 398; Winsted Bank v. Webb, 39 N. Y. 325; Pratt v. Foote, 12 Barb. 212, 213; Farrington v. Frankfort Bank, 24 Barb. 562; Olcott v. Rathbone, 5 Wend. 490; Bates v. Rosekrans, 37 N. Y. 409. Nor did its prosecution to judgment without satisfaction. Davis v. Anable, 2 Hill, 339; Hawks v. Hinchleff, 17 Barb. 492; Corn Exchange Ins. Co. v. Babcock, 57 Barb. 231."

32. 2 Parsons on Notes and Bills, 203; *ante*, § 1266.

33. Hesse v. Dille, 23 W. Va. 97, citing the text. (But see Compton v. Patterson, 28 S. C. 116.)

34. Watkins v. Hill, 8 Pick. 522. See Pomeroy v. Rice, 16 Pick. 22; 2 Parsons on Notes and Bills, 205, 219. See vol. I, § 748; Taft v. Boyd, 13 Allen, 84; Dodge v. Emerson, Sup. Ct. Mass., Oct., 1881, Alb. L. J. for Feb. 25, 1882, p. 155.

35. *Ante*, § 205; Ritter v. Singmaster, 73 Pa. St. 400; Sloman v. Cox, 1 Cromp., M. & R. 471; Goodrich v. Tracey, 43 Vt. 314; Byles on Bills (Sharswood's ed.) [*230], 373; Edwards on Bills, 200.

may not have been actually surrendered." [36] The constant introduction of such refinements shows an impatience with the general principle that a note is not payment unless paid; and if that general principle be conceded, as it must be, to be the rule of the common law and the law merchant, consistency with principle would not admit anything to be payment except money, or something else accepted as such. As said in another New York case by Folger, J.: "Until the promise is in fact redeemed there is no payment." [37]

§ **1267. Rebuttal of presumptions.**— The presumptions of the law which have been referred to are universally held to be open to rebuttal; and it is competent for the parties to show that the bill or note was by express agreement received in absolute payment and discharge of the contemporaneous or precedent debt, or the contrary,[38] or that there were facts and circumstances attendant upon the transaction from which an understanding and agreement might be inferred.[39] But the mere fact that a receipt or memorandum passed between the parties at the time speaks of the transaction as "in payment," or "payment in full," or "in satisfaction," it has been considered would not alone warrant the inference that absolute payment was intended, but would be interpreted as meaning conditional payment, to be in full when paid.[40] But a different

36. Phœnix Ins. Co. v. Church, 81 N. Y. 226 (1880).

37. Jagger Iron Co. v. Walker, 76 N. Y. 526; First Nat. Bank of Creede v. Miner, 9 Colo. App. 361, 48 Pac. 837; Holland Trust Co. v. Waddell, 75 Hun, 104, 26 N. Y. Supp. 980; Harvey v. First Nat. Bank, 56 Nebr. 320, 76 N. W. 870; Savings Bank v. Central Market Co., 122 Cal. 28, 54 Pac. 273.

38. Boyd v. Hitchcock, 20 Johns. 76; Booth v. Smith, 3 Wend. 66; Thompson v. Wilson, 27 Ind. 370; Appleton v. Parker, 15 Gray, 173; Butts v. Dean, 2 Metc. (Mass.) 76; Comstock v. Smith, 22 Me. 262; Follett v. Steele, 16 Vt. 30; Shumway v. Reid, 34 Me. 560; Iowa County v. Foster, 49 Iowa, 676; Ferguson v. Harris, 39 S. C. 323, 17 S. E. 782, 39 Am. St. Rep. 731, note; Wipperman v. Hardy, 17 Ind. App. 142, 46 N. E. 537; Cushwa v. Improvement, etc., Assn., 45 W. Va. 490, 32 S. E. 259.

39. Harris v. Lindsay, 4 Wash. C. C. 98, 271; White v. Howard, 1 Sandf. 81; Belleville Bank v. Bornman, 124 Ill. 207, citing the text. In the last case, it was held that the question of payment should have been submitted to the jury.

40. Tobey v. Barber, 5 Johns. 68; Maillard v. Duke of Argyle, 6 M. & G. 40; Berry v. Griffin, 10 Md. 27; Muldon v. Whitlock, 1 Cow. 290; Glenn v. Smith, 2 Gill & J. 494; Putnam v. Lewis, 8 Johns. 389; Steamboat Charlotte v. Hammond, 9 Mo. 58; McLaughan v. Bovard, 4 Watts, 308; Gardner v. Gorham, 1 Doug. 507; *In re* Hurst, 1 Flipp. C. C. 462; Hotchin v. Secor, 8 Mich. 494; Feamster v. Withrow, 12 W. Va. 651; Dudgeon v. Haggart, 17 Mich. 273; Burchard v. Frazer, 23 Mich. 228; Maze v. Miller, 1 Wash. C. C. 328, 2 Am. Lead. Cas. 246, 247. In 1 Smith's Lead. Cas. (7th Am. ed.) 713, it is said:

view has been taken in some cases.[41] It is clear that when the receipt is "in full when paid," it contemplates the transaction as conditional payment only.[42]

And the presumption of payment does not apply where the creditor abandons some security which he held when he takes the paper.[43] The transaction, however, is always to be inspected in all its parts, and the intent of the parties, as revealed by its circumstances, is the controlling guide to its construction. And the words "received and accepted in satisfaction," employed in settlement of a claim which was in judgment against the maker of the note, coupled with the fact that he gave an indorser on the note so given, were recently considered in Virginia sufficient to show an absolute discharge of the judgment by the debtor's note indorsed.[44]

§ **1268.** In some cases it has been held that an agreement to take a bill or note in absolute payment of a debt must be express in order to render it such;[45] but the better opinion is that such agreement may be implied, as well as expressed, and that all the circumstances may be looked to, to ascertain what was the actual agreement of the parties.[46]

§ **1269. Fraudulent representations on transfers in payment render them void as such.**— If the debtor, at the time when he passes the bill or note of a third party in payment, represents that it is good, or that the parties to it are solvent, knowing at the time the con-

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"Merely receipting the notes as cash, or giving a receipt in full, or receipting the notes as being payment of the debt, will not alone be sufficient to prove that the notes were taken, not as conditional payment, but as an immediate and absolute discharge." Soule v. Soule, 157 Mass. 451, 32 N. E. 663.

41. The rule in Louisiana is different. Barron v. How, 13 Mart. 144.

42. Dayton v. Trull, 23 Wend. 345.

43. Pomeroy v. Rice, 16 Pick. 22; Butts v. Dean, 2 Metc. (Mass.) 76; Fowler v. Ludwig, 34 Me. 455; Bank v. Good, 21 W. Va. 467, citing the text.

44. Morriss v. Harvey, Sup. Ct. Va., Sept., 1881, Va. L. J., Jan., 1882, p. 21.

45. Dougal v. Cowles, 5 Day, 511; Muldon v. Whitlock, 1 Cow. 290; Hays v. Stone, 7 Hill, 128; Glenn v. Smith, 2 Gill & J. 493; Conkling v. King, 10 Barb. 372; Pritchard v. Smith, 77 Ga. 465.

46. Merrick v. Boury, 4 Ohio St. 60; Miller v. Lumsden, 16 Ill. 161; Fulford v. Johnson, 15 Ala. 384; Gordon v. Price, 10 Ired. 385; Hart v. Boller, 15 Serg. & R. 162; Berry v. Griffin, 10 Md. 27; Johnson v. Cleaves, 15 N. H. 332; Slocumb v. Holmes, 1 How. (Miss.) 139; Norton v. Paragon Oil Can Co., 98 Ga. 468, 25 S. E. 501; Cushwa v. Improvement, etc., Assn., 45 W. Va. 490, 32 S. E. 259.

trary, it is fraud upon the creditor, and immediately on discovering it he may sue the debtor for the original debt.[47] Or if such bill or note were given for goods delivered at the time, the vendor may disaffirm the contract, and sue in trover for the goods. In New York, where there was an agreement to sell a quantity of flour for the note of one Lyon, and when the flour was demanded and the note tendered, Lyon had failed, it was held that the contract, though valid, was executory; and that the consideration for the flour had failed, and the vendor was not bound to part with the flour for the note of an insolvent.[48] The court assumed the law to be that upon an agreement to accept notes in payment, if the notes turned out bad before the article was delivered, a tender of them would not be good unless the vendor had contracted to run the risk.

§ **1270.** In defense to an action on a debt, it is sufficient to plead that a bill or note payable to order or bearer was delivered for or on account of the amount, and is still current, or has been transferred to a third party.[49] It is necessary to state in the plea that the bill or note was payable to order or bearer.

If a debtor give a bill or note in payment to an agent whom he knows has no authority to receive anything but cash, he is not discharged from the demand of the principal.[50]

§ **1271.** If the debtor, instead of paying the creditor, directs him to take a bill of a third person, and he does so, and the bill is

47. Bridge v. Batchelder, 9 Allen, 394; Hawse v. Crowe, 1 Ryan & M. 414; Pierce v. Drake, 15 Johns. 475; Bayard v. Shunk, 1 Watts & S. 94; Martin v. Pennock, 2 Barr, 376; Lowrey v. Murrell, 2 Port. 280; Brown v. Montgomery, 20 N. Y. 287; Long v. Sprull, 7 Jones (Law), 96; Delaware Bank v. Jarvis, 20 N. Y. 226; Gurney v. Womersley, 4 El. & Bl. 133 (82 Eng. C. L.); Fenn v. Harrison, 3 T. R. 759; Popley v. Ashlin, 6 Mod. 147, Holt, 121. See chapter XXII, § 736, vol. I; also 2 Parsons on Notes and Bills, 41, 266; Byles on Bills (Sharswood's ed.) [*157, 158], 278, 279, note; Story on Bills, § 225.

48. Rogett v. Merritt, 2 Cal. 117. And it has also been held that an action to recover damages, resulting from fraud in obtaining goods by false representation, may be brought before the maturity of a note received in payment therefor, in reliance upon the false representations, and the value of the goods so obtained may be recovered as damages for the fraud, if proved, provided it is shown upon the trial that the note has not been paid and the plaintiff offers to return the note to the defendant. See Thomas v. Dickinson, 67 Hun, 350, 22 N. Y. Supp. 260.

49. Kearslake v. Morgan, 5 T. R. 513; Griffiths v. Owens, 13 M. & W. 58; Price v. Price, 16 M. & W. 232; Crisp v. Griffiths, 2 Cromp., M. & R. 159.

50. Sykes v. Giles, 5 M. & W. 645.

dishonored, the debtor's liability revives;[51] and it is not necessary that the creditor should notify him of the dishonor.[52] If the creditor, not having the option of taking cash, takes of his own accord a bill of the debtor's agent, the debtor is not discharged.[53] But if the debtor refers his creditor to a third person for payment generally, and the creditor, having the option of taking cash, elects to take a bill, which is afterward dishonored, the original debtor is discharged.[54]

SECTION II.

SUSPENSION OF RIGHT OF ACTION BY TAKING BILL OR NOTE FOR OR ON ACCOUNT OF A DEBT.

§ **1272.** There is no doubt that a negotiable bill or note given for or on account of a contemporaneous or pre-existing debt, and whether or not it be in renewal of a previous bill or note, suspends all right of action on such debt during its currency — that is, until it is dishonored by nonacceptance or nonpayment. If this were not so, the creditor who took the additional security, in the form of a bill or note, might, in consequence of its negotiable character, transfer it to a *bona fide* holder, and subject the debtor to payment of both the original and the new debt.[55]

But as soon as the bill or note is dishonored, the original debt revives, and the creditor may pursue his remedy for it, or sue upon the bill or note.[56] The bill or note taken in conditional pay-

51. Marsh v. Pedder, 4 Campb. 257; Taylor v. Briggs, Moody & M. 28; Byles on Bills (Sharswood's ed.) [*370], 550.

52. Swinyard v. Bowes, 5 Maule & S. 62.

53. Robinson v. Read, 9 B. & C. 444 (17 Eng. C. L.); Marsh v. Pedder, 4 Campb. 257; Byles on Bills (Sharswood's ed.) [*371], 550; Continental Ins. Co. v. Dorman, 125 Ind. 189, 25 N. E. 213.

54. Strong v. Hart, 6 B. & C. 160 (13 Eng. C. L.).

55. Armistead v. Ward, 2 Pat. & H. 504; Black v. Zacharie, 2 How. 483; Van Epps v. Dillaye, 5 Barb. 244; Putnam v. Lewis, 8 Johns. 389; Raynor v. Laux, 28 Hun, 36; Lane v. Jones, 79 Ala. 161; Bank of New Hanover v. Bridgers, 98 N. C. 67, citing the text; Phœnix Ins. Co. v. Allen, 11 Mich. 501; Stedman v. Gooch, 1 Esp. 3; Kearslake v. Morgan, 5 T. R. 513; Griffith v. Owen, 13 M. & W. 58; Price v. Price, 16 M. & W. 231; Maier v. Canovan, 57 How. Pr. (N. Y.) 504; Edwards on Bills, 197; Byles on Bills (Sharswood's ed.) [*229], 379; Sturz v. Fischer, 19 App. Div. 198, 45 N. Y. Supp. 1009; Metzerott v. Ward, 10 App. D. C. 514, quoting with approval the text; Otto v. Halff, 89 Tex. 384, 34 S. W. 910, 59 Am. St. Rep. 56, text cited.

56. Stedman v. Gooch, 1 Esp. 4; Owenson v. Morse, 7 T. R. 50; Tobey v. Barber, 5 Johns. 68; Bank of Ohio Valley v. Lockwood, 13 W. Va. 426; Standard Oil Co. v. Snowden, 55 Ohio St. 332, 45 N. E. 320. In this case, a con-

ment becomes, by its dishonor, a collateral security, which the creditor may retain and endeavor to collect, without forfeiting the right to proceed in the principal cause of action, subject to the obligation of surrendering up the bill or note at the trial.[57]

§ 1273. When bill or note does not operate as suspension.— A bill or note given for or on account of a debt will not operate a suspension if the debtor fails to perform the entire agreement under which it was given. Thus, where suit has been commenced on a book account, and the defendant entered into an agreement to give his note for the amount and pay the costs of suit, but only gave his note, without paying such costs, it was held that the plaintiff might proceed in his action on the account.[58] And the like decision has been rendered even where the second bill had been negotiated.[59] But this has been justly said to be clearly wrong.[60] And clearly if the bill or note given for the antecedent debt were paid, the plaintiff could then proceed upon it, although the costs were not paid as agreed.[61]

It is better in all cases where a bill or note is given or transferred for a contemporaneous or precedent debt, that the parties should reduce their agreement respecting the transaction to writing, and state either that the instrument is taken in absolute payment, and at the clerk's risk, or else only in conditional payment

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tractor took from the owner of a structure three notes for the balance due for the building — the notes were indorsed and sold to a bank, and within four months after the completion of the structure, and while the bank was the owner and holder of the notes the contractor made and filed with the county recorder an affidavit in due form for perfecting a mechanic's lien for erecting the structure. Held, such lien was valid. While the decision in this case might seem to be in conflict with the general principle stated in the text, a careful reading of it shows that it is in harmony therewith. Burkett, J., delivering the opinion of the court, says: "The lien is taken to secure the indebtedness, and the indebtedness, whether in the form of an account or note, will remain secured by the lien until payment, and when payment shall be made the lien must be released, and upon refusal the same may be compelled by action. In the taking of the lien, it makes no difference who holds or owns the notes. When the owner of the property comes to make the payment he may be put to some inconvenience in ascertaining the parties entitled to receive the same, and obtaining a valid release of the lien, but such inconvenience is only an incident of the transaction." * * *

57. Price v. Price, 16 M. & W. 231; Jackson v. Brown, 102 Ga. 87, 29 S. E. 149, 66 Am. St. Rep. 156.

58. Putnam v. Lewis, 8 Johns. 389. **59.** Norris v. Aylette, 2 Campb. 329.

60. Edwards on Bills, 299. **61.** Dillon v. Rimmer, 1 Bing. 100.

to be in full when paid, which will at once settle controversy on the subject.[62] When this is not done, the question must necessarily be resolved by the jury, upon the statements of the parties and all the circumstances of the case,[63] except where there is no evidence whatever, in which event the presumptions which have been referred to would be followed.

§ **1274. The taking of a bill or note from a party bound by contract under seal,** does not extinguish or suspend the remedy on the sealed instrument, until such bill or note is actually paid. Obtaining a judgment upon it does not alter the case.[64] Nor will the taking of a bill or note for arrears of rent prevent the landlord from pursuing his remedy of distress.[65] Taking a forged note does not discharge the original, although the original be surrendered;[66] nor is an indorser of the original discharged if he was fixed by due notice.[67] And taking a usurious security would stand upon the same footing as a forged one, the avoidance of the security because of the usury reviving the debt.[68]

SECTION III.

RIGHTS AND DUTIES OF HOLDER OF BILL OR NOTE TAKEN IN CONDITIONAL PAYMENT.

§ **1275.** When suit is brought against a defendant upon a debt, whether evidenced by a note or otherwise, and it appears that he has given a bill or note for the same debt, which has become mature and is unpaid, where it does not operate as a bar to the suit, it is

62. Herring v. Sanger, 3 Johns. Cas. 71; Harris v. Lindsay, 4 Wash. C. C. 98, 271, 2 Am. Lead. Cas. 246.

63. Hart v. Boller, 5 Serg. & R. 162; Johnson v. Weed, 9 Johns. 307; Lyman v. Bank of United States, 12 How. 244; Gardner v. Gorham, 1 Doug. 207; Jackson v. Brown, 102 Ga. 87, 29 S. E. 149, 66 Am. St. Rep. 156.

64. Drake v. Mitchell, 3 East, 251; Curtis v. Rush, 2 Ves. & B. 416; Byles on Bills (Sharswood's ed.) [*370], 549; Standard Oil Co. v. Snowden, 55 Ohio St. 332, 45 N. E. 320.

65. Brown v. Gilman, 4 Wheat. 256; Chipman v. Martin, 13 Johns. 241; Harris v. Shipway, Buller N. P. 182; Byles on Bills [*370], 549; 2 Parsons on Notes and Bills, 164; Palfrey v. Baker, 3 Price, 572; Davis v. Gyde, 2 Ad. & El. 623, 4 N. & M. 462.

66. Goodrich v. Tracy, 43 Vt. 319; § 1266*b*.

67. Ritter v. Singmaster, 73 Pa. St. 400.

68. Gerwig v. Sitterly, 56 N. Y. 214; Cook v. Barnes, 36 N. Y. 520; Hughes v. Wheeler, 8 Cow. 77; Goodrich v. Tracy, 43 Vt. 319; Bank of Malvern v. Burton, 67 Ark. 426, 55 S. W. 483.

essential to the plaintiff's recovery that it be produced and surrendered up or otherwise satisfactorily accounted for at the trial. This is necessary as a safeguard to the defendant, for if the plaintiff should have passed it off before maturity to a third party, the defendant might be compelled to pay the debt a second time.[69] If the note were lost, and were negotiable, the better opinion is that the debtor should sue in equity where indemnity could be required, against his appearance in the hands of a *bona fide* holder.[70]

§ 1276. Debt discharged by laches in respect to demand or notice. — When a party contracts a debt, and contemporaneously gives in conditional payment his draft upon a third party, it is the duty of the creditor to present it in a reasonable time for acceptance or payment, and to give notice in the event of its dishonor to the drawer. If he fail to make such presentment, or to give due notice, the drawer is not only discharged from liability on the bill, but also from the debt or consideration for or on account of which it was given.[71] And where a bill or note is indorsed by the cred-

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69. Matthews v. Dare, 20 Md. 248; Cole v. Sacket, 1 Hill, 516; Lobey v. Barber, 5 Johns. 66; Dayton v. Trull, 23 Wend. 345; Alcock v. Hopkins, 6 Cush. 484; Hays v. McClurg, 4 Watts, 452; Milles v. Lumsden, 16 Ill. 161; Harris v. Johnston, 3 Cranch, 311; Jones v. Savage, 6 Wend. 658; Raymond v. Merchant, 3 Cow. 150; Smith v. Lockwood, 10 Johns. 367; Bank of Ohio Valley v. Lockwood, 13 W. Va. 427; Lazier v. Nevin, 3 Hagans (W. Va.), 622; Edwards on Bills, 204.

70. In Dangerfield v. Wilby, 4 Esp. 159, where the plaintiff sued to recover money lent, and it appeared that the debtor had given a note for the amount, which was not produced or accounted for, Lord Ellenborough nonsuited him, saying: "It was incumbent on him to show it to be lost, so that the defendant should not be again subjected to payment of it."

71. Mauney v. Coit, 80 N. C. 300, Smith, C. J., approving the text; Hawley v. Jette, 10 Oreg. 31, 45 Am. Rep. 133, citing the text; Schierl v. Baumel, 75 Wis. 69; Cheltenham Stone Co. v. Gates Iron Works, 124 Ill. 626. But it is no part of the duty of the creditor to return the dishonored paper to the debtor. He may retain it as collateral security for his claim. Stringfield v. Vivian, 63 Mich. 683; Berry v. Bridges, 3 Taunt. 130 (1810). The defendant being unable to pay a bill when it fell due, which he had accepted, indorsed to the plaintiff a bill drawn by the debtor himself and payable to his own order. It was dishonored by the drawee, who accepted, but did not pay it, and no notice was given the defendant. Held, that defendant was discharged both from the bill and the antecedent debt, for the reason that the plaintiff, by not giving him due notice, had put it out of his power to recover what was due thereon. See also Blanchard v. Tittavawassee Boom Co., 40 Mich. 566. In Dayton v. Trull, 23 Wend. 345, the defendant gave his draft payable one year from date, and the plaintiff suing for the precedent debt, it was

itor in conditional payment of a debt, the same rule would apply, the indorser standing in the relation of a new drawer; and if there were any laches respecting presentment or notice, he would be no longer liable on the note, or for the consideration.[72] The same rule applies where the debt was precedent.[73] And in like manner if the creditor takes a bill drawn and accepted, or indorsed by third parties, or a note indorsed by third parties as conditional payment or collateral security for a debt, and omits to present it at maturity, or give notice of its dishonor to those entitled thereto, it becomes money in his hands as between him and his debtor, and constitutes absolute payment.[74]

Where, however, a debtor gives his own note indorsed by other parties, or the bill or note of another party indorsed by himself, as collateral security merely for a debt already secured by his own note or otherwise, the creditor may pursue his remedy upon the principal and upon the collateral securities at the same time; and nothing but the satisfaction of the one will bar his right of recovery on the other.[75]

§ **1277. Conflicting authorities.**— But the authorities are somewhat confused and unsettled, it being contended in some cases that the rule which makes demand and notice essential to a recovery against a drawer or indorser does not apply in actions brought to recover a debt for which a bill or note has been taken in payment; and that want of demand and notice will not be a

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held that he must show that the draft had not been paid, and that due diligence had been exercised to present it, and gave notice. In Smith v. Miller, 43 N. Y. 171, Bronson, J., said: "Laches, which would discharge the drawer or indorser of a bill of exchange, will as effectually extinguish the debt for payment of which a bill or other negotiable instrument is transferred. Smith v. Miller, 52 N. Y. 546." Mehlberg v. Fisher, 24 Wis. 607; Allan v. Eldred, 50 Wis. 136; Betterton v. Roope, 3 Lea, 220; Middlesex v. Thomas, 5 C. E. Green, 39; Phœnix Ins. Co. v. Allen, 11 Mich. 501; Story on Bills, § 109; Edwards on Bills, 445. See §§ 452, 971; Manning v. Lyon, 70 Hun, 345, 24 N. Y. Supp. 265.

72. Jennison v. Parker, 7 Mich. 355; Phœnix Ins. Co. v. Allen, 11 Mich. 501; Booth v. Smith, 3 Wend. 66; Byles on Bills (Sharswood's ed.) [*372], 551; Edwards on Bills, 198, 201, 445; Redfield & Bigelow's Lead. Cas. 637, 642; Huston v. Weber, 3 Thomp. & C. (N. Y.) 147, 1 Hun, 120.

73. Ibid.; Story on Bills, § 109; Story on Notes, § 117; Edwards on Bills, 445; Tobey v. Barber, 5 Johns. 68.

74. Peacock v. Purcell, 14 C. B. (N. S.) 728; Edwards on Bills, 445.

75. Lazier v. Nevin, 3 Hagans (W. Va.), 622.

defense unless payment has actually been lost through the laches of the creditor.[76] But the holder of a bill or note taken for or on account of a precedent or contemporaneous debt is a holder for value. If he passes it to a third party, the parties are excluded from equitable defenses, and subjected to all the liabilities of parties to negotiable instruments; and thus exposed to the burdens, it seems but right that they should be entitled to exact all the privileges which attach ordinarily to their positions.

§ 1277a. Whether debt is discharged by failure to preserve liability of drawer or indorser of collateral bill or note.— When the transferrer indorses the bill or note merely as collateral security for or on account of a precedent debt, without any new consideration therefor, it has been considered that he is not entitled to require strict presentment and notice as an indorser; and that the responsibility of the creditor is limited to the loss occasioned by his negligence in respect to presentment and notice.[77]

But we do not see that this distinction rests on solid foundations. The indorsee of a collateral bill or note acquires the rights of a holder, and should correspondingly discharge a holder's duties.[78] And the principle has been well stated in an English case, by Erle, C. J., that "The legal effect of taking a bill as collateral security is, that if, when the bill arrives at maturity, the holder is guilty of laches, and omits duty to present it, and to give notice of its dishonor, the bill becomes money in his hands, as between him and the person from whom he received it."[79]

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76. Gallagher's Exrs. v. Roberts, 2 Wash. C. C. 191; Kephart v. Butcher, 17 Iowa, 240. See also Brooks v. Elgin, 6 Gill, 254; Cook v. Buck, 10 Humphr. 412; Hamilton v. Cunningham, 2 Brock. 350. In 2 Am. Lead. Cas. 259, 260, the learned editors, after commenting on the cases, say: "The true view would seem to be that the failure of the creditors to pursue the usual course of business with reference to commercial instruments taken for a debt is a *prima facie* bar to a suit for the debt itself, which may, notwithstanding, be removed by proving that the instrument was unavailable as a means of payment, and that the debtor has not been injured by the omission to present it at maturity and to give notice of its nonpayment."

77. Westphal v. Ludlow, 6 Fed. 348, 2 Am. Lead. Cas. 260. See §§ 452, 828, 971; Bridge Co. v. Savings Bank, 46 Ohio St. 228; Kennedy v. Rosier, 71 Iowa, 671; Merchants' State Bank v. State Bank of Philip, 94 Wis. 444, 69 N. W. 170.

78. See *ante*, § 828.

79. Peacock v. Purcell, 14 C. B. (N. S.) 728. See in accord Batterton v. Roope, 3 Lea, 220; Lee v. Baldwin, 10 Ga. 208; Haines v. Pearce, 41 Md.

§ 1278. Due diligence required of transferee by delivery.— When the debtor transfers by delivery merely the bill or note of another for an antecedent debt, he is undoubtedly not entitled to require strict presentment and notice, as he is not a party to the instrument.[80] Still, by accepting the instrument in conditional payment, the creditor comes under an obligation to use due diligence in making it subserve the purpose for which it was given; and if by his delay and laches he loses the opportunity to collect and apply the proceeds, he cannot then enforce the original right of action against the transferrer.[81] But the burden of proof is on the defendant in an action on the original consideration to show that there had been laches on the creditor's part; for if the bill or note remains in his hands, it is presumptive evidence that it has been dishonored by nonpayment.[82]

§ 1278a. Debt discharged by laches of the creditor in the collection of collaterals.— When the creditor accepts a chose in action from his debtor as collateral security for the payment of his debt, he incurs the obligation of taking such seasonable steps as may be necessary to preserve the liability of him against whom the right of action exists. His duties respecting the collaterals in his hands, are, with reference to their preservation, the same as those of a bailee or pledgee of chattels; he must exercise, in that regard, the care and diligence of a prudent business man. He cannot, therefore, passively allow the Statute of Limitations to become a bar to their enforcement. If, through his negligence, a right of action once accrued has been lost, the conditional character of their acceptance is gone, and they become an absolute satisfaction of the debt.[83]

221; Roberts v. Thompson, 14 Ohio, 1; Lawrence v. McCalmont, 2 How. 426; Hamilton v. Cunningham, 2 Brock. 350; Easton v. German-American Bank, 24 Fed. 536; Rumsey v. Laidley, 34 W. Va. 721, 12 S. E. 866, 26 Am. St. Rep. 935.

80. Story on Bills, § 109; Story on Notes, § 117.

81. Tobey v. Barber, 5 Johns. 68; Dayton v. Trull, 23 Wend. 345, 2 Am. Lead. Cas. 256.

82. Goodwin v. Coates, 1 Moody & R. 221; Bishop v. Rowe, 3 Maule & S. 362; 2 Parsons on Notes and Bills, 183; Byles on Bills (Sharswood's ed.) [*372], 551. But see Dayton v. Trull, 23 Wend. 345. See Rush v. First Nat. Bank, 17 C. C. A. 627, 71 Fed. 102.

83. Semple v. Detwiler, 30 Kan. 386; Ludden v. Marsters, 16 Nebr. 657; Easton v. German-American Bank, 24 Fed. 526; Martin v. Home Bank, 30 App. Div. 498, 52 N. Y. Supp. 466, citing text; First Nat. Bank v. O'Connell, 84 Iowa, 377, 51 N. W. 162, 35 Am. St. Rep. 313.

SECTION IV.

THE EFFECT OF TAKING A BILL OR NOTE UPON A LIEN.

§ **1279.** By the common law a party selling personal property has a right of lien for the purchase money as long as he retains possession of the property. A lien is simply a right to hold, and without possession there can be no lien.[84] The vendor's lien may be waived expressly. "It may also be waived by implication at the time of the formation of the contract, when the terms show that it was not contemplated that the vendor should retain possession until payment; and it may be abandoned during the performance of the contract, by the vendor's actually parting with the goods before payment."[85]

§ **1279a. When lien is regarded as waived.**— The circumstances under which the lien will be regarded as waived are as follows: (1) In the *first* place, it will be regarded as waived by implication when the goods are sold on credit,[86] unless there be an express agreement to the contrary, or an established usage to the same effect in the particular trade of the parties be shown.[87] (2) In the *second* place, the vendor's lien will also be waived by taking a bill, note, or other security payable in future for the goods bought.[88] A promissory note payable on demand, however, would not defeat the vendor's lien.[89]

§ **1280. When lien revives.**— But if the goods are permitted to remain in the vendor's hands until the bill or note given for them by the buyer falls due, and it is then dishonored, the

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84. Heywood v. Waring, 4 Campb. 291.

85. Benjamin on Sales, 598.

86. Spartali v. Benecke, 10 C. B. 212, 19 L. J. C. P. 293.

87. Field v. Lelean, 6 H. & N. 617, 30 L. J. Exch. 168, overruling on this point Spartali v. Benecke, *supra*.

88. In Chambers v. Davidson, L. R., 1 P. C. App. 296, 4 Moore P. C. C. (N. S.) 158, Lord Westbury said: "Lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile transaction which might involve a lien is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights to the extent of the express contract that they have made. *Expressum facit cessare tacitum.*" Bunney v. Poyntz, 4 B. & Ad. 568 (24 Eng. C. L.); Barrett v. Goddard, 3 Mason, 107; Byles on Bills (Sharswood's ed.) [*385], 566.

89. Clark v. Draper, 19 N. H. 419. *Contra,* Hutchins v. Olcott, 4 Vt. 549.

vendor's lien will be revived.[90] In such a case Lord Tenterden said: "We are of the opinion that, on nonpayment of the bill, the defendant ought to retain the goods."[91] Unless, indeed, the bill or note had been negotiated and were outstanding in the hands of a transferee, in which case the lien would not be revived by its dishonor.[92]

§ **1281. Vendor's lien on realty.**— When real property is sold, the principle relative to personal property does not apply, and the acceptance of a bill or note, upon which no third person is security, even when it is negotiated to a third party by discount or otherwise, does not amount to a relinquishment of the vendor's lien on the land for the unpaid purchase money.[93] The Master of the Rolls said in an English case: "The effect of a security of a third person has never been decided; but I concur with Lord Redesdale that bills of exchange are not security, but a mode of payment."[94] Nor will a check drawn on a bank by the vendee, which is not presented or paid, operate a relinquishment of the vendor's lien, nor any instrument whatever involving merely the vendee's responsibility,[95] even if another person be substituted for the original payee.[96] In Kansas, where a note was given and indorsed, it was said by Brewer, J.: "The lien which the vendor has is something more than a bare right, a personal privilege. It is an interest created by the contract of the parties, and is as fixed, complete, and absolute as the interest of a mortgage. It is more, for the mortgagee has no estate in the land under the decisions of this court, while the vendor, in a bond to convey, holds the legal title. It is a general rule that the incident follows the principal; the transfer of a debt carries with it the security. The vendor holds the legal title as security. He transfers the

90. New v. Swain, 1 Dan. & Ll. 193; Valpy v. Oakeley, 16 Q. B. 641; Dixon v. Yates, 5 B. & Ad. 341; Benjamin on Sales, 623.

91. New v. Swain, 1 Dan. & Ll. 193.

92. Bunney v. Poyntz, 4 B. & Ad. 568 (24 Eng. C. L.); Byles on Bills [*373], 553; 2 Parsons on Notes and Bills, 166.

93. Magruder v. Peter, 11 Gill & J. 217; Tompkins v. Mitchell, 2 Rand. 428; Bayley v. Greenleaf, 7 Wheat. 46; *Ex parte* Loring, 2 Rose, 79; Hughes v. Kearney, 1 Shoales & L. 135; Hall v. Mobile & M. R., 58 Ala. 10; 1 Lomax Digest [218], 268; Byles on Bills [*374], 554.

94. Grant v. Mills, 2 Ves. & B. 306; Story Eq. Jur., § 1226.

95. Honore v. Blakewell, 6 B. Mon. 67; Mims v. Macon, etc., R. Co., Kelly, 333.

96. Irvin v. Garner, 50 Tex. 48.

debt which is secured. Why may not the indorsee, the holder of the debt, avail himself of the security? In the case of a mortgage the rule is well settled. What is this but an equitable mortgage?" [97] And the ruling accorded with these views. If a negotiable note is drawn by the vendee, and indorsed by a third person, or drawn by a third person, and indorsed by the vendee, it is considered by high authorities that it will repel the lien presumptively.[98]

§ 1281a. Whether bond for purchase money waives vendor's lien. — It has been held that taking a bond for the purchase money of land waives the vendor's lien;[99] but the better opinion is to the contrary, and that the bond is mere evidence of the debt.[1] And when such securities are taken as to raise the presumption

97. Stevens v. Chadwick, 10 Kan. 406.

98. Brown v. Gilman, 4 Wheat. 526, 1 Mason, 192; Foster v. Trustees, 3 Ala. 302; Burk v. Gray, 6 How. (Miss.) 527; Woods v. Bailey, 3 Fla. 41; Boon v. Murphy, 6 Blackf. 1272; Campbell v. Baldwin, 2 Humphr. 248; White v. Dougherty, Mart. & Y. 309. See Cresap v. Manor, 63 Tex. 488; 1 Lomax Digest [218], 269. *Contra*, Magruder v. Peter, 11 Gill & J. 217. In Brown v. Gilman, 4 Wheat. 255, Marshall, C. J., said: "The notes for which the vendors stipulated are to be indorsed by persons approved by themselves. This is a collateral security on which they relied, and which discharges any implied lien on the land itself for the purchase money." And in the same case, when before the lower court (1 Mason, 191), Story, J., said: "On a careful examination of all the authorities, I do not find a single case in which it has been held, if the vendor takes a personal collateral security, binding others as well as the vendee — as, for instance, a bond, or note, with a security or indorser, or a collateral security by way of pledge or mortgage — that under such circumstances a lien exists upon the land itself."

99. Fawell v. Heelis, 2 Amb. 724; Winter v. Anson, 1 Sim. & S. 434.

1. White v. Casanove, 1 Harr. & J. 106; Cox v. Fenwick, 3 Bibb, 183; Young v. Wood, 11 B. Mon. 23; Lagow v. Badollet, 1 Blackf. 416; Cole v. Withers, 33 Gratt. 193; Yaney v. Mauck, 15 Gratt. 300; Knisely v. Williams, 3 Gratt. 253; Story Eq. Jur., § 1226. Chancellor Kent has said on this subject in his Commentaries, vol. IV, § 58 [*153], "In several cases it is held that taking a bond from the vendee for the purchase money, or the unpaid part of it, affected the vendor's equity, as being evidence that it was waived, but the weight of authority and better opinion is, that taking a note, bond, or covenants from the vendee for the payment of the money, is not of itself an act of waiver of the lien, for such instruments are the only ordinary evidence of the debt. Taking a note, bill, or bond, with distinct security, or taking distinct security exclusively by itself, either in the shape of real or personal property from the vendee, or taking the responsibility of a third person, is evidence that the seller did not repose upon the lien, but upon independent security, and it discharges the lien."

of a waiver of the lien, that presumption may be repelled by proof.[2]

§ **1281b. Transfer of note for purchase money.**— When a note is given for purchase money of land, and is transferred by the vendor, the lien passes also to the transferee,[3] unless the indorsement were without recourse or the vendor who transfers guarantees the payment, in either of which cases the lien is defeated.[4]

§ **1282. Mechanics' liens.**— In many of the States of the United States statutes have been enacted giving mechanics' liens on the buildings or works constructed, for the amount of materials furnished and labor done upon them. And, as a general rule, it may be stated that such liens are not waived by the receipt, on the part of the mechanic, of a bill of exchange or negotiable promissory note for the amount of the debt which such lien secures,[5] but pass as an incident of the debt by the transfer of the security for its payment.[6] Taking a bond even for such a debt would not be regarded as waiving such a lien. Additional securities are in their nature cumulative, and where parties have not expressly or impliedly so stipulated, there is no reason why the one should be regarded as a relinquishment of the other.[7]

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2. Story Eq. Jur., § 1226.

3. Sloan v. Campbell, 71 Mo. 387; Hall v. Mobile & M. R., 58 Ala. 10; Edwards v. Bohannon, 2 Dana, 98; Woods v. Bailey, 3 Fla. 41; Stevens v. Chadwick, 10 Kan. 406, 15 Am. Rep. 352, 353; Buchanan v. Kimes, 58 Tenn. 275, 36 Am. Rep. 493; Hamblen v. Folts, 70 Tex. 135; Felton v. Smith, 84 Ind. 485; Hagerman v. Sutton, 91 Mo. 520. See *ante*, §§ 748, 834. In some cases it has been held that if the vendor's lien be not reserved, but is merely equitable in its character, the transfer of the vendee's note by the vendor does not carry with it the lien. Pollow v. Helm, 7 Baxter, 545; Green v. De Moss, 10 Humphr. 374. But the assignment of the lien is in any event merely equitable, and the distinction as to the assignment of express and implied liens does not seem tenable. See 2 Parsons on Notes and Bills, 167–169, and notes. The payee of the transferred note cannot, after the transfer before maturity, impair the security of the lien inuring to the transferee, by entering satisfaction of the debt on the record. Lee v. Clark, 89 Mo. 551; Hagerman v. Sutton, 91 Mo. 520; Degenhart v. Short, 15 Tex. Civ. App. 636, 40 S. W. 150.

4. Woods v. Bailey, 3 Fla. 41; Schnebly v. Ragan, 7 Gill & J. 120.

5. Sweet v. James, 2 R. I. 270; Gable v. Gale, 7 Blackf. 218; Steamboat Charlotte v. Hammond, 9 Mo. 58; Mix v. Ely, 2 Greene, 508, 513; Rhodes *et al.* v. Webb-Jameson Co. *et al.*, 19 Ind. App. 195, 49 N. E. 283.

6. Jones v. Hurst, 67 Mo. 568.

7. Kinsley v. Buchanan, 5 Watts, 118; Henchman v. Lybrand, 14 Serg. & R. 32.

CHAPTER XL.

DISCHARGES OF BILLS AND NOTES OTHERWISE THAN BY PAYMENT.

SECTION I.

DISCHARGES BY OPERATION OF LAW.

§ **1283.** Besides the discharge of all liability by payment, there may be other discharges by operation of law and by agreement between the parties. By operation of law the obligation of any party to the bill or note may be discharged: (1) By a general bankrupt or insolvent act of the State or country where the contract is made or is payable.[1] (2) By merger of the bill or note in a judgment thereon against the party or parties liable thereon. (3) By appointment of the maker or acceptor to be the executor of the holder.[2] (4) By gift or bequest of the bill or note to the maker or acceptor by last will. (5) By any matter which constitutes such discharge by the local law.

§ **1284. Judgment merges debt.**—As between the parties thereto, a judgment on a bill or note operates as a merger of the indebtedness, and while other parties to the instrument may be sued upon it, the one against whom the judgment has been obtained is liable only under such judgment. The judgment extinguishes the bill or note as to the judgment debtor, but is no satisfaction so as to discharge other parties until paid.[3] If the

1. But the insolvent laws of a State have no extraterritorial force or effect. They are inoperative as to citizens of another State or Territory, although the contract is to be performed within the State granting the discharge. Baldwin v. Hale, 1 Wall. 223; Soule v. Chase, 39 N. Y. 342; Pratt v. Chase, 44 N. Y. 597.

2. This is the common-law rule. But in equity the executor is accountable for the amount of his debt as assets if necessary for payment of debts of the testator; otherwise he is discharged. Story on Notes, § 444; Marvin v. Stone, 2 Cow. 781. And the common-law rule is generally abolished by statutes in the United States.

3. Russell & Erwin Mfg. Co. v. Carpenter, 5 Hun, 164; Claxton v. Swift, 2 Show. 441; Tarleton v. Allhusen, 2 Ad. & El. 32; Story on Notes, § 409; 2 Parsons on Notes and Bills, 232; Byles on Bills (Sharswood's ed.) [*228], 372.

judgment be rendered by a court without jurisdiction it is void and without effect.[4]

§ **1285.** There are some other cases in which the debt may be extinguished by merger. Thus, at common law, if the creditor appoint his debtor executor, by the English law it operates at law as a release or extinguishment of the debt, provided there are other assets to pay the creditor's debt.[5] But this principle does not obtain in the United States. Where one of three acceptors is the holder of the bill at maturity, the liability to pay, and the right to receive the money, concur in one person, and operates as performance and extinguishment of the contract.[6] So where an estate descends to the debtor as heir.[7] So a gift of the bill or note to maker or acceptor cancels it.[8]

§ **1286.** A bill is not satisfied by bequest of a legacy by the drawer to the payee who is its holder.[9] But an entry by the testator who is holder of the bill, in his book, that the maker of a note should pay no interest, and should not be called on for the principal, discharges it.[10]

SECTION II.

DISCHARGES BY AGREEMENT OF THE PARTIES.

§ **1287.** By agreement between the parties a discharge may be effected: (1) By accord and satisfaction by receipt of some collateral thing from the maker or acceptor. (2) By a release from the holder to the maker or acceptor. (3) By a covenant never to sue the maker or acceptor on the instrument. (4) By agreement that another may be substituted as the debtor. (5) By agreement that another security shall be taken in lieu of the bill or note. (6) By taking a higher security.

§ **1288. First: An accord and satisfaction,** as between the maker or acceptor and the holder, by the giving and acceptance of some

4. Linn v. Carson, 32 Gratt. 171.

5. Williams on Executors, 937; Freakley v. Fox, 9 B. & C. 130; Story on Bills, § 442; Story on Notes, § 407; Byles on Bills (Sharswood's ed.) [*54, 233], 140, 376.

6. Harmer v. Steele, 4 Welsby, H. & G. 1.

7. Story on Bills, § 445.

8. Stewart v. Hidden, 13 Minn. 43.

9. Carr v. Eastabroke, 3 Ves. 561.

10. Edon v. Smyth, 5 Ves. 341, 350, note, citing Ashton v. Pye.

collateral thing in the discharge of the bill or note, utterly extinguishes it.[11] For whatever amounts to satisfaction of a bill or note by the acceptor or maker is satisfaction as to all parties who are collaterally liable. Satisfaction made by one partner of a firm, which are either makers or indorsers, discharges all the partners; and so where a person is partner in two firms, one of which are the makers, and the other indorsers of the note, satisfaction by him discharges both firms.[12] If an executory contract is the consideration of another executory contract, both may be mutually rescinded, the giving up one being the consideration for giving up the other.[13]

But a contract upon an executed consideration cannot be discharged either before[14] or after the breach,[15] save by a release, or by satisfaction for a valuable consideration. If the holder of a bill or note renounces his claim and gives up the instrument, the drawer and indorsers are as much discharged as by payment, and he cannot sue the maker or acceptor upon it. And having voluntarily relinquished the evidence of the debt, it may be doubted if he could sue the maker or acceptor at all.

§ 1289. Part payment is ordinarily only payment pro tanto.— A part payment of a bill or note which has fallen due only extinguishes it *pro tanto*, and an agreement that it shall be in full discharge of the debt does not make such part payment any more effectual as to the residue, there being no sufficient consideration for the discharge of the whole.[16] But any agreement by

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11. Shade v. Creviston, 93 Ind. 592; Sterling Wrench Co. v. Amstutz, 50 Ohio St. 484, 34 N. E. 794. Where a debtor sent a check to his creditor saying "we desire this to be in full settlement of account but admit that you do not allow the claim" and the creditor took the amount, it was held no accord and satisfaction. Van Dyke v. Wildor & Co., 66 Vt. 583, 29 Atl. 1016.

12. Atkins v. Owens, 4 Nev. & Man. 123.

13. King v. Gillet, 7 M. & W. 55.

14. Byles on Bills (Sharswood's ed.) [*224], 367, note.

15. Byles on Bills (Sharswood's ed.) *225, 368; 2 Parsons on Notes and Bills, 235.

16. Fitch v. Sutton, 5 East, 230; Pinnel's Case, 5 Co. 117; Price v. Cannon, 3 Mo. 453; Meyers v. Byington, 34 Iowa, 205; Bender v. Been, 78 Iowa, 283; Missouri Loan Bank v. Garner, 1 Mo. App. 200; Rea v. Owens, 37 Iowa, 262; Carroway v. Odeneal, 56 Miss. 223; Cavaness v. Ross, 33 Ark. 572; Rothschild v. Mosbacker, 26 App. Div. 167, 49 N. Y. Supp. 698, citing Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351; Nassoiy v. Tomlinson, 148 N. Y. 330, 42 N. E. 715, 51 Am. St. Rep. 695; Hamilton & Co. v. Stewart, 105 Ga. 300,

way of compromise,[17] or composition,[18] into which any new element entered, would be sustained, and if the claim were disputed, agreement to receive part payment in full would discharge it. After a smaller amount than the existing debt has been accepted in full satisfaction by way of compromise, there is no consideration for a note afterward executed for the amount released by the creditor.[19]

§ 1289a. When part payment will support agreement to accept it in satisfaction.— If the part payment were before maturity,[20] or were made by a stranger,[21] or was made by a bill or note with a surety,[22] or collateral security,[23] or were in any way more

31 S. E. 184; Sheets, Admr. v. Russell, 12 Ind. App. 677, 40 N. E. 30; Hodges v. Traux *et al.*, 19 Ind. App. 651, 49 N. E. 1079.

17. Jenks v. Barr, 56 Ill. 450; 2 Parsons on Notes and Bills, 218; Sibree v. Tripp, 15 M. & W. 23; Cumber v. Wane, 1 Str. 425; Wells v. Morrison, 91 Ind. 62. Ordinarily the retention of a check inclosed in a letter, which refers to the amount as the balance due on account between the parties will not be held to be an accord and satisfaction so far as to bar an action for the balance. (Citing cases.) It is only in cases where a dispute has arisen between the parties as to the amount due, and a check is tendered on one side in full satisfaction of the matter in controversy, that the other party would be deemed to have acquiesced in the amount offered by an acceptance and a retention of the check. Eames Brake Co. v. Prosser, 157 N. Y. 290, 51 N. E. 986; Lincoln, etc., Co. v. Allen, 27 C. C. A. 87, 82 Fed. 148.

18. Murray v. Snow, 37 Iowa, 410; Hanover Nat. Bank v. Blake, 142 N. Y. 404, 37 N. E. 518, 40 Am. St. Rep. 607; Continental Nat. Bank of Chicago v. McGeoch *et al.*, 92 Wis. 286, 66 N. W. 606.

19. Rasmussen v. State Nat. Bank, 11 Colo. 304. In New York held that where a debtor sends a draft to his creditor, stating it to be in full payment of his account to date, and the creditor retains and uses the draft, but declines to regard it as full payment, and the debtor thereupon demands that it be taken as such or that it or its avails be returned at once, and the creditor neglected to return the draft or its proceeds, but repeats his demand for a balance alleged to be still due, there is accord and satisfaction; the claim is canceled and no protest, declaration, or denial of the creditor can vary the result. See Freiberg v. Moffett, 91 Hun, 17, 36 N. Y. Supp. 95. See also Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351; Fuller v. Kemp, 138 N. Y. 238, 33 N. E. 1034; Pottlitzer v. Wesson, 8 Ind. App. 472, 35 N. E. 1030.

20. Bowker v. Childs, 3 Allen, 434; Brooks v. White, 2 Metc. (Mass.) 283; Whittle v. Skinner, 23 Vt. 231; Lee v. Oppenheimer, 32 Me. 253; Bank v. Shook, 100 Tenn. 436, 45 S. W. 338, citing text.

21. Welby v. Drake, 1 Car. & P. 557; Thompson v. Percival, 5 B. & Ad. 925.

22. Hardman v. Bellhouse, 9 M. & W. 596; Mason v. Campbell, 27 Minn. 54.

23. Lewis v. Jones, 4 B. & C. 506.

advantageous to the creditor,[24] it would suffice to support any agreement based upon it. As said, in Massachusetts, by Dewey, J.: "The same ancient authority which declares that the payment and acceptance of a less sum on the day the debt becomes due, in satisfaction of a greater, is no defense beyond the amount paid, also declares that the payment and acceptance of a less sum before the day of payment has arrived, in satisfaction of the whole, would be a good accord and satisfaction, for it is said, peradventure, parcel of the sum before the day it fell due would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material." [25] The same rule would apply if a number of notes, some of which were due and some of which were not due, were delivered up for less than face value;[26] and also if the old note were by agreement surrendered up for a new one, the contract then being executed.[27] Where suit had been brought on a note, and a compromise was effected, the holder agreeing to indorse on the note a credit of $50, if defendant would pay balance on a certain day, and under this agreement suit was dismissed, it was held, that on failure of defendant to pay the balance the payee might erase the credit given.[28]

§ **1290. Secondly: A release** is technically an instrument under seal, the seal importing a consideration. But the release of a party to a bill or note by any agreement, upon a valuable consideration, is as effectual as if made under seal.[29] And it discharges a joint party, and all parties who are subsequent to the

24. See Goddard v. O'Brien, Eng. High Ct., Q. B. Div., March 27, 1882, and Mechanics' Bank v. Huston, Sup. Ct. of Pa., Feb. 13, 1882, both of which cases are referred to in Cent. L. J., March 26, 1882, p. 401 (vol. XIV, No. 21), and in both of which it is held that the giving up of a negotiable instrument for a less sum than a debt, in full payment, introduces an element of advantage which discharges the debt. Ostrander v. Scott, 161 Ill. 339, 43 N. E. 1089.

25. Brooks v. White, 2 Metc. (Mass.) 283; Schweider v. Lang, 29 Minn. 255; Mason v. Campbell, 27 Minn. 54, citing the text; Clayton, Admr. v. Clark, Exr. *et al.*, 74 Miss. 499, 21 So. 565, 22 So. 189, 60 Am. St. Rep. 521.

26. Bowker v. Childs, 3 Allen, 436.

27. Draper v. Hill, 43 Vt. 439; Ellsworth v. Fogg, 35 Vt. 255.

28. Chamberlin v. White, 79 Ill. 549; Humphreys v. Third Nat. Bank, 21 C. C. A. 538, 75 Fed. 852.

29. Benjamin v. McConnell, 4 Gilm. 536; Milliken v. Brown, 1 Rawle, 391; Nicholson v. Revill, 4 Ad. & El. 675, 6 Nev. & M. 192; Sterling Wrench Co. v. Amstutz, 50 Ohio St. 484, 34 N. E. 794.

one released, and might have looked to him on making payment for reimbursement. It is not necessary that the releasor should be the holder of the instrument at the time of making the release.[30] But a release of a drawee before he accepts is no bar to a suit on his acceptance, for it can only operate on existing rights.[31]

If there is not a technical release under seal, which, as has been said, imports a consideration, no agreement can operate as a release, unless it is upon a sufficient consideration.[32] A verbal agreement of the payee of a note with the maker to release him, and accept a third party in his stead, who signs in pursuance of such agreement, is upon sufficient consideration, and is valid.[33]

§ 1291. **Thirdly: A general covenant not to sue** the maker or acceptor will operate as an extinguishment of the debts as to him,[34] and will, of course, operate as a discharge of the drawer and indorsers.[35] But such a covenant does not discharge another who is jointly liable with the covenantee;[36] nor will such a covenant not to sue, given by one of two creditors, operate as a release.[37] And a covenant not to sue for a limited time will not affect a release as between the parties (though it will discharge the sureties), unless it be stipulated that it may be pleaded in bar.[38] Nor will an agreement not to sue for a limited time discharge the party with whom it is made.[39]

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30. Scott v. Lefford, 1 Campb. 246; Flanagan v. Brown, 70 Cal. 254; Meslin's Exrs. v. Hiett, 37 W. Va. 15, 16 S. E. 437.

31. Hartley v. Manton, 5 Q. B. 247; Ashton v. Freestun, 2 M. & G. 1, 1 Scott N. R. 273; Brage v. Netter, 1 Ld. Raym. 65.

32. Keeler v. Bartine, 12 Wend. 110; Carter v. Zemblin, 68 Ind. 405; Scharf v. Moore, 102 Ala. 468, 14 So. 879.

33. Carpenter v. Murphee, 49 Ala. 84; Lyon v. Aiken, 70 Iowa, 16; Maness v. Henry, 96 Ala. 454, 11 So. 410.

34. Story on Notes, § 409.

35. Byles on Bills (Sharswood's ed.), 384; First Nat. Bank v. Day, 64 Iowa, 120, citing the text.

36. Dean v. Newhall, 8 T. R. 168; Hutton v. Eyre, 6 Taunt. 289; Lacy v. Kinnaston, Holt, 178, 1 Ld. Raym. 688; Twopenny v. Young, 3 B. & C. 208; 2 Parsons on Notes and Bills, 238; Story on Notes, § 409; Story on Bills, § 431.

37. Walmsley v. Cooper, 11 Ad. & El. 216, 3 Per. & D. 149.

38. Drage v. Netter, 1 Ld. Raym. 65; Hartley v. Manton, 5 Q. B. 247; Ashton v. Freestun, 2 M. & G. 1; Thimbleby v. Barron, 3 M. & W. 210; Byles on Bills (Sharswood's ed.) [*240], 385.

39. Ford v. Beech, 11 Q. B. 842 (63 Eng. C. L.); Byles on Bills (Sharswood's ed.) [*230], 374.

§ **1292. Fourthly and fifthly: The substitution of another debtor, or of another security** for the bill or note, do not require extended notice. They depend upon the agreements between the parties, and are governed by the general law of contracts.[40]

§ **1293. Sixthly: Bond or covenant for debt.**— A bill or note, or other simple contract debt, is merged in a bond or covenant taken for or to secure the claim, as against the party executing such bond or covenant, because in legal contemplation the specialty is an instrument of a higher nature, and affords a higher security and a better remedy than the original demand presented.[41] But this does not hold even in favor of a surety by simple contract, if it appear on the face of the subsequent deed that it was intended only as an additional or collateral security, and there is nothing in the deed itself expressly inconsistent with such intention.[42] Nor would the principle stated apply where bonds are given for interest on coupons secured by mortgage, for so long as the debt remains the courts will never presume the principal security to have been surrendered without satisfaction.[43]

SECTION III.

DISCHARGE OF A JOINT PARTY.

§ **1294.** A note may be the joint note of two or more parties, or it may be the joint and several note of two or more parties. A note simply joint is the single note of all the joint parties taken collectively. But the joint and several note of the same parties is one more than as many notes as the number of the signers, being the several note of each one of them and the joint note of all.[44]

Now, when the maker of a joint note, or a joint acceptor, or joint indorser, is discharged by a release or otherwise, all others jointly bound with him are discharged; for no separate suit against each, or joint suit against all, can be maintained in such

40. Armstrong v. Cache Valley Land & Canal Co., 14 Utah, 450, 48 Pac. 690.
41. Story on Notes, § 409.
42. Bowles v. Elmore, 7 Gratt. 390.
43. Gilbert v. W. C. V. M., etc., R., 33 Gratt. 597; Cole v. Withers, 33 Gratt. 186.
44. King v. Hoare, 13 M. & W. 505.

a case. And, besides, the discharge of one by the holder deprives the others of the right of proportional relief by contribution, which they would otherwise become entitled to on making payment.[45]

§ 1295. An agreement with one partner to look to him only for the whole debt, if not for a valuable consideration, will not discharge him.[46] But if the holder accept from him a separate security in discharge of the social debt, that will be sufficient.[47] So an agreement by which the creditor undertakes, upon payment of one-half of his debt by one joint maker, to look to the other for the balance, is not binding unless shown to have been made upon valuable consideration.[48] A release of one of two joint debtors will not discharge the others if the holder's rights against them be expressly reserved;[49] nor will a copartner be discharged by time given another if there be such a reservation.[50] Where one of three partners, after a dissolution of partnership, undertook to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills, it was held that the separate notes, having proved

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45. Nicholson v. Revill, 6 Nev. & M. 192, 4 Ad. & El. 675; Brooks v. Stuart, 10 Ad. & El. 854; King v. Morrison, 2 Dev. 341; Harrison v. Close, 2 Johns. 448; Tuckerman v. Newhall, 17 Mass. 581; Boardman v. Paige, 11 N. H. 431; Robertson v. Smith, 18 Johns. 459; Crawford v. Roberts, 8 Oreg. 324; Byles on Bills (Sharswood's ed.) [*232], 375; Thompson on Bills, 387; Story on Bills, § 431; Story on Notes, §§ 425, 435; 1 Parsons on Notes and Bills, 247, 250; Edwards on Bills, 573, 574; Chitty on Bills (13th Am. ed.) [*416], 470, 472. It has been held in Colorado, that the principle stated in the text is applicable to joint and several as well as to joint promissory notes. See Heckman v. Manning, 4 Colo. 543; Hochmark v. Richler, 16 Colo. 265, 26 Pac. 818; Sully v. Campbell, 99 Tenn. 434, 42 S. W. 15; Brant v. Barnett *et al.*, 10 Ind. App. 653, 38 N. E. 421; Stevens v. Hannan, 86 Mich. 305, 48 N. W. 951, 24 Am. St. Rep. 125; Munyon v. French, 60 N. J. L. 18, 36 Atl. 771.

46. Lodge v. Dicas, 3 B. & Ald. 611.

47. Bedford v. Deakin, 2 B. & Ald. 210; Evans v. Drummond, 4 Esp. 89; Nicholson v. Revill, 4 Ad. & El. 675; Stephens v. Thompson, 2 Wms. 77; Story on Bills, § 431; Byles on Bills (Sharswood's ed.) [*48], 132.

48. Small v. Ober, 57 Iowa, 326.

49. Kearsley v. Cole, 16 M. & W. 128; Price v. Barker, 4 El. & Bl. 760; Thompson on Bills, § 387; 1 Parsons on Notes and Bills, 249.

50. Lodge v. Dicas, 3 B. & Ald. 611; Crawford v. Millspaugh, 13 Johns. 87.

unproductive, he might still resort to his remedy against the other partners; and that the taking under these circumstances the separate notes, and even afterward renewing them several times successively, did not amount to satisfaction of the joint debt.[51] Where there was an independent stipulation to pay contained in a mortgage executed by one of the joint makers of a note to secure its payment, the release of the other joint maker was held not to discharge the former.[52]

§ 1296. Judgment against joint promisor and covenant not to sue. — A judgment against one of two joint promisors is a bar to an action against both jointly,[53] and is also a bar to an action against the other one.[54] The joint parties cannot be sued separately, for they have incurred no separate obligation; and they cannot be sued jointly, because judgment has already been recovered against one who would be subjected to two suits for the same cause.[55] But where the liability is joint and several, a judgment against one does not preclude procedure against the other or others, though after judgment against one, all cannot be sued jointly.[56]

A covenant not to sue one of two or more joint makers does not discharge or release the others, being regarded as a mere personal covenant, for breach of which an action will not lie.[57] Nor does

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51. Bedford v. Deakin, 2 B. & Ald. 210, 2 Stark. 173. See Finch v. Galigher, 181 Ill. 625, 54 N. E. 611.

52. Walls v. Baird, 91 Ind. 433.

53. Mason v. Eldred, 6 Wall. 238; Willings v. Consequa, 1 Pet. C. C. 305; Gibbs v. Bryant, 1 Pick. 121; Smith v. Black, 9 Serg. & R. 145; Lechmere v. Fletcher, 1 Cromp. & M. 635; Odell v. Carpenter, 71 Ind. 467; Robertson v. Smith, 18 Johns. 459; Ward v. Johnson, 13 Mass. 148; King v. Hoare, 13 M. & W. 494, 5 Rob. Pr. 822; 1 Parsons on Notes and Bills, 249. But see Sheehy v. Mandeville, 6 Cranch, 253; Higgins' Case, 9 Co. Rep. 45; 2 Parsons on Notes and Bills, 252.

54. Ibid.; Byles on Bills (Sharswood's ed.) [*228], 272; Story on Notes, § 409; King v. Hoare, 13 M. & W. 494; Holman v. Langtree, 40 Ind. 349; Martin v. Baugh, 1 Ind. App. 20, 27 N. E. 110, citing text.

55. Mason v. Eldred, 6 Wall. 238. It has been held in Tennessee, that "Judgment against one for part does not bar suit against other makers for the whole note." See Sully v. Campbell, 99 Tenn. 434, 42 S. W. 15.

56. Story on Bills, § 428. See United States v. Cushman, 2 Sumn. 310, 426; Byles on Bills (Sharswood's ed.) [*228], 372, 5 Rob. Pr. 823; Giles v. Canary, 99 Ind. 116; Sully v. Campbell, 99 Tenn. 434, 42 S. W. 15; Jarnagin v. Stratton, 95 Tenn. 619, 32 S. W. 625.

57. Twopenny v. Young, 3 B. & C. 208; Mallet v. Thompson, 5 Esp. 178; Story on Notes, §§ 409, 421, 425.

part payment by one joint debtor discharge another,[58] nor the mere taking of security from one.[59]

§ **1297. Giving time to joint party.**— Upon the same principle that a covenant not to sue a joint party will not operate as a discharge of other joint parties, the giving of time to, and taking the note of one;[60] or proceeding in a suit against one even to judgment,[61] but without satisfaction, it has been thought, will be no discharge of the other joint parties; but the better opinion is that judgment against one joint party bars proceedings against al' other parties who are joint, and not also several.[62]

§ **1298. Death of joint party.**— At common law it is the settled doctrine that in case of a joint obligation, if one of the obligors die, his representative is at law discharged, and the survivor alone can be sued.[63] And it seems to be equally well settled, that if the joint obligor so dying be a surety not liable for the debt irrespective of the joint obligation, his estate is absolutely discharged both at law and in equity, the survivor only being liable,[64] and this is the case even though in the surety's lifetime there was a joint judgment against him and his coprincipal.[65] In many of the States statutes have changed this principle, but in others it is still preserved. In such cases where the surety owes no debt outside and irrespective of the joint obligation, the contract is the measure and limit of his liability. He signs a joint contract, and incurs a joint liability, and no other; and dying prior to his comaker, the liability attaches to the survivor alone.

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58. Ruggles v. Patten, 8 Mass. 480. See First Nat. Bank v. Bullard, 20 Mont. 118, 49 Pac. 658.

59. Bedford v. Deakin, 2 B. & Ald. 210; Thompson on Bills (Wilson's ed.), 393.

60. Draper v. Wild, 13 Gray, 580; Parker v. Cousin, 2 Gratt. 372; Story on Notes, §§ 409, 421; Story on Bills, § 428.

61. See Sheehy v. Mandeville, 6 Cranch, 253; Story on Notes, § 409, note 7.

62. *Ante*, § 1296; Story on Notes, § 409.

63. Getty v. Binsse, 49 N. Y. 388; Towers v. Moore, 2 Vern. 98; Simpson v. Vaughan, 2 Atk. 31; Harrison v. Field, 2 Wash. 136; Other v. Iveson, 3 Drew. Ch. 177.

64. Getty v. Binsse, 49 N. Y. 388; Simpson v. Field, 2 Cases in Ch. 22.

65. Risley v. Brown, 67 N. Y. 160.

SECTION IV.

DISCHARGE OF PARTNERSHIP DEBT BY BILL OR NOTE OF ONE PARTNER.

§ **1299.** The doctrine is now regarded as sound and well settled as a general rule (though there has been vacillation and difference of opinion on the question), that the giving of the separate bill or note of one of several partners for a copartnership debt, is good consideration for the discharge of the other partners. For it may be advantageous to the creditor in various ways; it avoids difficulties which might arise from suing the debtor with other defendants; in the event of his bankruptcy it would have priority over joint debts in England; and it may be more convenient and satisfactory to the creditor in the pursuit of his remedy, whether in equity or at law.[66]

§ **1300. Effect of separate note of one partner for partnership debt.** — The bill or note of one partner may be undoubtedly taken as collateral security merely for the firm's debt, in which case the latter is not affected thereby.[67] It may also be taken with an express reservation to the creditor of all remedies against the firm, in which case also the original liability of the firm is undoubtedly preserved.[68] But the question remains, what is the presumption when the separate bill or note of one partner is taken, payable at a future day, for the debt of the firm, and what is its effect? Partners are joint parties, not joint and several. And the prevailing doctrine is that the separate note of a partner for a partnership debt is not presumably an extinguishment or satisfaction thereof, and that the burden of proof is upon the party alleging it to show that such effect was intended.[69] In Massachusetts a different view

66. Thompson v. Percival, 5 B. & Ad. 925; Reed v. White, 5 Esp. 122; Evans v. Drummond, 4 Esp. 89; Powell v. Charless, 34 Miss. 485; Nicholas v. Cheairs, 4 Sneed, 231; Arnold v. Camp, 12 Johns. 410; Van Epps v. Dillaye, 6 Barb. 244; Waydell v. Luer, 3 Den. 510 (overruling same case, 5 Hill, 448, and Cole v. Sackett, 1 Hill, 516). See Sheehy v. Mandeville, 6 Cranch, 264; Edwards on Bills, 194, 195, 2 Am. Lead. Cas. 248; Byles on Bills (Sharswood's ed.) [*371], 550; 2 Parsons on Notes and Bills, 199.

67. 2 Parsons on Notes and Bills, 201.

68. See *post*, § 1322; Bedford v. Deakin, 2 B. & Ald. 210, Holroyd, J.; Story on Notes, § 425.

69. *Ante*, §§ 1295, 1297; Parker v. Cousins, 2 Gratt. 372; Estate of Davis and Desauque, 5 Whart. 530; Thompson v. Briggs, 8 Fost. 40; Gardner v. Conn, 34 Ohio St. 187; Muldon v. Whitlock, 1 Cow. 290; Montross v. Byrd,

prevails, but in that State, however, an individual note is presumptively payment.[70]

The view upon which this doctrine must rest is, that the one partner simply adds his separate security for a joint debt, and that, while it would be a breach of contract to sue him on the joint debt, while the separate security is current, his remedy lies by action for such breach (as, in like manner, it lies for breach of covenant not to sue[71]), and the creditor may at any time sue upon the original joint contract without regard to the separate security. If, when the separate security is taken, the note or other security of the firm is surrendered up, it would seem *prima facie,* though not conclusively, demonstrative of an intention to exchange the new security for the old, and to regard the latter as discharged.[72] And the question as to the intent of the parties is generally one of fact to be determined by a jury. The surrender of the partnership security and the acceptance of the separate note of one member, enables the latter to represent to his associates, with apparently satisfactory vouchers, that the partnership obligation is at an end, and to settle with them accordingly; and the case differs from those in which it is considered that no presumption of satisfaction arises from the renewal by an individual of his own paper, and the surrender to him of the instrument renewed.[73]

§ **1300a. Renewals in firm's name after dissolution.**— If after dissolution of a firm a creditor, who is not affected with notice of dissolution, take from one of the former partners a bill or note in the firm name, it is as binding on the firm as if no dissolution had occurred, upon principles stated in another portion of this

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6 La. Ann. 519; Leabo v. Goode, 67 Mo. 126; Powell v. Charless, 34 Mo. 485; Edwards on Bills, 193, 194; Lindley on Partnership (Ewell's ed.), *440, and note; Chase v. Brundage, 58 Ohio St. 517, 51 N. E. 31; Redenbaugh v. Kilton, 130 Mo. 558, 37 S. W. 67. Compare Oil Well Supply Co. v. Wolfe, 127 Mo. 616, 30 S. W. 145.

70. French v. Price, 24 Pick. 13. See *ante,* § 1266.

71. Story on Notes, § 421.

72. 5 Rob. Pr. 863; 2 Am. Lead. Cas. 271; Morriss v. Harvey, Sup. Ct. of Va., Sept. Term, 1881, reported in Va. L. J. for Jan., 1882, p. 21; Estate of Davis, 5 Whart. 538; Mason v. Wickersham, 4 Watts & S. 100. Compare Wiseman v. Lyman, 7 Mass. 286; Sneed v. Wiester, 2 A. K. Marsh. 277; Sheehy v. Mandeville, 6 Cranch, 253. *Contra,* Powell v. Charless, 34 Mo. 485; Leabo v. Goode, 67 Mo. 130.

73. See *ante,* § 1266*a*.

work.[74] But if the creditor have notice of dissolution, it has been held, that a note given in the firm's name by one of the former partners could not bind any other ex-partners as a party to it, because unauthorized by them; and further, that it discharged the nonconsenting ex-partners, who stood in the relation of sureties to the settling partner, he having taking the assets and assumed the debts.[75] Upon the peculiar circumstances presented the case was, as it seems to us, rightly decided; but what is the ordinary presumption and effect of the transaction when one ex-partner of a dissolved firm gives a partnership bill or note for the firm debt? If unauthorized by the other ex-partners, and taken by one affected with notice of the dissolution, it cannot bind them. Does it discharge them? We think not. It cannot be presumed to have been intended to discharge them, for it pretends to bind them. And if they are discharged it must be upon the ground that, as between themselves, partners are sureties, and that suspension of remedy against one discharges the others. But we have already seen that taking the bill or note of one joint contractor does not discharge the others; and as the unauthorized firm note can only bind the parties making or consenting to it, we can perceive no legal principle upon which the discharge of nonconsenting members of the firm can be grounded.[76]

The very numerous cases on this and similar questions present quite a diversity and confusion of views. It is difficult to discern in many of them the principles relied upon; and impossible to reconcile them. We have stated the conclusions which seem to us the most consistent with general principles; and are without

74. *Ante*, vol. I, §§ 369*a*, 369*b*, 370*a*, 370*b*; Midland Nat. Bank v. Schoen, 123 Mo. 650, 27 S. W. 547.

75. Smith v. Sheldon, 35 Mich. 42. Where a retiring partner surrenders assets to continuing partner under an agreement that he shall pay the debts of the firm, and notifies the creditor of dissolution and of the agreement, the acceptance of the individual note of the continuing partner by the creditor would discharge the retiring partner, he, under these circumstances, being regarded as surety. Maier v. Canavan, 8 Daly, 272. See Lindley on Partnership, *440, and Ewell's note; Tarver v. Evansville Furniture Co., 20 Tex. Civ. App. 66, 48 S. W. 199. Where the payee has knowledge of the dissolution of a partnership, and that the retiring member is to be relieved from liability upon the note, and the payee thereafter extends the time of payment and receives collateral therefor, the retiring member is discharged. Wood, etc., Machine Co. v. Oliver, 103 Mich. 326, 61 N. W. 527.

76. Parker v. Cousins, 2 Gratt. 372.

space to enter into all the refinements and vacillations of the adjudicated cases.[77]

§ **1301.** Where no new security is taken, a mere promise to look to one partner only, or that one only should assume the debts, is not binding, because without consideration.[78] But if third parties were induced to enter into an arrangement on the faith of such a promise, it would be otherwise. And it has been urged that when the partner seeking to be discharged is shown to have altered or varied his situation on the faith of such agreement, the rule would be different also.[79] When two or more persons, not partners, are jointly indebted, the individual note of one will operate as a discharge of both, if so agreed between the parties;[80] but such agreement will not be presumed, and must be distinctly proved.[81]

77. In Byles on Bills (Sharswood's ed.) [*48], 132, it is said: "The taking security from one of several partners, joint makers of a note, or acceptors of a bill, will in general discharge the other copartners." Story says the same thing with even more emphasis. Story on Bills, § 431. More guardedly Parsons says: "In general, or, at least, frequently, a holder who takes security from one or more partners liable on negotiable paper discharges the rest." 1 Parsons on Notes and Bills, 135. The doctrine is too strongly stated by Byles and Story — for it is simply a question of intent, the presumption being: where the partnership security is retained that it is preserved alive, and the contrary when it is surrendered; such presumption being controlable by other circumstances appearing. In Thompson v. Percival, 3 Nev. & M. 167, 5 B. & Ad. 925, there was evidence tending to show agreement to look only to the separate security, an accepted bill of the continuing partner, and the question whether it was an accord and satisfaction was left to the jury.

78. Lodge v. Drias, 3 B. & Ald. 611.

79. 2 Am. Lead. Cas. 249.

80. Myatts v. Bell, 41 Ala. 222.

81. Bowers v. Still, 49 Pa. St. 475; Schollenberger v. Selenridge, 49 Pa. St. 83. See *ante*, § 1297.

CHAPTER XLI.

WHAT DISCHARGES A SURETY — THE LAW OF PRINCIPAL AND SURETY IN ITS APPLICATION TO BILLS AND NOTES.

§ **1302.** In the chapter on "Payment and Other Discharges" have been considered the matters which operate as a discharge of liability of the maker and acceptor of a negotiable instrument, with incidental reference to the effect of such matters on the liability of the drawer and indorsers. But there are other matters which discharge the drawer and indorsers that deserve special attention, as their relations to the holder of the instrument are very different from those of the maker or acceptor. These matters may be conveniently discussed under the head of "The Law of Principal and Surety in its Application to Bills and Notes." And under that heading will also be appropriately embraced those cases in which the party signs a negotiable instrument describing himself as surety; or is known to be such, although signing as a joint or several promisor.

SECTION I.

WHO ARE PRINCIPALS AND WHO SURETIES — AND GENERAL PRINCIPLES OF SURETIES' LIABILITIES.

§ **1303.** In the *first* place, as to who are to be regarded as principals, and who as sureties. The acceptor of a bill and the maker of a note, when the acceptance is made or note executed upon a valuable consideration, are undoubtedly principals as to all the parties thereto. And the drawer of such a bill, and the indorsers of such a bill or note, are sureties of the acceptor or maker to the holder.[1] But though all the parties to such a bill are sureties of

1. Clark v. Devlin, 3 Bos. & P. 363; Wallace v. M'Connell, 13 Pet. 136; Blair v. Bank of Tennessee, 11 Humphr. 84; Gunnis v. Weigley, 114 Pa. St. 194; Chitty on Bills (13th Am. ed.) [*411], 463. The question of who is principal, or who the surety, is not determined by the form of the contract, but by the inquiry as to who received the consideration for which the obligation was executed. See Leschen v. Guy, 149 Ind. 17, 48 N. E. 344; Tanner v. Gude, 100 Ga. 157, 27 S. E. 938, citing text; Commercial Bank v. Wood, 56 Mo. App. 214; State Sav. Bank v. Baker, 93 Va. 514, 25 S. E. 550; Dey v. Martin, 78 Va. 1.

the acceptor, they are not as between themselves cosureties, liable for contribution to each other in the event that any one should pay the amount for the acceptor; but each prior party is a principal as between himself and each subsequent party. Thus, if the bill were payable to the drawer's order, and accepted, and then indorsed by the drawer and two subsequent indorsers successively, to the holder, the drawer and indorsers would be sureties of the acceptor to the holder. But as between the holder and the drawer, the drawer is principal debtor, and the indorsers sureties. As between the holder and second indorser, the second indorser is principal, and the third indorser is surety.[2]

If the drawer and indorser of a bill for the acceptor's accommodation agree that each shall pay one-half the bill, if the acceptor fail to pay, they are joint sureties; and if either one pay the whole amount, he may recover half from the other.[3]

§ **1304.** In New York it has been held, that while an indorser is in the nature of a surety, he is answerable upon an independent contract, and it is his duty to take up the bill when dishonored; and that the rule, adopted in that State, that a surety may call upon the creditor to prosecute the principal, did not extend in its privilege to an indorser, though he could show any act impairing his right to resort against the principal in exoneration of himself from his engagement to the creditor.[4]

§ **1305. Fixed indorsers are sureties.**— The fact that the liability of the drawer or indorser is fixed by due demand and notice, does not alter their relation as sureties of the debt; it simply fixes their liability as sureties for its payment, provided nothing is done by the creditor to exonerate them. This view is established by great

2. Newcomb v. Raynor, 21 Wend. 108; Byles on Bills (Sharswood's ed.) [*236], 379; Edwards on Bills, 565.

3. Edelen v. White, 6 Bush, 408.

4. Trimble v. Thorn, 16 Johns. 152 (1819); Beardsley v. Warner, 6 Wend. 613 (1831); Gibson v. Parlin, 13 Nebr. 292. In the case of a nonnegotiable note, the assignee must sue the maker before he can resort to the assignor. Lee v. Love, 1 Call, 497; Bronaugh v. Scott, 5 Call, 78; Perrin v. Broadwell, 3 Dana, 596; Huntington v. Harvey, 4 Conn. 125; Bishop v. Yeazle, 6 Blackf. 127; Ricketson v. Wood, 10 Mo. 547. These and other cases are quoted by Professor Parsons (2 Parsons on Notes and Bills, 244) for the doctrine, that the indorsee of a negotiable note loses his recourse against the maker by neglect to sue. But they do not so hold, their application being limited to the resort of an assignee of a nonnegotiable note against his assignor. There are, however, statutory provisions in some of the States which require prompt recourse against the principal before pursuing the indorser.

weight of authority, and may be regarded as settled.[5] Professor Parsons regards some New York cases as maintaining a different doctrine — that after demand and notice the drawer and indorser become definitely liable as principals.[6] This view is a just deduction from these cases, but they did not so expressly decide, but only that the indorser is not a surety entitled to require the holder to sue as sureties might do under the New York law.[7]

When, however, a final judgment has been entered against the drawer or indorser, the relation of suretyship ceases, and his liability is merged in that of a principal judgment debtor.[8]

§ **1306. Whatever discharges acceptor or maker discharges drawer and indorsers.**— As a general rule, whatever discharges the acceptor of a bill or maker of a note discharges the drawer and indorsers who are sureties, for the contract which they undertook to assure thus passes out of existence by the act of the beneficiary. He cannot discharge the party primarily bound for the performance of an engagement, and then insist that another shall stand responsible for its performance. Besides, the drawer or indorser, on making payment for the maker or acceptor, would be entitled to the holder's remedies against him; and if the holder has discharged him from his obligation, the drawer or indorser would be remediless and have no resort for reimbursement.[9]

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5. Clark v. Devlin, 3 Bos. & P. 365; English v. Darley, 2 Bos. & P. 61; Gould v. Robson, 8 East, 576; Veazie v. Carr, 3 Allen, 14; Bank of United States v. Hatch, 6 Pet. 250; Burrill v. Smith, 7 Pick. 291; Lobdell v. Niphler, 4 La. (O. S.) 295; Hefford v. Morton, 11 La. (O. S.) 117; Millaudon v. Arnons, 15 Mart. 596; Wood v. Jefferson County Bank, 9 Cow. 194; Hubbly v. Brown, 16 Johns. 70; Priest v. Watson, 7 Mo. App. 578; Story on Notes, § 413; Story on Bills, § 425; 2 Parsons on Notes and Bills, 243, 244; Edwards on Bills, 569; Tanner v. Gude, 100 Ga. 157, 27 S. E. 938, citing text.

6. 2 Parsons on Notes and Bills, 243.

7. Trimble v. Thorn, 16 Johns. 152; Beardsley v. Warner, 6 Wend. 613; Warner v. Beardsley, 8 Wend. 202, Seward, Senator, *quære*.

8. Bray v. Manson, 8 M. & W. 668, Parke, B.; Baker v. Flower, 5 Jur. 655. It is otherwise in Texas by statute. Pasch. Dig., art. 4789; Parke v. Nations, 33 Tex. 210.

9. Sargent v. Appleton, 6 Mass. 85; Couch v. Waring, 9 Conn. 261; Byles on Bills (Sharswood's ed.), 378, 386; Broadway Sav. Bank v. Schmucker, 7 Mo. App. 171; Gunnis v. Weigley, 114 Pa. St. 194; Shutts v. Fingar, 100 N. Y. 539, citing the text. But if the indorser himself joins in the contract, and together with the indorsee releases the maker, the rule has no force, and the indorser may still be held upon his indorsement. The reason for the rule is that the indorsee may not impair the indorser's right of action against the maker after

Upon this principle, where the holder of a note sued the maker and recovered judgment, and afterward sued the indorser for a balance of interest, it was held that the latter suit could not be maintained; for the maker was discharged by the first suit from all further liability, on the principle *nemo debet bis vexari eadem causa,* and, therefore, there could be no remedy against the indorser.[10] A mere surety may plead in bar to an action on a note the discharge of the principal on account of its illegality.[11]

§ 1306a. Cases in which surety is bound although principal is not. — There are some cases, however, in which the principal may be discharged and the surety be still bound. Thus, if a party became surety for a married woman whose note is void because she could not make such a contract, the surety will nevertheless be bound, there being no fraud, duress, or deceit in the procuration of the note;[12] but it would be otherwise if either of these elements entered into the transaction.[13] How far an indorser is bound, though the maker may not be, has been elsewhere considered.[14]

§ 1307. Discharge of prior indorser discharges subsequent indorsers. — We have already seen that whatever discharges a prior indorser discharges all subsequent indorsers, for the reason that he stood between them and the holder, and on making payment each one could have had recourse against him, but from which his discharge precludes them.[15] It follows from the same reasoning that discharge of a subsequent indorser can discharge no prior party; for such subsequent indorser could, under no circumstances, be liable to such prior party.[16] The contracts of the several indorsers

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having paid the note, but when the indorser himself releases this right, the reason having ceased to exist, the rule fails also. Mulnix v. Spratlin, 10 Colo. App. 391, 50 Pac. 1078; Brown v. Croy, 74 Mo. App. 462; Bernd v. Lyles, 71 Conn. 734.

10. Couch v. Waring, 9 Conn. 261.

11. Gill v. Morris, 11 Heisk. 614.

12. Davis v. Staaps, 43 Ind. 103; Hicks v. Randolph, 3 Baxt. 352; Jones v. Crosthwaite, 17 Iowa, 393; Allen v. Berryhill, 27 Iowa, 531. See § 1314; Lee v. Yandell, 69 Tex. 36, citing the text.

13. Osborn v. Robbins, 36 N. Y. 365. See Gist v. Feitz, 43 Nebr. 238, 61 N. W. 621.

14. See vol. I, §§ 669–679, especially § 675.

15. Newcomb v. Raynor, 21 Wend. 108; Shutts v. Fingar, 100 N. Y. 539, citing the text. But it is not necessary to notify a prior indorser in order to hold a subsequent one.

16. Claridge v. Dalton, 4 Maule & S. 232; English v. Darley, 2 Bos. & P. 61; Smith v. Knox, 3 Esp. 46; Bank of United States v. Hatch, 6 Pet. 250;

are like so many links of a pendant chain: if the holder dissolves the first, every link falls with it. If he dissolves an intermediate link, all after it are likewise dissolved. But the last link supports nothing, and its dissolution injures no one.[17]

SECTION II.

WHAT ACTS OF CREDITOR DISCHARGE A SURETY FOR THE DEBT.

§ 1308. We may enumerate as matters which will discharge a surety: (1) Misrepresentation or concealment to induce his becoming surety. (2) Diversion of the instrument from the agreed purpose. (3) Alteration of the instrument. (4) Payment. (5) Release. (6) Satisfaction. (7) Covenant not to sue a prior party. (8) Parting with security for the debt. (9) Agreement to indulge prior party by extension of time or forbearance of suit.

§ 1309. (I, II, and III.) As to misrepresentation, concealment, duress, diversion, and alteration.— The contract of suretyship is a contract *uberrimæ fidei*. Therefore, where one is induced to become surety for another, as drawer of a bill, or indorser of a note for accommodation, or otherwise, and there is any misrepresentation or fraudulent concealment of a material fact, which, if known, would have induced the drawer or indorser or other surety not to enter into the contract, his contract is void from the beginning as between the surety and all parties privy to such misrepresentation or concealment.[18] Any essential vice in the obligation of the principal which may suffice to annul it is as available to the surety as to him, unless the surety be also the assignor, in which case he is estopped from setting up the antecedent defect.[19] If the

White v. Hopkins, 3 Watts & S. 99; Lynch v. Reynolds, 16 Johns. 41; Thompson on Bills, 393; Story on Notes, §§ 420, 423, 434; Story on Bills, § 429.

17. See Edwards on Bills, 570.

18. Hamilton v. Watson, 12 Clarke & F. 109; North British Ins. Co. v. Lloyd, 10 Exch. 523; Solser v. Brock, 3 Ohio St. 302; Evans v. Keeland, 9 Ala. 42; Byles on Bills (Sharswood's ed.), 377; Melick v. First Nat. Bank, 52 Iowa, 94, where payee assured surety that payor was not indebted to him in any further amount. Jungk v. Holbrook, 15 Utah, 198, 49 Pac. 305, 62 Am. St. Rep. 921; Howard v. Johnson, 91 Ga. 319, 18 S. E. 132; Lewis v. Brown, 89 Ga. 115, 14 S. E. 881; Harrington v. Findley, 89 Ga. 385, 15 S. E. 483; First Nat. Bank of Stanford v. Mattingly, 92 Ky. 650, 18 S. W. 940; St. Louis Nat. Bank v. Flanagan, 129 Mo. 178, 31 S. W. 773, citing text.

19. Putnam v. Schuyler, 4 Hun, 168; Harrington v. Findley, 89 Ga. 385, 15 S. E. 483.

principal signed under duress, the holder guilty of the duress could not enforce the obligation against a surety.[20] If the payee is neither cognizant of, nor participates in the fraud, he is not affected by it.[21] Any fraud which deceives the surety after he has become a party releases him.[22] And where a bill is drawn or accepted, or a note made or indorsed for accommodation, with an agreement that it shall be used for a particular purpose, any diversion in its use operates a discharge of the accommodation party as to all other parties who have knowledge of such diversion.[23] But this subject is elsewhere more fully considered.[24] So alteration is elsewhere treated.[25]

If the holder inform an indorser that the bill has been paid by the acceptor, which statement is untrue, he cannot afterward sustain an action against the indorser, though his liability was duly fixed, if in the meantime any party against whom the indorser could have had recourse for payment has become insolvent.[26]

§ **1310. (IV) Payment** by the maker or acceptor, of course, discharges the drawer and indorsers,[27] as will also a tender of payment which the holder refuses to accept.[28] (V) So also does a release of

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20. Griffith v. Sitgreaves, 90 Pa. St. 161.

21. Anderson v. Warne, 71 Ill. 20.

22. Harris v. Brooks, 21 Pick. 122; Denton v. Butler & Stevens, 99 Ga. 264, 25 S. E. 624; Harrington v. Findley, 89 Ga. 385, 15 S. E. 483. Where a surety, upon a promissory note on behalf of himself and cosurety, called upon the payee in relation to the liability of the sureties on such note, and was told by the payee that he would look to the principal for payment and never to either of the sureties, held, that it was competent to prove such conversation by the testimony of the cosurety, to whom the statements of the payee had been communicated by the surety, who had conversed with the payee, it appearing from the evidence that the latter surety was acting for both parties. See Wolf v. Madden, 82 Iowa, 114, 47 N. W. 981.

23. Dewey v. Cochran, 4 Jones, 184; Southerland v. Whitaker, 5 Jones, 5; 1 Parsons on Notes and Bills, 236.

24. See chapter XXIV, §§ 790, 796, vol. I.

25. See chapter XLIII, on Alteration, vol. II. And it follows that any material variation in the instrument without the consent of the surety will discharge him. See Stutts v. Strayer, 60 Ohio St. 384, 54 N. E. 368, 71 Am. St. Rep. 723.

26. Petrie v. Feeder, 21 Wend. 171.

27. See chapter XXXVIII, on Payment.

28. Spurgeon v. Smiths, 114 Ind. 453. But a tender of goods which is refused will not have that effect. Wilson v. McVey, 83 Ind. 108. In Illinois, it has been held that an agreement between a third party and the grantors of lots sold to a minor, by which the former guarantees that the minor will

the acceptor or maker discharge drawer and indorsers,[29] even though they consent to the release, for that only confirms it.[30] But if there were in the release an express reservation of the holder's rights against the drawer and indorsers, they would not be discharged, their rights and remedies against the maker or acceptor being thus reserved by implication.[31] (VI) Whatever amounts to satisfaction of the bill or note by the maker or acceptor, operates as an absolute discharge of all parties collaterally liable.

There is a distinction between extinguishment and satisfaction. The holder's claim may be extinguished as to an indorser or drawer,

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ratify the purchase so as to make himself personally liable on the notes, and which further provides that in the event the minor "shall repudiate or refuse to pay said notes," said third party will pay the same, has no binding force after the minor has ratified the purchase after becoming of age and becoming liable on the notes. Starr v. Milliken, 180 Ill. 458, 54 N. E. 328; O'Conor v. Morse, 112 Cal. 31, 44 Pac. 305, 53 Am. St. Rep. 155; Fitch v. Hammer, 17 Colo. 591, 35 Pac. 336. The effect of a tender is to stop interest and prevent costs, as to the parties primarily liable — tender at maturity will discharge drawer and indorsers. See Wright v. Robinson & Co., 84 Hun, 172, 32 N. Y. Supp. 463. But the maker of a note will not himself be relieved of payment of interest after maturity unless his readiness and willingness to pay at maturity is coupled with a tender to pay at the proper time and place. See McNair v. Moore, 55 S. C. 435, 33 S. E. 491, 74 Am. St. Rep. 760. And upon the same principle it has been held, that when it appears that the note sued on was deposited as collateral to secure the payment of a sum of money for which the depositor was indebted, and with such collateral there was also deposited certain rent notes to secure the payment of the collateral note, and that the holder of the latter had received from the rent notes and other sources a sufficient sum to discharge the collateral note, the note in law will be construed to have been paid and the sureties thereon discharged from further liability. See Ober & Sons Co. v. Drane, 106 Ga. 406, 32 S. E. 371. But the converse of the proposition is not true, and hence the payment of a sum of money by the surety to the payee as a consideration for his release, does not entitle the maker to credit therefor on the note. See Gilstrap v. Smith, 101 Ga. 120, 28 S. E. 608, 65 Am. St. Rep. 290. But tender must be made before maturity. Hudson Bros. Commission Co. v. Glencoe Sand & Gravel Co., 140 Mo. 103, 41 S. W. 450, 62 Am. St. Rep. 722.

29. Byles on Bills [*240], 384; Union Nat. Bank of New Orleans v. Grant, 48 La. Ann. 18, 18 So. 705. See Pierce City Nat. Bank v. Hughlett, 84 Mo. App. 268; Montgomery v. Sayre, 100 Cal. 182, 34 Pac. 646, 38 Am. St. Rep. 271.

30. Broadway Sav. Bank v. Schumacker, 7 Mo. App. 171; Eggemann v. Henschen, 56 Mo. 123.

31. Gloucester Bank v. Worcester, 10 Pick. 528; Stewart v. Eden, 2 Cai. 121; Tombeckbee Bank v. Stratton, 7 Wend. 429; Story on Bills, § 429; Fisher v. Stockebrand, 26 Kan. 573; Boatman's Sav. Bank v. Johnson, 24 Mo. App. 317.

and the debt yet unsatisfied. But if there is satisfaction by one, it operates as to all.[32] (VII) A covenant not to sue a prior party discharges the surety, because it disables him from suing should he pay the debt.

§ 1311. (VIII.) As to the creditor's parting with security for the debt.— Upon making payment of the debt, the surety is undoubtedly entitled to all the rights, remedies, and securities which the creditor could have enforced.[33] And while the creditor may not only abstain from active measures, but may even relinquish steps already commenced,[34] he must do nothing which can impair the rights and remedies of the surety. Therefore, if any collateral security which the creditor held be released, or a judgment lien given up, or a levy withdrawn, the surety is discharged.[35] But the withdrawal of an execution from the hands of the sheriff before

32. Story on Notes, § 403; 2 Parsons on Notes and Bills, 252. And a surety upon a promissory note of a minor is not liable thereon where the minor upon attaining majority disaffirmed the contract and returned the property for the purchase price for which the note was given. See Keokuk County State Bank v. Hall, 106 Iowa, 540, 76 N. W. 832.

33. Williams v. Price, 1 Sim. & Stu. 581; *Ex parte* Mure, 1 Coxe, 93; King v. Baldwin, 2 Johns. Ch. 317; Humphrey v. Hitt, 6 Gratt. 509; Hayes v. Ward, 4 Johns. Ch. 123; Sullivan v. Morrow, 4 Ind. 425; Smith v. Jay, 23 Vt. 656; Kirkpatrick v. Hawk, 80 Ill. 122; Hurd v. Spencer, 40 Vt. 581; Dillon v. Russell, 5 Nebr. 484; Treanor v. Yingling, 37 Md. 491; Muirhead v. Kirkpatrick, 9 Harris, 237; Byles on Bills (Sharswood's ed.) [*246–247], 392; 2 Am. Lead. Cas. 348; Fitch v. Hammer, 17 Colo. 591, 31 Pac. 336. The court saying, "This is an equitable exception to the rule, that payment by one joint debtor discharges the debt as to all."

34. Bellows v. Lovell, 5 Pick. 307; Lawson v. Sayder, 1 Md. 171; Commissioners v. Ross, 3 Binn. 250; Montpelier Bank v. Dixon, 4 Vt. 399. The duty imposed by the creditor is not an active, but a negative one, as it is simply bound not to cancel, waste, or impair its security. State Bank of Lock Haven v. Smith, 155 N. Y. 185, 49 N. E. 680.

35. Commonwealth v. Haas, 16 Serg. & R. 252; Farmers' Bank v. Reynolds, 13 Ohio, 84; Mayhew v. Boyd, 5 Md. 102; Ferguson v. Turner, 7 Mo. 497; Sneed v. White, 3 J. J. Marsh. 525; Mayhew v. Crickett, 2 Swanst. 193; Winston v. Yeargin, 50 Ala. 340; Woodward v. Walton, 7 Heisk. 50; Clopton v. Spratt, 52 Miss. 251; Case v. Hawkins, 53 Miss. 702 (an accommodation indorser); *In re* Cator, 14 Lea, 409; Shutts v. Fingar, 100 N. Y. 539; Sample v. Cochran, 82 Ind. 260; Crim v. Fleming, 101 Ind. 154; Rubey v. Watson, 22 Mo. App. 434; Price v. Dime Sav. Bank, 124 Ill. 324; City Sav. Bank v. Reel, 62 Cal. 419; Spring v. George, 57 N. Y. S. C. (50 Hun) 227; Dunn v. Parsons, 47 N. Y. S. C. (40 Hun) 78; Allen v. O'Donald, 23 Fed. 573; Priest v. Watson, 75 Mo. 310; 5 Rob. Pr. (new ed.) 766; 1 Parsons on Notes and Bills, 242. See cases cited above in note 34. Byles on Bills [*241], 386; Keeler v. Hollweg, 36

a levy will not discharge the surety.[36] Nor will an omission to revive a judgment, by means of which the lien and the land are lost;[37] nor discontinuance of steps to foreclose a mortgage.[38]

The transfer of a mortgage would not discharge a surety, for it operates as a transfer of a debt secured by it.[39]

But neglect to record a mortgage, whereby its value is lost, would discharge the surety,[40] and this even though the original mortgage would have been worthless, if recorded, by reason of prior liens.[41]

But the surety will not be discharged in any case where it can be clearly proved that the act of the creditor has worked no real injury. And he is discharged only to the extent that he would

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App. Div. 490, 55 N. Y. Supp. 821. But the transfer by a pledgee of a promissory note held as collateral security for a debt to the maker of the note is a payment *pro tanto* of the debt secured. See Gilliam v. Davis, 7 Wash. 332, 35 Pac. 69; Plankinton v. Gorman, 93 Wis. 560, 67 N. W. 1128, citing and approving text; Frederick Institute v. Michael, 81 Md. 487, 32 Atl. 189, 340; Okey v. Sigler, 82 Iowa, 94, 47 N. W. 911. On the same principle it has been held that if the creditor mismanages or wastes the mortgaged property, the surety will be discharged to the extent of the value of the property so wasted or mismanaged. See Maledon v. Leflore, 62 Ark. 387, 35 S. W. 1102; First Nat. Bank v. Lillard, 55 Mo. App. 675. See Hardy v. Worthen, 53 Mo. App. 580; Wilbur v. Williams, 16 R. I. 244, 14 Atl. 878; Otis v. Bonstorch, 15 R. I. 42, 23 Atl. 39; Montgomery v. Sayre, 100 Cal. 182, 34 Pac. 646, 38 Am. St. Rep. 271.

36. Humphrey v. Hitt, 6 Gratt. 509; Lenox v. Prout, 3 Wheat. 520; Alcock v. Hill, 4 Leigh, 622; M'Kenny v. Waller, 1 Leigh, 434; Sawyer v. Bradford, 6 Ala. 572; Morrison v. Hartmann, 2 Harris, 416; Price County Bank v. McKenzie, 91 Wis. 658, 65 N. W. 507; Bank v. Nimocks, 124 N. C. 352.

37. United States v. Simpson, 3 Pa. 437; Farmers' Bank v. Reynolds, 13 Ohio, 84.

38. Butler v. Gambs, 1 Mo. App. 466; Hoover v. McCormick, 84 Wis. 215, 54 N. W. 505, citing text; Myers v. Farmers' State Bank, 53 Nebr. 824, 74 N. W. 252.

39. Wilbur v. Williams, 16 R. I. 244, 14 Atl. 878.

40. Barr v. Boyer, 2 Nebr. 265.

41. In Atlanta Nat. Bank v. Douglas, 51 Ga. 205 (1874), McCay, J., said: "The failure of the principal to record the loss of the lien, in this case, the destruction of the mortgage, is a change in the terms of the security's undertaking. He only guarantees the notes as security by the mortgage, and when the mortgage was destroyed, his contract was no longer existent; its terms were broken," distinguishing and explaining Toomer v. Deckerson, 37 Ga. 428. In Union Nat. Bank v. Cooley, 27 La. Ann. 202, it was held, that surrender of a void and valueless collateral did not release surety; State Bank of St. Louis v. Butler, 114 Mo. 276, 21 S. W. 816.

be injured if held bound.[42] Thus, withdrawal of a levy on property only entitles the surety to a credit for the value of the property levied on.[43]

Where the payee, receiving from maker before maturity an order on the indorser, gave up the note, but on dishonor of the order demanded it back, it was held the indorser could not be injured, and, therefore, was not discharged.[44] Where the creditor gave up notes of the principal secured by a mortgage from a third party, and accepted forged and worthless renewals thereof, the surety executing such mortgage, but not a party to the notes, was held discharged.[45]

§ 1312. (IX) Extension of time, or forbearance of suit.— The principle that whatever discharges the principal discharges the surety is of extended application, and it is operative whenever anything is done which relaxes the terms of the exact legal contract by which the principal is bound, or in anywise lessens, impairs, or delays the remedies which the creditor may resort to for its assurance or enforcement. For, whenever the creditor relaxes his hold upon the principal debtor, he impairs the hold upon him which the surety would acquire by substitution in his place on making payment; and good faith and fair dealing require that the surety should not be exposed to the injuries which might thus be inflicted upon him.[46] In the immense majority of cases the

42. Payne v. Commercial Bank, 6 Smedes & M. 24; Loomis v. Fay, 24 Vt. 240; Neff's Appeal, 9 Watts & S. 36; Pease v. Tilt, 9 Daly, 233; Price County Bank v. McKenzie, 9 Wis. 658, 65 N. W. 507. Substitution of security when made in good faith, and apparently for the benefit of all concerned, will not release surety. See Bank of Lock Haven v. Smith, 155 N. Y. 185, 49 N. E. 680; Denny v. Seeley, 34 Oreg. 364, 55 Pac. 976. Also held in the last case, that selling collateral for its full market value, does not release surety, since surety is not injured. See also Bank v. Couch, 118 N. C. 436, 24 S. E. 737; Kittridge v. Stegmier, 11 Wash. 3, 39 Pac. 242.

43. Ward v. Vass, 7 Leigh, 135. In harmony with the doctrine of the text, it has been held, that an extension of time to answer given to the defendant, the maker of a note, in an action brought thereon against him and the indorser, does not amount to an extension of the time of payment of the note, so as to release the indorser. German-American Bank v. Niagara Cycle Co., 13 App. Div. 450, 43 N. Y. Supp. 602; Nassau Bank v. Campbell, 63 Hun, 229, 17 N. Y. Supp. 737.

44. Smith v. Harper, 5 Cal. 330.

45. Merchants' Bank v. McKay, 15 Canada Sup. Ct. Rep. 672.

46. Thompson on Bills, 390; First Nat. Bank of Black River Falls v. Jones, 92 Wis. 36, 65 N. W. 861. Held, in this case, that an extension of the

act done does not actually damage the surety a shilling, yet the doctrine is so firmly established that only legislative enactment can change it.[47]

Extension of time for payment is the most frequent form in which the creditor so deals with the principal as to discharge the surety; and whenever such indulgence is granted in pursuance of a binding legal contract, the surety is at once released from his obligations.[48] And the same effect follows (the discharge of the

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time of payment of a renewal note, without the knowledge or consent of one of the makers, does not discharge him, although he was merely an accommodation maker of the original note, where the renewal note was accepted at his sole request and for his accommodation and benefit alone — in effect holding that the doctrine of discharge stated in the text applies only to persons who are sureties on the face of the paper, and not to comakers, who may be able to prove that they were in fact sureties. See Donkle v. Milem, 88 Wis. 33, 59 N. W. 386. See Triplet v. Randolph, 46 Mo. App. 569; O'Conor v. Morse, 112 Cal. 31, 44 Pac. 305, 53 Am. St. Rep. 155.

47. Swire v. Redman, 1 Q. B. Div. 536 (1876); O'Conor v. Morse, 112 Cal. 31, 44 Pac. 305, 53 Am. St. Rep. 155.

48. See §§ 1315 to 1319 inclusive; also § 1329 and § 1259 *et seq.*; Siebeneck v. Anchor Sav. Bank, 111 Pa. St. 187; State Sav. Bank v. Baker, 93 Va. 514, 25 S. E. 550; Daniel v. Wharton, 90 Va. 586, 19 S. E. 170; Dey v. Martin, 78 Va. 1; Charleston v. Gann, 80 Va. 369; Smith v. United States, 2 Wall. 219, 17 L. Ed. 788; Parmelee v. Williams, 72 Ga. 43; Shutts v. Fingar, 100 N. Y. 539, citing the text; Slagle v. Pow, 41 Ohio St. 603; Cates v. Thayer, 95 Ind. 156; Stevens v. Oaks, 58 Mich. 343; Hall v. Capital Bank, 71 Ga. 715; Batavian Bank v. McDonald (Wis.), 46 N. W. 902; Timberlake v. Thayer, 71 Miss. 279, 14 So. 446. But if the contract of extension was obtained by fraud of the principal signer, it will not be a binding contract of extension and will, therefore, not discharge the surety. See Dwinnell v. McKibben, 93 Iowa, 331, 61 N. W. 985; Herman v. Williams, 36 Fla. 136. "Unless he subsequently assents to the extension and ratifies it." Bishop v. Eaton, 161 Mass. 496; First Nat. Bank v. Cecil, 23 Oreg. 58, 31 Pac. 61, 32 Pac. 393. If, however, the instrument contains stipulation that extension of time to the principal and notice of the extension waived, it is tantamount to assent on part of surety to extension, and granting such extension will not release surety. Bank v. Couch, 118 N. C. 436, 24 S. E. 737, citing the text. But the principle announced in the text does not apply to an indorser of a note when his liability has been fixed by protest and notice, for, he then becomes an independent and principal debtor and does not stand, to an indorsee for value, in the position of a mere surety for the maker of the note. German-American Bank v. Niagara Cycle Co., 13 App. Div. 450, 43 N. Y. Supp. 602; Schroeder v. Kinney, 15 Utah, 462, 49 Pac. 894; Gillett v. Taylor, 14 Utah, 190, 46 Pac. 1099, 60 Am. St. Rep. 890; Froude v. Bishop, 25 App. Div. 514, 49 N. Y. Supp. 955, citing text; Bank v. Sumner, 119 N. C. 591, 26 S. E. 129. Held, in this case, that the doctrine by which a surety is re-

surety) if time is given to one of the joint makers of a note of which the surety is indorser.[49] If the creditor takes a time draft, or a renewal note from the principal, the presumption is that right of action is suspended, and time of payment extended to its maturity, and an indorser of the original bill or note is thereby presumptively discharged.[50] But where the suretyship is evidenced

leased does not apply to a case wherein the payee of a note becomes a surety on a note by indorsing it to another in payment of his own debt, or otherwise obtaining full value for it, because the doctrine applies in the case of a strict construction of a contract for the benefit of such sureties as sign notes for the benefit of the principal, and without consideration or benefit for themselves. Nelson v. Flagg, 18 Wash. 39, 50 Pac. 571, in which case the maker was obliged to pay the rate of interest, provided for in the note during the period of extension, thus constituting such a new contract between the parties as to discharge a surety when not made with his knowledge or consent. Clark v. Read, 12 App. D. C. 343; Buck v. Bank of State of Georgia, 104 Ga. 660, 30 S. E. 872; Knight v. Hawkins, 93 Ga. 709, 20 S. E. 266; Alley v. Hopkins, 98 Ky. 668, 34 S. W. 13, 56 Am. St. Rep. 382; Okey v. Sigler, 82 Iowa, 94, 47 N. W. 911; Angel v. Miller, 16 Tex. Civ. App. 679, 39 S. W. 1092; Vestal v. Knight, 54 Ark. 97, 15 S. W. 17; Niblack v. Champeny, 10 S. Dak. 165, 72 N. W. 402; Schroeder v. Kinney, *supra;* Scott v. Scruggs, 95 Ala. 383, 11 So. 215. See Nelson v. Brown, 140 Mo. 581, 41 S. W. 960, 62 Am. St. Rep. 755; Lee, Fried & Co. v. Brugmann, 37 Nebr. 232, 55 N. W. 1053; Merriman v. Miles, Exr., 54 Nebr. 566, 74 N. W. 861, 69 Am. St. Rep. 731; Wayman v. Jones, 58 Mo. App. 313; Home Nat. Bank v. Estate of Waterman, 134 Ill. 461, 29 N. E. 503; Bishop's Estate v. Bank's Appeal, 195 Pa. St. 85, 45 Atl. 582.

49. Story on Notes, § 414.

50. Pomeroy v. Tanner, 70 N. Y. 547; Buck v. Smiley, 64 Ind. 431. See *post*, § 1329, and cases cited; Frank v. Williams, 36 Fla. 136, 18 So. 351. But acceptance of note of principal obligor by obligee, not in satisfaction, but as a mere memorandum of the amount due under the bond, does not release the surety. Wills v. Hurst, 101 Tenn. 656, 49 S. W. 740. Surrender of original notes and substitution of others to which she was not a party releases surety. Barnes v. McCullers, 118 N. C. 46; First Nat. Bank v. Harris, 7 Wash. 140, 34 Pac. 466. Taking notes for annual interest upon a promissory note (referring to the interest to accrue upon a renewal) and upon the main note, in effect renews the latter. See Heath v. Achey, 96 Ga. 438, 23 S. E. 396; Brannon *et al.* v. Irons *et al.*, 19 Ind. App. 305, 49 N. E. 469. Surety on a note, on its maturity, executed a joint note to the payee, on the margin of which he made an indorsement to the effect that payment of the note would cancel the old note, which was attached. Held, that this was a renewal of their surety obligation and not the creation of another and independent indebtedness. Merchants' Nat. Bank v. Eyre, 107 Iowa, 13, 77 N. W. 498. In this connection, see also Sawyers v. Campbell, 107 Iowa, 397, 78 N. W. 56. And likewise, if the payee receives a payment of interest in advance on note for a period of time beyond the date of the maturity of the

by a collateral instrument securing a note to which the surety is not a party, and the creditor takes a renewal of such note maturing before the collateral, it has been held that the rights of the surety are not affected thereby, and he is not discharged.[51]

§ 1313. The reason why extension of time of payment discharges the surety is that he would be entitled to the creditor's place by substitution; and if the creditor, by agreement with the principal debtor, without the surety's assent, disables himself from suing when he would be otherwise entitled to do so, and thus deprive the surety, on paying the debt, from immediate recourse on his principal, the contract is varied to his prejudice — hence he is discharged.[52] But this principle on which sureties are released "is not a mere shadow without substance. It is founded upon a restriction of the rights of the sureties by which they are supposed to be injured." [53] Therefore, when there is a legal impossibility of injury, the principle does not apply. This was decided to be the case where the maker of a note was a discharged bankrupt; and an agreement between him and the holder for two months' delay, although on a valid consideration, it was held did not discharge the indorser, because the latter could not, by making payment, have recourse against him.[54] To discharge a surety by giving time to the principal, the creditor must have put it out of his power for the time being to proceed against the principal.[55]

§ 1314. Defenses available to principal, but not to surety.— While, as a general rule, whatever discharges the principal discharges the surety, the principal may sometimes have a defense

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note, such payment presupposes an agreement of extension. Walley v. Deseret Nat. Bank, 14 Utah, 305, 47 Pac. 147; Elyton & Co. v. Hood, 121 Ala. 373, 25 So. 745; Timberlake v. Thayer, 71 Miss. 279, 14 So. 446.

51. Healey v. Dolson, 8 Ont. 689. Creditor does not release sureties for his debt by dealing with a party as an indorser. Bank v. Layne, 101 Tenn. 45, 46 S. W. 762. And it has also been held that the surety will not be discharged by an independent contract between the principal parties, though it may be contemporaneous and relate to the same subject-matter without varying the contract of the surety. See Stutts v. Strayer, 60 Ohio St. 384, 54 N. E. 368, 71 Am. St. Rep. 723.

52. King v. Baldwin, 2 Johns. Ch. 559.

53. 6 How. 283.

54. Tiernan's Exrs. v. Woodruff, 5 McLean, 350.

55. *Post*, § 1326; Continental Life Ins. Co. v. Barber, 50 Conn. 567; Powers v. Silberstein, 51 N. Y. S. C. 321; O'Conor v. Morse, 112 Cal. 31, 44 Pac. 305, 53 Am. St. Rep. 155.

which is not available to the surety. Where one signs a joint and several note with a married woman as surety, her plea of coverture will be no defense to him.[56] So, if a corporation make a note which is in excess of its legal power, a surety therein would nevertheless be bound.[57] And the indorser of a note on which the maker's name is forged, or of which the maker is an infant or married woman, is liable thereon, because he guarantees the instrument *in toto*.[58] And one who signs a note as principal, but is in reality a surety, and so known to the holder — signing after others whose names are forged upon the note, and while it is in the hands of the beneficiary — affirms the genuineness of the forged signatures, and cannot deny them unless the holder was privy to the fraud.[59]

§ **1315. Elements in indulgence necessary to discharge surety.**— The following elements or circumstances must unite in order to constitute an indulgence which will discharge the surety. *First,* a valid consideration, for without it the promise would not be binding. *Second,* a promise or agreement to indulge, for without it the hands of the creditor are not tied, although he may have received collateral security for the debt. *Third,* the promise must not be altogether indefinite, for an indefinite promise of forbearance is void and nugatory, since it might be for an hour, which would be of no advantage to the debtor. *Fourth,* the indulgence must be without the surety's assent, for if he assents he is a party to it. *Fifth,* the indulgence must be without reservation of remedy against the surety, for that would reserve the surety's recourse on his principal. *Sixth,* the agreement must be with the principal, and not with a stranger.

§ **1316. First, as to the consideration.**— There must undoubtedly be a consideration for the promise to indulge, and if the agreement be merely voluntary, the surety is not discharged. Mere indulgence at the will of the creditor, extended to the debtor, in nowise im-

56. Smyley v. Head, 2 Rich. 590. See *ante*, § 1306*a*.

57. Conn v. Coburn, 7 N. H. 368.

58. See *ante*, § 675, vol. I.

59. Selser v. Brock, 3 Ohio St. 302. See *ante*, § 672, vol. I; Culbertson v. Wilcox, 11 Wash. 522, 39 Pac. 954. Held, in this case, that the fact that one who signed a note as maker was in reality a surety, would not entitle him to discharge from liability by an extension of the time of payment, unless the holder of the note had actual notice of the suretyship at the time of extending payment.

pairs the obligation of the surety; if it did, it would be a most inconvenient and oppressive rule, as then suits must immediately follow the maturity of the paper. It is well settled that there must be a valid common-law agreement, in binding legal form, to give time to the maker or acceptor in order to effect the discharge of the drawer or indorser. An agreement which does not suspend the creditor's right of action on the demand, or which is not enforceable at law or in equity, will not discharge the surety.[60] Therefore, where the executrix of an estate verbally promised to pay the holder out of her own estate, if he would forbear to sue, the drawer was held to be still bound, because the contract was not

60. McLemore v. Powell, 12 Wheat. 554; Bank of Utica v. Ives, 17 Wend. 501; Crawford v. Millspaugh, 13 Johns. 87; Davis v. Graham, 29 Iowa, 514; Galbraith v. Fullerton, 53 Ill. 126; Buckalew v. Smith, 44 Ala. 638; Payne v. Commercial Bank, 6 Smedes & M. 24; Aud v. Magruder, 10 Cal. 282; Hazard v. White, 26 Ark. 155; Byles on Bills (Sharswood's ed.), 385; Story on Notes, § 419; Story on Bills, § 426; Parkhurst v. Vail, 73 Ill. 343; *Ex parte* Balch, 2 Low, 440. See *post*, § 1326; Russell v. Brown, 21 Mo. App. 51; Hartman v. Redman, 21 Mo. App. 124; Brown v. Kirk, 20 Mo. App. 528; West v. Brison, 99 Mo. 692; Byers v. Harris, 67 Iowa, 685. See Smith v. Warren, 88 Mo. App. 285; Regan v. Williams, 88 Mo. App. 577; California Nat. Bank v. Ginty, 108 Cal. 149, 41 Pac. 38; Provines v. Wilder, 87 Mo. App. 162; Tuohy v. Woods, 122 Cal. 665, 55 Pac. 683; Way v. Dunham, 166 Mass. 263, 44 N. E. 220; Boyd v. Cochrane, 18 Wash. 281, 51 Pac. 383. And accordingly it has been held that an accepted order upon a third person for payment of a debt not due is sufficient consideration for an agreement to forbear to sue upon a note which is past due. See Staver *et al.* v. Missimer, 6 Wash. 173, 32 Pac. 995, 36 Am. St. Rep. 142, note; Wallace v. Richards, 16 Utah, 52, 50 Pac. 804, citing text; Arend v. Smith, 151 N. Y. 502; Gross v. Steinle, 20 D. C. 339; Michigan Mut. Life Ins. Co. v. Custer, 128 Ind. 25, 27 N. E. 124; Davis v. Stout, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565; Alley v. Hopkins, 98 Ky. 668, 34 S. W. 13, 56 Am. St. Rep. 382; Eaton v. Whitmore, 3 Kan. App. 760, 45 Pac. 450. Taking a renewal note and the interest in advance for ninety days from the maker of the original note is a legal and binding contract, made upon a valid consideration, to extend the time of payment of the debt evidenced by said original note, and suit could not be maintained upon said debt until the expiration of the time for which said advanced interest has been paid. This would release a surety upon the original note, who did not assent to the extension of time. Schnitzler v. Fourth Nat. Bank of Wichita, 1 Kan. App. 647, 42 Pac. 496; Wallace v. Richards, 16 Utah, 52, 50 Pac. 804; Smith v. Mason, 44 Nebr. 611; Officer v. Marshall, 9 Tex. Civ. App. 428, 29 S. W. 246; Owings v. McKenzie, 133 Mo. 323, 33 S. W. 802; Harburg v. Kumpf, 151 Mo. 16, 52 S. W. 19; The Aultman & Taylor Co. v. Smith, 52 Mo. App. 351; Donovan Real Estate Co. v. Clark, 84 Mo. App. 163. See Smith v. McCall, 63 Mo. App. 631; Burrus v. Davis, 67 Mo. App. 210.

binding under the Statute of Frauds.[61] Mere gratuitous forbearance, of whatever duration inside of the limitation bar, will not discharge, for it is not the forbearance, but the contract, that operates the discharge;[62] and even where the holder insists on interest, that will not suffice to discharge the surety.[63]

§ 1317. **Usurious premium for extension of time.**— But an agreement to forbear suit, made in consideration of a usurious premium, which has been executed by payment of the premium and by forbearance accordingly, would discharge the drawer or indorser;[64] and such, it has been held, would also be its effect if the usurious contract were executory, on the ground that in such case the creditor places himself under a moral obligation, based upon a consideration which is beneficial to him, and which he recognizes as binding; and to permit him to take advantage of his own wrong, would enable him to profit doubly by his illegal action.[65] But the weight of authority is against this view.[66] It has been

61. Philpot v. Briant, 4 Bing. 717; Berry v. Pullen, 69 Me. 101.

62. Page v. Webster, 15 Me. 249; Berry v. Pullen, 69 Me. 101; Veazie v. Carr, 3 Allen, 14.

63. Philpot v. Briant, 4 Bing. 717. See Story on Bills, § 425. But see Rose v. Williams, 5 Kan. 483. An agreement by a creditor with the principal debtor made after the debt has become due and without the surety's consent to forbear the collection of the debt for a definite period, if without consideration, does not discharge the surety. And the promise by the principal debtor to pay interest upon the debt during the period of forbearance forms no consideration for such forbearance when the debtor is already bound to pay such interest. See Tatum v. Morgan, 108 Ga. 336, 33 S. E. 940.

64. Armistead v. Ward, 2 Pat. & H. 504; Whittemore v. Ellison, 72 Ill. 301; Hamilton v. Prouty, 50 Wis. 592; Fay v. Tower, 68 Wis. 289; Scott v. Harris, 76 N. C. 205, 36 Am. Rep. 871, note; Austin v. Dorwin, 21 Vt. 38; People's Bank v. Pearson, 30 Vt. 711; Billington v. Wagoner, 33 N. Y. 31; Kenningham v. Bedford, 1 B. Mon. 325; Kyle v. Bostwick, 10 Ala. 589; Vilas v. Jones, 10 Paige, 76; Miller v. McCan, 7 Paige, 451; Harbert v. Dumont, 3 Ind. 346; Redman v. Deputy, 26 Ind. 338; Lemmon v. Whitman, 75 Ind. 318; Osborn v. Low, 40 Ohio St. 347; Mann v. Brown, 71 Tex. 244; Cross v. Wood, 30 Ind. 378; Abel v. Alexander, 45 Ind. 523. But in Tennessee held, "Delay granted or promised upon a usurious consideration, is not based on a valid, enforceable contract and will not serve to release the sureties." McKamy v. McNabb, 97 Tenn. 236, 36 S. W. 1091; Froude v. Bishop, 25 App. Div. 514, 49 N. Y. Supp. 955.

65. Armistead v. Ward, 2 Pat. & H. 504; Corielle v. Allen, 13 Iowa, 289; Wheat v. Kendall, 6 N. H. 504; Smith v. Pearson, 52 Cal. 611. See on this subject, Oates v. National Bank, 100 U. S. (10 Otto) 248.

66. Vilas v. Jones, 1 N. Y. 274; McComb v. Kittridge, 14 Ohio, 348; Abel v. Alexander, 45 Ind. 523; Braman v. Hawk, 1 Blackf. 392; Naylor v. Moody, 3

held that where, by statute, a bonus paid for forbearance to sue is necessarily applied as part payment, or by agreement it is so applied, an indorser will not be discharged, because no legal obligation not to sue is created;[67] and that a promise by the maker to pay a greater rate of interest on the note, being without consideration, does not discharge an indorser.[68] In the absence of such a statute an agreement to pay a greater rate of interest would discharge the indorser.[69] The payment of legal interest in advance will uphold an agreement for forbearance, and discharge the surety,[70] and a note for the interest will be equal to its payment in advance.[71]

§ 1317a. Whether an agreement to pay the same rate of interest will support the stipulation to forbear is a question on which authorities differ. Some consider that it will;[72] others that it will

Blackf. 92; Coman v. The State, 4 Blackf. 241; Meiswinkler v. Jung, 30 Wis. 361 (1872); St. Maries v. Polleys, 47 Wis. 78; Church v. Maloy, 70 N. Y. 63; Thayer v. King, 38 N. Y. S. C. 437; Green v. Lake, 2 Mackey, 162; Tudor v. Goodloe, 1 B. Mon. 324; Scott v. Hall, 6 B. Mon. 127; Patton v. Shanklin, 14 B. Mon. 17; Halstead v. Brown, 17 Ind. 202; Smith v. Hyde, 36 Vt. 306; Burgess v. Dewey, 36 Vt. 618; Irvine v. Adams, 48 Wis. 468. See also Berry v. Pullen, 69 Me. 101.

67. Nightingale v. Meginnis, 34 N. J. 461. See Fernan v. Doubleday, 3 Lans. 216.

68. Schlussel v. Warren, 2 Oreg. 18.

69. Kittle v. Wilson, 7 Nebr. 84.

70. Binnian v. Jennings, 14 Wash. 677, 45 Pac. 302; Bank of British Columbia v. Jeffs, 18 Wash. 135, 51 Pac. 348. Held, in this case, that where a creditor, without inadvertence or mistake, receives a payment of interest in advance on the note of the debtor, and does not expressly reserve the right to sue before the expiration of the period for which interest is taken, there is a contract created to extend the time of payment during the period for which interest is paid. In Watley v. Deseret Nat. Bank, 14 Utah, 305, 47 Pac. 147, it is held that the payment of interest in advance, on a note by the principal to a creditor, is, of itself, sufficient *prima facie* evidence of an agreement to extend the time of payment for the period for which the interest is paid. Grace v. Lynch, 80 Wis. 166, 49 N. W. 751; Schieber v. Traudt *et al.*, 19 Ind. App. 349, 49 N. E. 605; Scott v. Scruggs, 95 Ala. 383, 11 So. 215. See Officer v. Marshall, 9 Tex. Civ. App. 428, 29 S. W. 246. See Nelson v. Brown, 140 Mo. 581, 41 S. W. 960, 62 Am. St. Rep. 755; Siebeneck v. Anchor Sav. Bank, 111 Pa. St. 187, 2 Atl. 485; Bishop's Estate, Banks' App. 195; 2 Hare & Wallace Lead. Cas. 469. But it is held such agreement is not presumed. First Nat. Bank v. Leavitt, 65 Mo. 563; St. Joseph F. & M. Ins. Co. v. Hauck, 71 Mo. 466. *Contra*, Crosby v. Wyatt, 10 N. H. 322.

71. Gahn v. Niemcewicz, 11 Wend. 312.

72. Pierce v. Goldberry, 31 Ind. 52 (overruled in Abel v. Alexander, 45 Ind. 523); Chute v. Pattee, 37 Me. 102; McComb v. Kittridge, 14 Ohio, 348 (over-

not,[73] which latter is, as we think, the better opinion, for it is merely a promise to do what the party is already bound to do.[74]

§ **1317b. Part payment** is not a sufficient consideration for an agreement to extend time, and, therefore, if there be no other consideration for an extension, it would not discharge a surety.[75] But if a note were given for the balance it would itself be a consideration for extension, and a surety would be thereby discharged.[76]

§ **1318. Second: The promise must be absolute.**— There must be an absolute agreement for indulgence by extension of time or forbearance to sue; for an agreement based upon a condition which is uncomplied with is not binding, and, therefore, does not discharge those who occupy the relation of sureties, but leaves all parties unaffected.[77] So an unexcepted offer is inchoate and in-

ruled in Jones v. Brown, 11 Ohio St. 601); Fawcett v. Freshwater, 31 Ohio St. 637; Blazer v. Bundy, 15 Ohio St. 57; Wood v. Newkirk, 15 Ohio St. 295; Reed v. Tierney, 12 App. D. C. 165. The Court of Appeals in this case reviews the decisions on the subject and concludes that the weight of authority supports the proposition that an agreement to pay the same rate of interest will not support a stipulation to forbear. Moore v. Redding, 69 Miss. 841, 13 So. 849.

73. In Harter v. Moore, 5 Blackf. 367; Stuber v. Schack, 83 Ill. 192, Schoefield, J., said: "The promise to pay interest being merely a promise to do that for which the party was already liable," is not a sufficient consideration. Wilson v. Powers, 130 Mass. 127; Tatum v. Morgan, 108 Ga. 336, 33 S. E. 940.

74. Moore v. Macon Sav. Bank, 22 Mo. App. 684, citing the text; Harburg v. Kumpf, 151 Mo. 16, 52 S. W. 19.

75. Andrews v. Hagadon, 54 Tex. 571; Herbert v. Servin, 41 N. J. L. 225; Carraway v. Odenhall, 56 Miss. 223; Prather v. Gammon, 25 Kan. 379; Jenness v. Cutler, 12 Kan. 500; Halderman v. Woodward, 22 Kan. 734; Royal v. Lindsay, 15 Kan. 291. See § 1327; Petty v. Douglas, 76 Mo. 70; Briggs v. Norris, 67 Mich. 325; Ingels v. Shutliff, 36 Kan. 444; McKamy v. McNabb, 97 Tenn. 236, 36 S. W. 1091.

76. See Jaffray v. Crane, 50 Wis. 349, where note for part of debt taken in satisfaction was held to discharge a surety. Price v. Dime Sav. Bank, 124 Ill. 324, in which case the surrender and cancellation of old note secured by collaterals held sufficient consideration. Vestal v. Knight, 54 Ark. 97, 15 S. W. 17.

77. Hansberger v. Geiger, 3 Gratt. 144; Norris v. Cumming, 2 Rand. 323; Wallace v. Richards, 16 Utah, 52, 50 Pac. 804, citing text; Hyland v. Bohn Mfg. Co., 92 Wis. 157, 65 N. W. 369. Held, in this case, that after a default in payment, voluntary promises of forbearance for a time, without consideration, did not constitute binding extensions, or a waiver of the right to take possession of the property. Maddox v. Lewis, 12 Tex. Civ. App. 424, 34 S. W. 647; Bacon v. Bacon, 94 Va. 692, 27 S. E. 576.

effectual.[78] An express agreement to extend the time is not necessary to satisfy the rule. Facts from which the law implies an agreement are sufficient, as, for example, the receipt of interest by the creditor for a specified time,[79] receiving new notes, or proving the claim in bankruptcy.[80]

§ 1319. **Third: The indulgence must not be indefinite.**— The promise or agreement to indulge the principal must specify some definite time, or, at least, be not indefinite; for otherwise the time might be so short (as an hour, for instance) as to be of no advantage to the debtor.[81] If the time be definite and unconditional a day will suffice.[82] Agreement to extend time "twenty or thirty days" is definite as to twenty days, and, therefore, discharges surety.[83] "Until after harvest time" has been held too indefinite an agreement of extension to discharge a surety,[84] but the opposite view obtained as to an agreement to extend the time "until after threshing."[85] The indulgence must be for a period longer than that which would be required by law for judgment to be obtained; otherwise, though upon a valid consideration, the surety will not be discharged.[86] Thus, where it was agreed that the right of action

78. Hewet v. Goodrick, 2 Car. & P. 468; Badnall v. Samuel, 3 Price, 521; Thompson on Bills, 395; Means v. Anderson, 19 R. I. 118, 32 Atl. 82; First Nat. Bank v. Cecil, 23 Oreg. 58, 31 Pac. 61, 32 Pac. 393; Bank of British Columbia v. Jeffs, 15 Wash. 231, 46 Pac. 247; Tuohy v. Woods, 122 Cal. 665, 55 Pac. 129.

79. Starrett v. Burkhalter, 86 Ind. 442. But see Citizens' Bank v. Moorman, 38 Mo. App. 486, *contra;* also Russell v. Brown, 21 Mo. App. 51.

80. Seibeneck v. Anchor Sav. Bank, 111 Pa. St. 187.

81. Alcock v. Hill, 4 Leigh, 622; Gardner v. Watson, 13 Ill. 347; Miller v. Stem, 2 Pa. St. 286; Blackstone Bank v. Hill, 10 Pick. 133; Parnell v. Price, 3 Rich. 121; Menifee v. Clark, 35 Ind. 304; Abel v. Alexander, 45 Ind. 523; People's Bank v. Legrand, 103 Pa. St. 309; Edwards v. Chair Co., 41 Ohio St. 17; Cates v. Thayer, 93 Ind. 156; Williams v. Scott, 83 Ind. 405; Bach v. Zimmerman, 106 Ind. 498, citing the text; West v. Brison, 99 Mo. 692; Merchants' Ins. Co. v. Hauck, 83 Mo. 21; Henry v. Gilliland, 1 West. Rep. 290; Union Nat. Bank v. Cross, 100 Wis. 175, 75 N. W. 992; Bunn v. Commercial Bank, 98 Ga. 647, 26 S. E. 63; Bonnell v. Prince, 11 Tex. Civ. App. 399, 32 S. W. 855.

82. Smith v. Sheldon, 35 Mich. 42; Fellows v. Prentiss, 3 Den. 512.

83. Scott v. Harris, 76 N. C. 205; Owen v. Bray, 80 Mo. App. 526.

84. Findley v. Hill, 8 Oreg. 248.

85. Moulton v. Posten, 52 Wis. 169.

86. Sizer v. Heacock, 23 Wend. 81; Hallett v. Holmes, 18 Johns. 28; Isaac v. Daniel, 8 Ad. & El. (N. S.) 500; Price v. Edmunds, 10 B. & C. 578; Lee v. Levi, 4 B. & C. 390, 1 Car. & P. 553; Byles on Bills (Sharswood's ed.) [*242],

should be suspended, but also that in case of any default the holder should have judgment at as early a period as he could have obtained it had he pursued his legal remedy, the surety was held not to be discharged.[87]

So, taking a *cognovit* from the acceptor, payable as early as a judgment could otherwise be obtained, does not exonerate the drawer or indorsers.[88] It would be otherwise if the postponement were beyond the period when judgment could be regularly obtained.[89] And the general rule above stated applies only to cases where time has been given after suit brought, and does not apply where time is given by contract before any action has been commenced.[90]

§ **1320.** An agreement for continuance of a case to another term of court, based on a valuable consideration, would discharge the drawer or indorser of the bill or note in suit, because it would operate as a suspension of any remedy for the debt for the stipulated period.[91] But if merely by consent and without consideration, it would not have this effect.[92]

§ **1321. Fourth: The surety's assent prevents his discharge.**— *Volenti non fit injuria* is a maxim of law, and it applies where the sureties consent to the indulgence. Then they are parties to it, and are not discharged.[93] Where the drawer replied to the holder, who stated the offer of the principal, " You may do as you like,"

387; 2 Parsons on Notes and Bills, 242; Story on Bills, § 427: Chitty on Bills (13th Am. ed.), 468; Story on Notes, § 415.

87. Kennard v. Knott, 2 M. & G. 474.

88. Fentum v. Pocock, 5 Taunt. 192.

89. Story on Notes, § 415; Edwards on Bills, 570.

90. Raught v. Black, 2 Disney, 477.

91. Bank of the United States v. Hatch, 6 Pet. 250.

92. Hays v. Myrick, 47 Ala. 335.

93. Norris v. Crummey, 2 Rand. 334; Hunter v. Jett, 4 Rand. 107; Gloucester Bank v. Worcester, 10 Pick. 528; Prouty v. Wilson, 123 Mass. 297; Smith v. Hawkins, 6 Conn. 444; Bruen v. Marquand, 17 Johns. 58; Smith v. Winter, 4 M. & W. 454; Mayhew v. Crickett, 2 Swanst. 185; Gray v. Brown, 22 Ala. 262; Story on Notes, § 419; 1 Parsons on Notes and Bills, 240; Edwards on Bills, 571; Ludwig v. Iglehart, 43 Md. 39; Bowery Bank v. Gerety, 153 N. Y. 411, 47 N. E. 793; Jackson Bank v. Irons, 18 R. I. 718, 30 Atl. 420; Bishop v. Eaton, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437; Frank v. Williams, 36 Fla. 136, 18 So. 351; Bank v. Couch, 118 N. C. 436, 24 S. E. 737; Klein v. Long, 27 App. Div. 158, 50 N. Y. Supp. 419; Pimental v. Marques, 109 Cal. 406, 42 Pac. 159.

it was held an assent to the indulgence proposed.[94] And in Thompson on Bills[95] it is said: "If an obligant be consulted as to the propriety of giving time, his silence may be taken as consent, if the delay be a reasonable one in the circumstances." It would certainly, however, be safer for the holder to require an explicit answer. An ambiguous reply should not be relied on.[96] If the holder give time to a prior party, and a subsequent party, knowing the fact, afterward promises to pay, he waives his defense, and is bound absolutely.[97]

§ 1322. Fifth: Reservation of remedies against surety.— The surety will not be discharged by indulgence to the principal when there is an unqualified reservation of the creditor's remedies against the surety.[98] Thus the drawer or indorser would not be discharged by time granted to the maker or acceptor: *First,* because it rebuts the implication that the drawer or indorser was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and *secondly,* because it prevents the rights of the drawer or indorser against the acceptor or maker being impaired, the injury to such right of the surety being the other reason. For the debtor (acceptor or maker) cannot complain if the instant afterward the surety (drawer or indorser) enforces these rights against him, and his consent that the creditor (the holder) shall have recourse against the surety (drawer or indorser) is impliedly a consent that such surety shall have recourse against him.[99] The contrary doctrine that such

94. Clark v. Devlin, 3 Bos. & P. 363. See Prouty v. Wilson, 123 Mass. 297, for circumstances showing surety's assent.

95. Wilson's ed. 396; London, etc., Bank v. Parrot, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64.

96. Withall v. Masterman, 2 Campb. 179.

97. Stevens v. Lynch, 12 East, 38.

98. Bank v. Simpson, 90 N. C. 469, citing the text; Rockville Nat. Bank v. Holt (Conn.), 20 Atl. 669; Merchants' Bank v. Bussell, 16 Wash. 546, 48 Pac. 242, citing the text; National Bank v. Jose, 10 Wash. 185, 38 Pac. 1026; Sawyers v. Campbell, 107 Iowa, 397, 78 N. W. 56, citing text; Hodges v. Elyton Land Co., 109 Ala. 617, 20 So. 23; Big Rapids Nat. Bank v. Peters, 120 Mich. 518, 79 N. W. 891.

99. Muir v. Crawford, L. R., 2 Scotch App. 456 (1875), 13 Moak's Eng. Rep. 138; *Ex parte* Carstairs, 1 Buck, 560; Bouler v. Mayor, 19 C. B. (N. S.) 70 (115 Eng. C. L.); Kearsley v. Cole, 16 M. & W. 127 (1846), Parke, B.; *Ex parte* Glendinning, 1 Buck, 517; Boultbee v. Stubbs, 18 Ves. 20; *Ex parte* Gifford, 6 Ves. 807, 808; Owen v. Homan, 3 Eng. L. & Eq. 125; Nichols v. Norris, 3 B. & Ad. 41; Stewart v. Eden, 2 Cai. 121; Canadian Bank of Com-

reservation of remedies is ineffectual, has been adopted in some cases.[1] Parol evidence may be given to show that an agreement which by itself would discharge a surety, was not to have that effect.[2]

§ **1323. Reservation should appear on face of instrument.**— The reservation of the rights of the surety should appear on the face of the agreement giving time, and cannot, when such agreement is written, be proved by parol. But that is not always necessary where the agreement to preserve the surety's rights is distinct and collateral.[3]

§ **1324. Sixth: Agreement must be made with principal.**— The agreement for indulgence, in order to discharge the drawer or indorser, must be made with the maker or acceptor who is the principal debtor; and if it be made with a third party, it will not affect the drawer's or indorser's rights or remedies, although such third party may have his appropriate remedy for breach of the contract with him.[4]

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merce v. Northwood, 14 Ont. 209; Wagman v. Hoag, 14 Barb. 233, 239; Clagett v. Salmon, 5 Gill & J. 314; Morse v. Huntington, 40 Vt. 488; Viele v. Hoag, 24 Vt. 46; Hagey v. Hill, 75 Pa. St. 108; Kenworthy v. Sawyer, 125 Mass. 28; Story on Bills, § 426; Story on Notes, § 416; Thompson on Bills, 387; 1 Parsons on Notes and Bills, 241; Burge on Suretyship, 210.

1. Gustine v. Union Bank, 10 Rob. (La.) 412 (1845); Harbert v. Dument, 3 Port. (Ind.) 246 (1852).

2. Wyke v. Rogers, 1 De G., M. & G. 408.

3. Byles on Bills (Sharswood's ed.) [*245], 390.

4. Frazer v. Jordan, 8 El. & Bl. 303, Coleridge, J., saying: "We think that the doctrine ought not to be extended to the case of a contract with a stranger. The principal debtor having given no consideration for the promise, has no ground to complain of the breach of it, and cannot say that faith has been broken with him. There is no privity of contract with him; and we see nothing on which any right, either at law or in equity (see Lord Abinger's observations in Lyon v. Holt, 5 M. & W. 250, 253, 254), for him to insist on such a contract can be founded. The stranger may have some private reason of his own to wish for some indulgence to be shown; and if he has given a good consideration, may be entitled to damages, nominal, or large or small, according to any legal interest he may have; but surely he is the only person to take advantage of his contract." Lyon v. Holt, 5 M. & W. 543; Sterling v. Marietta, etc., Co., 11 Serg. & R. 179; 2 Parsons on Notes and Bills, 241; Thompson on Bills, 394. Compare Nelson v. Brown, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755. If contract of extension is made with one of the principals, it will suffice. Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140, citing the text. *Contra*, Merchants' Bank v. Bussell, 16 Wash. 546, 48 Pac. 242, holding that contract of extension between holder

§ **1325.** An ordinary surety who has been discharged may certainly waive the discharge, and resume liability for a consideration.[5] And perhaps without any new consideration.[6] Undoubtedly a waiver made with full knowledge of the facts, by an indorser or drawer who has been discharged, will bind him, although without a new consideration.[7] Where the suretyship is not apparent upon the face of the paper, and the creditor has no knowledge of the fact that the parties, in form joint makers, are sureties, it has been held that an extension of time granted the principal will not discharge such sureties.[8]

SECTION III.

WHAT ACTS OF CREDITOR WILL NOT DISCHARGE A SURETY.

§ **1326.** The surety will not be discharged either by (1) a delay of the creditor to sue the principal; (2) by receipt of a part payment from the principal; or (3) by receipt from him of collateral security.

(1) **Mere delay** and passivity of the creditor does not discharge a drawer or indorser, or other surety, even when the delay and subsequent insolvency of the principal deprives him of all means of reimbursement;[9] and unless authorized so to do by statute,

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and part of sureties is binding and valid, although principal makers of the note may not be parties to the agreement. See also McDougall v. Walling, 15 Wash. 78, 45 Pac. 668, 55 Am. St. Rep. 871; Bank v. Matson, 99 Tenn. 390, 41 S. W. 1062, citing text.

5. New Hampshire Sav. Bank v. Colcord, 15 N. H. 119.

6. Fowler v. Brooks, 13 N. H. 420; 1 Parsons on Notes and Bills, 242.

7. See *ante*, § 1222, and chapter XXXV, vol. II; Dyar v. Shenkberg, 93 Iowa, 154, 61 N. W. 403; Dwinnell v. McKibben, 93 Iowa, 331, 61 N. W. 985.

8. Bonnell v. Prince, 11 Tex. Civ. App. 399, 32 S. W. 855; Lamson v. First Nat. Bank, 82 Ind. 22; Wasson v. Hodshire, 108 Ind. 26.

9. Powell v. Waters, 17 Johns. 176; Wood v. Jefferson County Bank, 9 Cow. 194; Bank of S. C. v. Myers, 1 Bailey, 412; Sterling v. Marietta Co., 11 Serg. & R. 179; Freeman's Bank v. Rollins, 13 Me. 202; Worsham v. Goar, 4 Port. 441; English v. Darley, 2 Bos. & P. 61; Sohn v. Martin, 92 Ind. 170. But see Thompson v. Campbell, 121 Ind. 398; Beveridge v. Richmond, 14 Mo. App. 405; Benedict v. Olson, 37 Minn. 431; Star Wagon Co. v. Swezy, 63 Iowa, 520; Huff v. Slife, 25 Nebr. 448. (A different rule applies as to notes not negotiable, see *ante*, § 1316.) Darby v. Berney Nat. Bank, 97 Ala. 643, 11 So. 881; Hoover v. McCormick, 84 Wis. 215, 54 N. W. 505, citing text; Gray v. Farmers' Bank, 81 Md. 631, 32 Atl. 518; Dyar v. Shenkberg, 93 Iowa, 154, 61 N. W. 403; Hefferlin v. Krieger *et al.*, 19 Mont. 123, 47 Pac. 638, citing text; Flentham v. Steward, 45 Nebr. 641, 63 N. W. 924. See Patton v. Cooper, 84 Mo. App. 427; Phœnix, etc., Ins. Co. v. Landis, 50 Mo. App. 116, citing

he cannot, by request or notice, compel the creditor to sue the principal debtor.[10] It has been held that an averment of the insolvency of the maker, in a suit by the indorsee against an indorser, excuses the former for failure to sue the maker. It is also said that the surety may waive suit, as well as demand and notice against the maker.[11]

§ **1327. (2) Part payment** made to the debtor by the maker or acceptor, either before, or at, or after maturity of the note or bill, will not discharge the drawer or indorsers, except to the amount of the sum so paid, unless the part payment is accompanied with some stipulation which may be hurtful to their interests. In itself it is only an extinguishment of the debt *pro tanto,* which relieves the drawer or indorsers to that extent, and is, therefore, beneficial.[12] It appears to have been once holden that if, on presentment for payment, the holder took less than the whole amount from the acceptor or indorser, in part satisfaction, he thereby discharged the other parties who did not assent.[13] But it is now settled that the holder may take part payment from any party, and sue the others for the residue.[14] Even an agreement that part payment shall dis-

text; Carver v. Steele, 116 Cal. 116, 47 Pac. 1007, 58 Am. St. Rep. 156; Savings Bank v. Central Market Co., 122 Cal. 28, 54 Pac. 273; State Loan & Investment Co. v. Cochran, 130 Cal. 245.

10. See *post,* § 1339; May v. Reed, 125 Ind. 199, 25 N. E. 216; Myers v. State Bank, 53 Nebr. 824, 74 N. W. 252.

11. Schmid v. Frank, 86 Ind. 1326.

12. Greenawalt v. McDowell, 65 Pa. St. 464; Hill v. Bostick, 10 Yerg. 410; James v. Badger, 1 Johns. Cas. 131; Bank of the United States v. Hatch, 6 Pet. 250; Mason v. Peters, 4 Vt. 101; English v. Darley, 2 Bos. & P. 61; Edwards on Bills, 570; Halliday v. Hart, 30 N. Y. 474; Turnbull v. Block, 31 Ohio St. 649. Upon the same principle it has been decided that if the principal has money in bank applicable to the payment of his negotiable note payable at said bank, and the bank permits him to check out the entire deposit for other purposes, and he afterward becomes insolvent, the surety on the note is thereby discharged from liability. See The Pursifull v. Pineville Banking Co., 97 Ky. 154, 30 S. W. 203, 53 Am. St. Rep. 409; Scott v. Scruggs, 95 Ala. 383, 11 So. 215; Bacon v. Bacon, 94 Va. 692, 27 S. E. 576.

13. Tassel v. Lewis, 2 Ld. Raym. 744 (1695), where it is said: "If the indorsee of a bill accepts but two pence from the acceptor, he can never after resort to the drawer." Kellock v. Robinson, 2 Stra. 745 (1727); Merchants' Nat. Bank v. McAnulty, 89 Tex. 124, 33 S. W. 963.

14. Hewitt v. Goodrich, 2 Car. & P. 468 (after dishonor); Gould v. Robson, 8 East, 576; Walwyn v. St. Quintin, 1 Bos. & P. 658; English v. Darley, 2 Bos. & P. 61; Chitty on Bills (13th Am. ed.), 472; Story on Notes, §§ 385, 422; Byles on Bills (Sharswood's ed.) [*242], 387; Thompson on Bills, 386; 2 Rob. Pr. (new ed.) 239.

charge the debt, will not discharge any party to the instrument, unless some other circumstance entered into the consideration.[15]

§ 1328. (3) The receipt of a mortgage, deed of trust, or other collateral security by the holder, from the maker or acceptor, with agreement to apply the proceeds to payment of the bill or note, will not in anywise affect the rights of the holder against the drawer or indorsers, if it be unaccompanied with any stipulation for indulgence or delay; for he is not incapacitated to pursue his remedy against any of the parties at any time, and the security taken operates for the benefit of the drawer or indorsers, who are the better protected against loss.[16] And it matters not that he afterward surrenders up such collateral security, on being informed that the bill would probably be paid by the drawee.[17]

§ 1329. While taking a bill, note, or check as collateral security merely, without any express or implied agreement for delay in consideration thereof, does not discharge the drawer or indorsers; yet if such bill, note, or check so taken by the holder be payable at a future day, there arises an implication of agreement for

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15. See chapter on Payment, and *ante*, § 1317*b*. In Hightower v. Ivy, 2 Port. 308, it was held that the refusal of an indorsee who had sued the maker, to receive part payment from him, discharged the indorser, it appearing that it could not be afterward recovered.

16. Beard v. Root, 4 Hun, 357; Bank of Utica v. Ives, 17 Wend. 502; Cary v. White, 52 N. Y. 138; Brengle v. Bushey, 40 Md. 141; Andrews v. Marrett, 58 Me. 539; Thompson v. Gray, 63 Me. 230; York v. Pierson, 63 Me. 587; Lincoln v. Bassett, 23 Pick. 154; Sigourney v. Wetherell, 6 Metc. (Mass.) 553; Sterling v. Marietta, etc., Co., 11 Serg. & R. 179; Payne v. Commercial Bank, 6 Smedes & M. 24; United States v. Hodge, 6 How. (U. S.) 279; Wade v. Staunton, 5 How. (Miss.) 631; Ripley v. Greenleaf, 2 Vt. 129; Oxford Bank v. Lewis, 8 Pick. 458; Suckley v. Furse, 15 Johns. 338; Miller v. Knight, 6 Baxt. 503; Twopenny v. Young, 3 B. & C. 208; Pring v. Clarkson, 1 B. & C. 14; Bedford v. Deakin, 2 B. & Ald. 210; Story on Notes, § 416; Story on Bills, § 427; Edwards on Bills, 570. The right to enforce note is not lost or the indorsers discharged merely because the taking of the collateral was illegal. See The Bowery Bank v. Gerety, 153 N. Y. 411, 47 N. E. 793; Jenkins v. Daniel, 125 N. C. 161, 34 S. E. 239, 74 Am. St. Rep. 632; Bank v. Matson, 99 Tenn. 390, 41 S. W. 1062, citing text; Bank v. Looney, 99 Tenn. 278, 42 S. W. 149, 63 Am. St. Rep. 830; Hoover v. McCormick, 84 Wis. 215, 54 N. W. 505, citing text; Maledon v. Leflore, 62 Ark. 387, 35 S. W. 1102; Tarver v. Evansville Furniture Co., 20 Tex. Civ. App. 66, 48 S. W. 199; Bacon v. Bacon, 94 Va. 692, 27 S. E. 576; London, etc., Bank v. Parrot, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64; Dodson v. Taylor, 56 N. J. L. 11, 28 Atl. 316.

17. Hurd v. Little, 12 Mass. 502. But the transfer by a pledgee of a promissory note as collateral security for a debt to the maker of the note is a payment *pro tanto* of the debt secured. See Gilliam v. Davis, 7 Wash. 332, 35 Pac. 69.

delay until its maturity, and, as has been said, "such indulgence may be, and is in most cases, the very consideration upon which the collateral security is given and obtained." [18] Undoubtedly the holder may show that it was agreed that there should be no delay, or that the remedy against the drawer or indorser was reserved; but that agreement for delay will be presumed, is the view sustained by weight of authority.[19] In England it was at one time held that where the holder of a bill took a second bill of the acceptor, after notifying the drawer of dishonor, payable at a future day, without any express agreement, and without surrendering the first bill, the second bill should be regarded as collateral security merely, although money had been raised upon it; and that the drawer was not discharged.[20] And there is authority to the same effect in the United States.[21] But this decision is now overruled, and the English doctrine conforms to the text.[22]

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18. Okie v. Spencer, 2 Whart. 253 (1836).

19. See *ante*, § 1256 *et seq.*, and § 1312 *et seq.*; Beard v. Root, 4 Hun, 356. In this case defendant was sued as indorser of a note for $226.25. The maker received from the holder a bond and mortgage for $600, after maturity of the note, and advanced him $100 thereon. Under the circumstances of the case the court held the indorser discharged, and E. Darwin Smith, J., said: "It is doubtless true that the mere taking of collateral security for a debt without an agreement to extend the time of payment, does not discharge a surety. But it is not necessary that the agreement to extend the time of payment be in express terms. The contract in this case, unavoidably, and by clear implication, includes such an agreement." Hubbard v. Gurney, 64 N. Y. 460; Pomeroy v. Tanner, 70 N. Y. 547; Armistead v. Ward, 2 Pat. & H. 504; Bangs v. Mosher, 23 Barb. 478. In Okie v. Spencer, 2 Whart. 253, the holder of a note took from the maker, at its maturity, a check dated six days afterward and the indorser was held to be discharged. Myers v. Willis, 5 Hill, 463; Fellows v. Prentiss, 3 Den. 512; Couch v. Waring, 9 Conn. 264; Eisner v. Kelly, 3 Daly, 485; Frois v. Mayfield, 33 Tex. 801. In Chitty on Bills (13th Am. ed.) [*408], 461, it is said: "It is admitted that the mere receiving a further security, payable at a future day, would in general imply an agreement to wait till it becomes due." Chitty, Jr., on Bills, 100*w*, and 100*x*, note; 2 Parsons on Notes and Bills, 247; 2 Am. Lead. Cas. 272; Thompson on Bills (Wilson's ed.), 392, 393, note *a*. *Contra*, Ripley v. Greenleaf, 2 Vt. 129, now overruled; Michigan State Bank v. Leavenworth, 28 Vt. 215.

20. Pring v. Clarkson, 1 B. & C. 14, 2 Dowl. & R. 78 (1882); followed in Galen v. Niemcewicz, 16 Johns. 321 (1833). This case may now be regarded as overruled. But see also Austin v. Curtis, 31 Vt. 64; Whitney v. Going, 20 N. H. 354.

21. See preceding note.

22. Kendrick v. Lomax, 2 Cromp. & J. 405 (1832). See Michigan State Bank v. Leavenworth, 28 Vt. 215 (1856); Baker v. Walker, 14 M. & W. 464 (1845).

§ **1330.** When the bill, note, check, or other security which is taken by the holder, is payable immediately, or what is the same thing, on demand, there can arise no presumption for delay on the part of the holder, and consequently it will operate in itself as a discharge of the drawer or indorser.[23] Yet the holder, by neglecting to collect the amount of the bill, note, or check with due diligence, may discharge the maker or acceptor who passed it to him; and thus by discharging the principal discharge the drawer or indorser. It is his duty to present a check on the same day if it be on a bank in the place where received, and to forward it by mail of the next day if in another;[24] and he must exercise diligence in presenting a bill or note payable on demand. What due diligence is, is elsewhere considered.

§ **1331. Composition with principal.**— Any composition with the maker or acceptor, whereby a certain per cent. is agreed to be taken in discharge of the whole amount, upon receiving collateral security from a third person for the composition money, and it were given accordingly, would discharge the drawer or indorser, whether he were an accommodation party or not; for it would amount to an extinguishment and satisfaction of the instrument as to all the parties thereto.[25]

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23. Crafts v. Beale, 11 C. B. 172, 2 Am. Lead. Cas. 273. See, on this point, Board of Education v. Fonda, 77 N. Y. 362, Folger, J.: "Taking of the draft (which was payable on demand) as a means of getting payment of the debt, and the unavailing use of it for that purpose, without laches, worked no suspension of remedy against Wolcott, the principal, that will discharge defendants if they are his sureties." Merriman v. Barker, 121 Ind. 74.

24. Smith v. Miller, 43 N. Y. 171 (1870), 52 N. Y. 546 (1873). See vol. II, § 1590.

25. Lewis v. Jones, 4 B. & C. 506; Steinman v. Magnus, 11 East, 390; Story on Notes, §§ 426, 427. In Story on Bills, § 430, it is said: "Perhaps it is questionable, even if the holder has the consent of the other parties, that he may accept the composition, and hold them liable, without resorting to the compounding creditor, whether he will not still be deprived of his remedy against them, if the composition operates as a release of the debt, inasmuch as it will be a fraud upon the other creditors, if they have supposed that they had contracted with each other on equal terms. On the other hand, the holder's compounding with, or releasing, the drawer, will not discharge the acceptor of a bill, although he has accepted it for the accommodation of the drawer, unless it is expressly so stipulated." See Kiam v. Cummings, 13 Tex. Civ. App. 198, 36 S. W. 770.

This doctrine was first introduced in courts of equity,[26] but it is now universally applied by courts of law. A discharge of the maker in bankruptcy does not release an indorser.[27]

SECTION IV.

LATENT SURETIES; ACCOMMODATION, AND JOINT PARTIES AS SURETIES.

§ 1332. There is no doubt that if the party add the word "surety" to his name upon the face of the paper, it is a distinct indication of the character in which he signs, and that he will be treated as a surety as against all parties.[28] And it is equally well settled that if the party signing add the word "principal" to his name, or expressly describe himself as principal on the face of the paper, all parties may so regard and treat him.[29] But there are other cases in which the parties signing do not expressly describe in what character they are to be bound, which claim especial attention.

What we have heretofore said in respect to the discharge of those parties to bills and notes who are regarded as occupying the rela-

26. Melvill v. Glendinning, 7 Taunt. 126.

27. Pratt v. Chase, 122 Mass. 265.

28. Hunt v. Adams, 5 Mass. 358; Robison v. Lyle, 10 Barb. 512; Edwards on Bills, 572. See § 1338*a*; Bank v. Good, 21 W. Va. 467, citing the text; Stovall v. Border Grange Bank, 78 Va. 194, citing the text; Peoria Mfg. Co. v. Huff, 45 Nebr. 7, 63 N. W. 121; Arbuckle v. Templeton, 65 Vt. 207, 25 Atl. 1095; People's Bank v. Pearsons, 30 Vt. 711.

29. In Sprigg v. Bank of Mount Pleasant, 10 Pet. 265, Thompson, J., said: "In ordinary cases, when sureties sign an instrument without any designation of the character in which they become bound, it may be reasonable to conclude that they understood that their liability was conditional, and attached only in default of payment by the principal. And hence the reasonableness of the rule of law, which requires of the creditor that his conduct with respect to his debtor should be such as not to enlarge the liability of the surety, and make him responsible beyond what he understood he had bound himself. But when one who is in reality only surety is willing to place himself in the situation of a principal by expressly declaring upon his contract that he binds himself as such, there cannot be any hardship in holding him to the character in which he assumes to place himself. As to that particular contract, he undertakes as a partner with the debtor, and has no more right to disclaim the character of principal than the debtor would have to treat him as principal if he had set out in the obligation that he was only surety." See also 14 Pet. 201; Harris v. Brooks, 21 Pick. 195; Menagh v. Chandler, 89 Ind. 94; Arbuckle v. Templeton, 65 Vt. 207, 25 Atl. 1095; Claremont Bank v. Wood, 10 Vt. 582; Benedict v. Cox, 52 Vt. 247.

tion of sureties, by indulgence to or discharge of their principals, was said under the assumption that the bill or note, as the case might be, was executed upon a valuable consideration, and that all parties were bound in all respects to the holder in like manner as they appeared to be.

§ 1332a. Parties signing as principals for accommodation.— Where the parties ostensibly principal were in reality mere parties for the accommodation of others, it has been held, by authorities of high consideration, that different and peculiar principles apply, and that in such cases, if the holder grant time to or release the party for whose accommodation another became acceptor or maker, the acceptor or maker was thereby discharged.[30]

§ 1333. English decisions.— Thus it was held at *nisi prius,* by Lord Ellenborough, that where the indorsee of a bill, who received it knowing that it was accepted for accommodation of the drawer, gave time to the drawer when it became due upon his paying a part, the acceptor was thereby discharged.[31] And subsequently, by the same judge, that giving time to an accommodation acceptor would not discharge the accommodated drawer, on the ground that the latter had no remedy over against the acceptor which could be materially affected;[32] in both cases regarding the acceptor as a surety, and the drawer as the principal debtor. The doctrine of Lord Ellenborough was soon doubted, and held not to apply where the acceptor promised to pay the bill when demand was made at maturity;[33] and Lord Mansfield declared in the ensuing year that

30. Hoffman v. Butler, 105 Ind. 372, citing the text; Fisher v. Denver Nat. Bank, 22 Colo. 379, 45 Pac. 440, supporting the text, "but the mere taking of collateral security, whether it be by note or mortgage, or both, or payable or enforceable after the maturity of the original debt, is not *prima facie* evidence of an extension of payment of original debt." See Fisher v. Denver Nat. Bank, *supra;* Flour City Nat. Bank v. McKay, 86 Hun, 15, 33 N. Y. Supp. 365. See Gist v. Feitz, 43 Nebr. 238, 61 N. W. 621.

31. In Laxton v. Peat, 2 Campb. 185 (1809), Lord Ellenborough said: "This being an accommodation bill within the knowledge of all the parties, the acceptor can only be considered a surety for the drawer, and in the case of simple contracts the surety is discharged by time being given, without his concurrence, to the principal. The defendant's remedy over is materially affected by the new agreement into which the plaintiff entered with the drawer after the bill was due. The case is exactly the same as if the bill had been drawn by the defendant (the acceptor), and accepted by Hunt (the drawer), in consideration of a debt due." See Edwards on Bills, 573.

32. Collett v. Haigh, 3 Campb. 281 (1812).

33. Kerrison v. Cooke, 3 Campb. 362 (1813), Gibbs, J.

"except in the case cited from Campbell (Laxton v. Peat), it never was known that anything passing between other parties could discharge an acceptor."[34] Lord Ellenborough himself, it appears, had applied a different doctrine from that held by him in the cases above referred to, in an earlier case, where a similar question was presented between the indorsee and the maker of a note for accommodation of the payee.[35] Upon the question arising in the Court of Common Pleas, in a case where it appeared that the indorsee of a bill accepted for the accommodation of the drawer took a *cognovit* from the drawer payable by instalments, it was unanimously held that the acceptor was not discharged, and the circumstance that the holder did not know it was an accommodation acceptance when he took it, was considered by Lord Mansfield entirely immaterial.[36]

§ **1334.** The doctrine of the Court of Common Pleas, enforced by the great name and cogent reasoning of Lord Mansfield, may be regarded as the settled doctrine of the courts of common law in England, in cases where the holder did not know that the note or acceptance was for accommodation at the time when he took the instrument, although he may have afterward acquired information of its true character.[37] And even where the holder

34. Raggett v. Axmore, 4 Taunt. 730 (1813).

35. Mallet v. Thompson, 5 Esp. 178 (1804). The indorsee of the payee, for whose accommodation the note was made, knowing that it was an accommodation note, covenanted in a composition deed not to sue or molest the payee on account of the debt for ninety-nine years, and received a dividend of the payee's estate. Lord Ellenborough held that the maker was not discharged, in a suit against him by the indorsee, and said: "It is true that the plaintiff, recovering on the defendant (the maker) in this case, he (the maker) may have his action over against Twigg (the payee), but it will be for money paid to his use at the defendant's suit; the payment creates a new debt, but the old debt is satisfied as between Twigg and the plaintiff."

36. Fentum v. Pocock, 5 Taunt. 192, 1 Marsh. 14 (1813).

37. Carstairs v. Rolleston, 5 Taunt. 551, 1 Marsh. 257 (1814). The holder released the payee who had indorsed to him an accommodation note. He did not know when he received it that it was accommodation paper. Held, the maker was not discharged. In Nichols v. Norris, 3 B. & Ad. 41, Parke, J., said: "I am of opinion that Fentum v. Pocock is sound law." In Price v. Edmunds, 10 B. & C. 578 (1830), Parke, J., said: "I think that the decision in Fentum v. Pocock, where it was held that the acceptor of an accommodation bill was not discharged by giving time to the drawer, was good sense and good law." Rolfe v. Wyatt, 5 Car. & P. 181 (1831). Held, giving time to drawer, on receiving part payment of bill accepted for his accommodation, did not discharge acceptor. The holder did not know it was an accommodation

knew that the apparent principal party was really signing for the accommodation of another, at the time when he received the instrument, the better opinion is that that circumstance does not alter his rights or duties, as such party has held himself out and obligated himself in a certain character, and has no just ground to demand or expect greater consideration than that legally incident to that character which he has assumed.[38] If he intended to insist on the privileges of a surety, he should have refused to bind himself save in a recognized form of suretyship. Furthermore, it may be observed, that while the indulgence or release of an acceptor (or other principal) materially affects the remedies of the drawer (or other surety) who is thereby delayed or entirely deprived of recourse against the acceptor upon the bill itself, to which he would be entitled, and upon which he might sue the acceptor on making payment, no such injury can possibly be inflicted on the acceptor for accommodation by indulgence to or release of the drawer. The acceptor may, at any time at or after maturity of the bill, pay it, and no matter what may be the arrangements between the holder and the drawer, sue the latter, not upon the bill, but for money paid to his use.[39] But now in courts of equity in England, and in courts of law where equitable pleas are admissible, the opposite doctrine prevails, and was enforced a few years since in a well-considered case.[40]

bill. Harrison v. Courtauld, 3 B. & Ad. 37 (1832). Held, that holder who knew at the time of the agreement, but not when he took the bill, that it was accepted for accommodation, by releasing drawer did not discharge acceptor. Story on Bills, §§ 253, 268.

38. Fentum v. Pocock, 5 Taunt. 192, 1 Marsh. 14 (1813), Lord Mansfield; Webster v. Mitchell, 22 Fed. 870, citing the text. See Gist v. Feitz, 43 Nebr. 238, 61 N. W. 621.

39. See Mallet v. Thompson, *supra;* § 1333, note 35; Thompson on Bills, 237; Story on Bills, § 268.

40. Edwin v. Lancaster, 6 Best & S. Q. B. 572 (118 Eng. C. L.) (1865). Bill accepted for drawer's accommodation, and agreement of compensation entered into between holder and drawer, the holder knowing then that the acceptance was for accommodation. Crompton, J.: "Originally, the cases at law were extremely strong that the position of parties to a bill of exchange or promissory note could not be reversed by making the party who appeared on the face of the instrument to be the principal debtor surety for the other. They proceeded on the principle that parol evidence is not allowed to alter a written contract. That principle is a sound one, and has governed many cases in courts of law. But cases in equity establish, that when one or both of two parties to an instrument are primarily liable, as in the instance of a common bond where several join as obligors, and the creditor may sue any one of

§ **1335. American decisions.**— In the United States the rule is generally sustained that the parties to a bill or note are bound by the character which they assume upon its face, and that they are liable to, and may be treated by the holder according to their ostensible relations to the instrument, especially when he had no knowledge that any of them were accommodation parties at the

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them at any time, it is competent for him to show that the relation of principal and surety exists between the parties. Lord Cottenham, in Hollier v. Eyre, 9 Clarke & F. 1, 45, referred to in Pooley v. Harradine, 7 El. & Bl. 431, 435 (90 Eng. C. L.), explained that the doctrine on which the courts of equity proceed arose from its being inequitable that the creditor should prejudice the rights of the surety against the principal. In Strong v. Foster, 17 C. B. 201 (84 Eng. C. L.), which was after pleas on equitable grounds had been introduced, the evidence failed to support the equitable defense, and it was not necessary to pronounce an opinion on the validity of it. In Pooley v. Harradine, 7 El. & Bl. 431 (90 Eng. C. L.), this court upheld a plea on equitable grounds, which stated that the defendant made the note jointly, with A. as surety only for him, of which the plaintiff had notice at the time, and that the plaintiff gave time to A. without the defendant's knowledge. That decision was adopted by the Court of Exchequer in Taylor v. Burgess, 5 H. & N. 1, and was held to be law by the Exchequer Chamber, in Greenough v. McClelland, 2 El. & El. 424, 429 (105 Eng. C. L.). But Pooley v. Harradine left one matter in doubt, viz., whether the creditor must have had notice of the suretyship at the time of taking the notes, or whether notice at the time of the dealing, alleged to amount to a discharge of the surety, was sufficient. That case came before this court in Baily v. Edwards, 4 Best & S. 761 (116 Eng. C. L.), which is very analogous to the present; and the law accurately laid down by my brother Blackburn, in that case applies here. There the plaintiffs, when they executed the deed by which time was given, had notice that the bill was accepted for the accommodation of their debtor; and that is the time to be looked at, because it is the time when the equity arises. It is clear that a creditor is not bound to sue either the principal or the surety. No delay in suing the surety will prejudice him, but he must not make a binding agreement by which he ties up his hands from suing the principal. If he does so, the surety is discharged, on the principle explained by Williams, J., in Strong v. Foster, 17 C. B. 201, 219 (84 Eng. C. L.). Here the plaintiff made a contract with the principal, upon good consideration, to give up the bills to be canceled. Whether that is a waiver of the right of action against the surety may be doubtful; for a waiver can only be to the party himself who relies upon it. But by that contract the plaintiff, for a good consideration, tied up his hands from suing the principal debtor. It may be shown by parol evidence, that in the transaction between the creditor and his debtors, according to truth and for the purposes of equity, one of the debtors was surety for the other; and then the creditor is within the rule by which, if he gives time to the principal debtor, the surety is discharged." Scott v. Scruggs, 9 C. C. A. 246, 60 Fed. 721.

time when he became a holder for value.[41] And the observation of Story may be quoted with approval, that "the strong tendency of the more recent authorities is to hold that, in all cases, the holder has a right to treat all the parties to a bill as liable to him exactly to the same extent, and in the same manner, whether he knows or not the note to be an accommodation note; for, as to him, all the parties agree to hold themselves primarily or secondarily liable, as they stand on the note; and that they are not at liberty, as to him, to treat their liability as at all affected by any accommodation between themselves."[42]

§ 1335a. Knowledge of creditor of party's accommodation character.— There is strong authority for what seems to us the better doctrine, that even if the holder knew at the time he received the bill or note that it was accepted or made for accommodation, his rights and duties are in no respect altered; and no indulgence to or release of a drawer or indorser will discharge the acceptor or maker.[43] But there are weighty American authorities which

41. Farmers', etc., Bank v. Rathbone, 26 Vt. 19; Gano v. Heath, 36 Mich. 441; Summerhill v. Tapp, 52 Ala. 227; Beveridge v. Richmond, 14 Mo. App. 405; Kirkland Land & Imp. Co. v. Jones, 18 Wash. 407, 51 Pac. 1043. Held, in this case, that the question of suretyship upon a promissory note cannot be raised by defendant in an action in which the alleged principal does not appear, as in such case a judgment cannot be rendered that the property of the principal be first exhausted before resort to that of the surety. Gillett v. Taylor, 14 Utah, 190, 46 Pac. 1099, 60 Am. St. Rep. 890; Jackson *et al.* v. Wood, Exrx., 108 Ala. 209, 19 So. 312.

42. See notes *ante*, §§ 709 and 710; Peoria Mfg. Co. v. Huff, 45 Nebr. 7, 63 N. W. 121; Story on Promissory Notes, § 418. See Story on Bills, § 253. *Contra*, see Edwards on Bills, 573.

43. Stephens v. Monongahela Nat. Bank, 88 Pa. St. 157; Bank of Montgomery v. Walker, 9 Serg. & R. 229, 12 Serg. & R. 382. The case of Fentum v. Pocock was approved. White v. Hopkins, 3 Watts & S. 101; Lewis v. Hanchman, 2 Barr, 416; Murray v. Judah, 6 Cow. 484, holder knowing acceptor of check was for accommodation, gave time to drawer; held acceptor not discharged. Clopper's Admr. v. Union Bank, 7 Harr. & J. 92; Yates v. Donaldson, 5 Md. 389; Lambert v. Sandford, 2 Blackf. 137; Hansborough v. Gray, 3 Gratt. 356; Claremont Bank v. Wood, 10 Vt. 182; 2 Rob. Pr. (new ed.) 241; Stiles v. Eastman, 1 Kelly, 205; Cronise v. Kellogg, 20 Ill. 13 (1858), Caton, J.: "The wider the door is opened to admit defenses to bills of exchange, the more is their general value impaired, and the more are commerce and exchange embarrassed. The acceptor of a bill of exchange has always been considered the party primarily liable to pay it. He expressly agrees to pay it, whether he has funds of the drawer in his hands or not, even though he expects to be in funds from the drawer. An accommodation acceptor occupies precisely the same position as one who accepts with funds,

concur with the English view, that whenever it is known that a party who signs as maker or acceptor, is in fact a party for accommodation, he is entitled to be regarded and treated as a surety.[44] If the holder knew the acceptance was for a particular purpose, which had been accomplished when he took the bill, he could not recover.[45]

§ 1336. Whether or not it may be shown by parol that a joint promisor was in fact a surety, and known to be such by the holder.— There is no doubt that where the relation of suretyship exists between joint promisors upon a bill or note, their true relation may be shown as between themselves;[46] but upon the question whether or not it may be shown in an action against them by the payee, the English and American cases exhibit great contrariety and vacillation of opinion. In Byles on Bills,[47] it is stated as the result of the English authorities that: "When of a joint and several note one maker is in reality principal and the other surety, yet it is no defense at law that one is principal and the other is surety, that this was known to the creditor at the time of the contract, and consequently that the surety is discharged by time given

as to all persons who receive the bill for value, whether they know that it was an accommodation acceptance or not. And it is a general maxim, that an acceptor of a bill of exchange can never be discharged, except by payment or a release." But see Parks v. Ingram, 2 Fost. 283; Adle v. Metroger, 1 La. Ann. 254. See, on this subject, Story on Bills, §§ 425, 432, and 435, where it is said: "There seems a strong inclination in the more recent authorities to the doctrine, that the rights of all the parties to the note are, in respect to the holder and his acts, governed by precisely the same rule, whether the note be one for the accommodation of all the parties or not." Also § 253. In 2 Am. Lead. Cas. 435, it is well said: "He who makes a note or accepts a bill for the accommodation of another, virtually authorizes those who take the instrument subsequently to make such terms or arrangements with the drawer or indorsers, as may be most conducive to their mutual interests, and cannot revoke the authority thus given, to the injury of others who have acted upon it."

44. See the English cases in § 1344 and notes; Meggett v. Baum, 57 Miss. 22, held, that if party knew acceptance was for accommodation, extension of time would discharge acceptor. To same effect, Guild v. Butler, 127 Mass. 386; Green v. Skinner, 72 Miss. 254, 16 So. 378; Metropolitan Bank v. Muller *et al.*, 50 La. Ann. 1278, 24 So. 295, 69 Am. St. Rep. 475.

45. Fletcher v. Heath, 7 B. & C. 517; Cartwright v. Williams, 2 Stark. 340; Continental Bank of Memphis v. Clark, 117 Ala. 292, 22 So. 988.

46. M'Gee v. Prouty, 9 Metc. (Mass.) 547; Harris v. Brooks, 21 Pick. 195; Buck v. Bank of State of Georgia, 104 Ga. 660, 30 S. E. 872.

47. Byles on Bills (Sharswood's ed.) [*238], 381.

to the principal.[48] But such a defense is plainly available in equity,[49] and, therefore, may be the ground of an equitable plea," the equitable plea being allowed in England by the statute of 17 and 18 Victoria, c. 125.

§ **1337.** In the Court of Queen's Bench, one maker of a note, who was known to the payee to be only an accommodation maker or surety for the others, was held to be discharged by the payee's contracting to give time, and giving it, to the other makers, although on the face of the note he was a joint principal; the decision being rendered upon an equitable plea allowed by the English statute, and based upon the ground that extraneous evidence to show that the defendant was surety for the other joint promisors did not and could not vary his contract; but that when it was established that he was a surety, and that the plaintiff knew it when he took the note, an equity was created which entitled him to insist on such a course of conduct by the plaintiff as would work him no injury.[50] More recent decisions have gone a step farther, and held that if the creditor knew of the relation of suretyship when he granted the indulgence, the surety would be dis-

48. Price v. Edmunds, 10 B. & C. 578; Perfect v. Murgrave, 6 Price, 111; Manley v. Boycot, 2 El. & Bl. 46; Rees v. Berrington, 2 Ves. Jr. 540; Scott v. Taul, 115 Ala. 529, 22 So. 447.

49. Hollier v. Eyre, 9 Clarke & F. 45; Davies v. Stainbank, 6 De G., M. & G. 679; Pooley v. Harradine, 7 El. & Bl. 431; Greenough v. McClelland, 30 L. J. Q. B. 15.

50. Pooley v. Harradine, 7 El. & Bl. 431, 40 Eng. L. & Eq. 96. In Manley v. Boycot, 2 El. & Bl. 46 (1853), an action by the payee of a joint and several note against one of the makers, the defendant pleaded that he was in reality a surety, and the court held the plea bad because it did not allege that the note was delivered by the defendant to the plaintiffs as surety, and that they agreed so to receive it from him, Lord Campbell, C. J., saying: "No parol evidence can be received of any agreement inconsistent with what appears on the face of the instrument, as that a bill drawn payable at three months shall not be payable till the expiration of four months; but evidence may be given by parol of an agreement at the time a bill is drawn and indorsed which is consistent with the written instrument; as, for example, that a bill is indorsed and handed over for a particular purpose, without giving the bailee the usual rights of indorsee of the bill. But if the payee of a joint and several promissory note, made in the common form by two, may be placed in the situation of treating the one as surety for the other, this can only be done by his express assent to do so when the note was delivered to him."

charged.[51] This may be regarded as the law of England on the subject; but the cases which have held that the holder has a right to treat all the parties to a bill or note as continually bound in the character which they have assumed upon the instrument, and that by assuming such character they consent and contract that they may be so treated (unless the holder agreed to regard them as sureties), seem to us to embody the true principles which should be respected and followed.[52]

§ 1338. Authorities in United States as to admissibility of parol evidence to show that joint party is surety.—In the United States, we think, the weight of authority is in favor of allowing evidence to show that one of the joint promisors signed as surety, and that this was known to the payee or indorsee when he took the instrument.[53] And there are cases which hold that if he knew the fact

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51. Bailey v. Edwards, 4 Best & S. Q. B. 761 (1864) (116 Eng. C. L.); Ewin v. Lancaster, 6 Best & S. Q. B. 572 (1865) (118 Eng. C. L.). See *ante*, § 1334. In Swire v. Redman, 1 Q. B. Div. 536 (1876), Cockburn, C. J., speaking of the doctrine that any act which impairs the rights of the surety discharges him, says: "As it depends on the supposed inequity of interfering with the rights which the surety has as between him and the principal debtor, it is not material that the knowledge on the part of the creditor that the surety was from the beginning such was not acquired till after the surety had become liable to the creditor." Continental Bank of Memphis v. Clark, 117 Ala. 292, 22 So. 988; Scott v. Scruggs, 9 C. C. A. 246, 60 Fed. 721.

52. In Strong v. Foster, 17 C. B. (8 J. Scott) 204 (84 Eng. C. L.) (1855), Willes, J., said: "You cannot show, by parol evidence, that the contract of a party to the bill or note was intended at the time it was made, to be other than that which is apparent on the face of the instrument itself. * * * A person who signs a note as a principal debtor must, in proceedings upon the note, undergo all the liabilities of a principal debtor, although as between himself and the party at whose instance he signs it, he is in fact a surety only, and that fact was known to the creditor at the time the note was handed over." And after commenting on the cases, he adds: "The result seems to be that here, if evidence is admissible to show that the defendant signed the note as surety, it must also be shown that the bankers agreed to accept him as such; and consequently that in the present case, where there was no such evidence, the defendant is not entitled to be treated as a surety, and the defense does not arise." So. Mut. Bldg. & Loan Assn. v. Perry, 103 Ga. 800, 30 S. E. 658.

53. Rose v. Williams, 5 Kan. 489 (1870); Perry v. Hadnett, 38 Ga. 104; Hubbard v. Gurney, 64 N. Y. 460; Harmon v. Hale, 1 Wash. Ter. 423; Grafton Bank v. Kent, 4 N. H. 221; Garrett v. Ferguson, 9 Mo. 125; Stillwell v. Aaron, 69 Mo. 539; Irvine v. Adams, 48 Wis. 468; Barron v. Cady, 40 Mich.

that one of the promisors was surety at the time when he granted indulgence to the other, it will be equally as effectual as a discharge of the surety promisor.[54] But the authorities are by no means harmonious; and in the midst of conflicting opinions we strongly incline to concur with those which look only to the face of the instrument to ascertain the rights and liabilities of all the parties. If a party intends to insist on a surety's rights, he should sign the instrument in a form which will carry notice of the fact to those dealing with it.[55] And if the holder treats him in a man-

259; 1 Parsons on Notes and Bills, 233, 234, note *e;* Lewis v. Long (N. C.), 9 S. E. 637, citing the text; Gratton Bank v. Kent, 4 N. H. 222, 17 Am. Dec. 414; Dickerson v. Board of Comrs., 6 Ind. 128, 63 Am. Dec. 373. And it may likewise be shown by parol that each of two joint makers of a note received one-half of the loan for which it was given, and that they were, therefore, joint makers and not principal and surety. Fitzgerald v. Noland, 102 Iowa, 283, 71 N. W. 224; Vestal v. Knight, 54 Ark. 97, 15 S. W. 17; Compton *et al.* v. Smith, 120 Ala. 233, 25 So. 300; Parsons v. Harrold, 46 W. Va. 125, 32 S. E. 1002, citing text; Pimental v. Morques, 109 Cal. 406, 42 Pac. 159.

54. In Wheat v. Kendall, 6 N. H. 504, Parker, J., said: "The injury to the surety is the same as if the creditor had possessed the knowledge at the time the note was taken." Branch Bank v. James, 9 Ala. 949. But the party might show that the defendant undertook to deal as principal and not as surety. In 1 Parsons on Notes and Bills, 233, it is said: "On the question whether parol evidence is admissible to show that one who signed a note as a joint or joint and several maker was only a surety for his comaker, in an action by the holder against such surety, the authorities are conflicting and uncertain. It seems to be settled that where the fact was not known to the holder previous to the maturity of the note, such evidence is inadmissible; but where this relation was known to the holder at the time of entering into the contract, the evidence is admissible in equity. But, at law, it is urged, on the one hand, that this is an attempt to vary the contract; that the parties, having called themselves joint or joint and several promisors in the contract, cannot assume a different relation or character by extraneous evidence. On the other hand, it is contended that the note does not express the whole contract, since it depends materially upon delivery, and the purposes for which delivery is made; that the terms of the note only offer a presumption of the relation in which the parties stand to each other; that this is a mere collateral fact which can be proved, and the presumption rebutted by parol evidence. We consider the weight of authority and principle is in favor of the admission of such evidence." Zapalac v. Zapp, 22 Tex. Civ. App. 375, 54 S. W. 938, quoting text.

55. Claremont Bank v. Wood, 10 Vt. 582; Dunham v. Donner, 31 Vt. 249; Benedict v. Cox, 52 Vt. 250, as to form of action; Pirkle v. Chamblee, 109 Ga. 32, 34 S. E. 276. Held, in this case, that "Presumptively, one who signed as surety a promissory note which had been previously signed by two other persons apparently as joint principals, undertook to contract as surety for

ner consistent with his ostensible relation to the paper, it tends to disappoint his reasonable and just expectations to permit such party to set up defenses based upon extraneous circumstances.[56] It will be seen that some of the cases, both in England and America, take the view that it may be shown that the payee agreed to regard the copromisor as surety, and that nothing short of such an agreement will justify his claiming a surety's privileges in any respect. This intermediate ground has much to commend it; and if any departure is made from the face of the instrument, it seems to be far more equitable and just than those which make mere knowledge of the suretyship the criterion.[57]

§ **1338a.** In New York, where a joint and several note was signed by three persons as makers, the last adding the word "surety" to his signature, it was held that the presumption was that he signed as surety for the other two, but that it might be shown that he was surety for only one, and that the other signer was also surety.[58] And in Kentucky it was held, that one signing a note under an agreement with the principal that he was to be liable, not as surety for the principal alone, but for the principal and a prior surety also, might show such an agreement by parol evidence, and recover of the prior surety whatever he was compelled to pay on account of such suretyship.[59]

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both of these persons, and the burden of showing that one of them was himself a mere surety for the other, and that the last signer so knew at the time of signing the paper, was on him who asserted that such was the fact." Wingate v. Blalock, 15 Wash. 45, 45 Pac. 663. See note to § 80; McIntyre v. Moore, 105 Ga. 112, 31 S. E. 144; So. Mut. Bldg. & Loan Assn. v. Perry, 103 Ga. 800, 30 S. E. 658.

56. Union Bank v. Crine, 33 Fed. 811, citing the text; Benjamin v. Arnold, 2 Hun, 447 (1874). In the last case payee of a joint and several note sued the four signers. Three of the defendants offered to prove that they signed as sureties only for the accommodation of the fourth, which fact was known to the plaintiff at the time she took the note, and that after its maturity, she, without their consent, extended the time of payment. Held, that the evidence was inadmissible. To same effect, see Campbell v. Tate, 7 Lans. 370. But these cases in New York are now overruled in Hubbard v. Gurney, 64 N. Y. 460; Gillett v. Taylor, 14 Utah, 190, 46 Pac. 1099, 60 Am. St. Rep. 890; Scott v. Taul, 115 Ala. 529, 22 So. 447.

57. See cases *supra.*

58. Sayles v. Sims, 73 N. Y. 552. See *ante,* § 1332; Schram v. Werner, 85 Hun, 293, 32 N. Y. Supp. 995. See McCollum v. Boughton, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480.

59. Chapeze v. Young, 87 Ky. 477; Crouse v. Wagner, 41 Ohio St. 473; Oldham v. Brown, 28 Ohio St. 41.

SECTION V.

SURETY'S REMEDIES.

§ 1339. We have already seen that mere passivity of a creditor does not discharge the surety. Even when the delay of the creditor and the subsequent insolvency of the principal deprive the surety of all means of reimbursement, he must still submit to it;[60] for the duty of performance rests upon those who make contracts. And, in the absence of statutory provision, the surety cannot by notice or request compel the creditor to commence a suit against his principal debtor.[61] The surety has his own efficient and appropriate remedies: (1) He may pay the debt and institute an action for money paid to his use, against the principal, and recover it back.[62] In some States, as in Virginia, he

60. Alcock v. Hill, 4 Leigh, 622; United States v. Simpson, 2 Pa. 427; Carr v. Howard, 8 Blackf. 199; Adams Bank v. Anthony, 18 Pick. 238; Donnerberg v. Oppenheimer, 15 Wash. 290, 46 Pac. 254, citing text.

61. Croughton v. Duvall, 3 Call, 73; Humphrey v. Hitt, 6 Gratt. 509; 5 Rob. Pr. (new ed.) 781; 1 Parsons on Notes and Bills, 237; 2 Parsons on Notes and Bills, 243, note. In Pain v. Packard, 13 Johns. 174, it was held that neglect to sue the solvent principal by the holder, at the request of the surety, and the subsequent insolvency and absconding of the principal, discharged the surety. This doctrine was denied by Chancellor Kent, in King v. Baldwin, 2 Johns. Ch. 554; but was reaffirmed by the Court of Errors, in the same case, reported in 17 Johns. 384. The courts of New York follow this latter decision, but within strict limits. The opinion of Chancellor Kent is now admitted to be the sounder view (see 2 Am. Lead. Cas. 339); and in Herrick v. Borst, 4 Hill, 450, Cowen, J., said of the doctrine of Pain v. Packard, that it "came into this court without precedent, was afterward repudiated even by the Court of Chancery, as it has always been held at law and in equity in England, but was restored on a tie by the casting vote of a layman." But even in New York (as we have already seen in section I, *ante*), the indorser, while regarded in the nature of a surety, is not a surety in the sense of the cases above quoted, who has a right to require the creditor to sue the maker. Beardsley v. Warner, 6 Wend. 613; Trimble v. Thorn, 16 Johns. 152; Ingels v. Sutliff, 36 Kan. 444; Converse v. Cook, 38 N. Y. S. C. 417. But see the case of De Caumont v. Rasines, 38 App. Div. 153, 56 N. Y. Supp. 652. For illustration of rights where the statute requires or allows notice by surety to holder of note, see Hamrick v. Barnett, 1 Ind. App. 1, 27 N. E. 106. See also Sullivan v. Sullivan, 39 App. Div. 99.

62. Barnes v. Sammons, 128 Ind. 596, 27 N. E. 747; Humphrey v. Hitt, 6 Gratt. 524; Story on Notes, § 419. The execution of the surety's note to the creditor has been held a sufficient payment for this purpose. Rizer v. Callen, 27 Kan. 340. But it was held in Stone v. Hammell, 83 Cal. 549, that

may recover it back by motion. Or (2) he may file a bill in chancery against the principal to compel him to make payment to the creditor.[63] Or (3) the surety may file a bill in chancery to compel the creditor to bring his action against the principal, upon being indemnified against the consequences of risk, delay, and expense.[64] And (4) if he pays the debt, and then be a co-surety, he may file a bill against him for contribution. These are the principles which apply to ordinary sureties. While an accommodation indorser may be regarded as a surety in some cases, and under some circumstances, and has all the rights attaching to that relationship, yet as between him and a *bona fide* holder of the paper, where his liability has become fixed, he becomes a principal debtor; and he cannot compel the holder to sue the maker, or to enforce a security he possesses. If he desires the benefit of any security held by the creditor he must pay the debt and claim the right of subrogation to his position.[65]

§ 1340. As to contribution.— An indorser is a surety to the holder for all parties liable prior to him, and each one of them

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the note will not have that effect unless it has operated to extinguish the debt of the principal to the original creditor. See further, in support of the doctrine held in Rizer v. Callen, *supra*, Boulware v. Robinson, 8 Tex. 327; Peters v. Barnhill, 1 Hill, 237. And *contra*, Brisendine v. Martin, 1 Ired. 286; Nowland v. Martin, 1 Ired. 307; Romine v. Romine, 59 Ind. 351.

63. Humphrey v. Hitt, 6 Gratt. 524. And it has been held that "one who has become surety at the request of cosureties and upon assurances made by them at the time that he would be saved harmless and would not have the debt to pay, may proceed in equity with whatever sum he has become bound to pay on account of said suretyship." Hayden v. Thrasher, 28 Fla. 162, 9 So. 855.

64. Humphrey v. Hitt, 6 Gratt. 524; King v. Baldwin, 17 Johns. 324. But if surety, in order to avoid suit at maturity, makes a new note to the payee with himself and wife as principals, under an agreement that such note should be the principal debt, he cannot insist that it is the duty of the payee to first collect such original note. McKee v. Whitworth, 15 Wash. 536, 46 Pac. 1045; Kittridge v. Stegmier, 11 Wash. 3, 39 Pac. 242. Held, in this case, that, if, after a surety has notified the creditor to bring suit, he subsequently consents to the dismissal of the suit brought pursuant to such notice, he will remain bound without any new promise.

65. Ross v. Jones, 22 Wall. 576; *In re* Babcock, 3 Story C. C. 393; First Nat. Bank v. Wood, 71 N. Y. 411; Savings Bank v. Terry, 13 Mo. App. 99. In Wisconsin, held, that a surety cannot go into equity for relief against either the creditor or the debtor until after the debt is due. Hinckley v. Pfister, 83 Wis. 65, 53 N. W. 21; Myers v. Farmers' State Bank, 53 Nebr. 824, 74 N. W. 252.

(except acceptor) is a surety to him. But indorsers are not cosureties (unless their indorsement is joint), but are severally and successively liable.[66] Where the sureties are not as between themselves principal and surety (as are prior and subsequent indorsers), but are merely cosureties, as are two or more joint, or joint and several, makers of a note, if one be required to pay the whole debt, the others are bound to contribute in equal proportions, and the cosurety may recover of the others their aliquot shares.[67] And this right of contribution arises though the same debt be secured by different instruments, executed by different sureties; and though one portion of the debt be secured by one instrument, and one portion by another;[68] and even though the surety demanding contribution did not at the time

66. See *ante*, § 703, vol. I; M'Neilly v. Patchin, 23 Mo. 40; McDonald v. Whitfield, 36 Eng. Rep. 34; Edison v. Edison, 56 Mich. 187. See also Houck v. Graham, 106 Ind. 195, in which case parol evidence was admitted in case of irregular indorsements, as between the parties, to show that apparent indorsers were cosureties. As to the admissibility of parol evidence between the parties to show their real relation, see also Mansfield v. Graham, 136 Mass. 15; Frost v. Tracy, 52 Mo. App. 308.

67. Byles on Bills (Sharswood's ed.) [*247], 392; 2 Parsons on Notes and Bills, 253; Davis v. Emerson, 17 Me. 64; Fletcher v. Jackson, 23 Vt. 581; Pitt v. Purssord, 8 M. & W. 538; Frevert v. Henry, 14 Nev. 191; Pully v. Pass, 123 N. C. 168, 31 S. E. 478; Adams v. Hayes, 120 N. C. 383, 27 S. E. 47; Faurot v. Yates, 86 Wis. 569. Held, in this case, that in an action by one guarantor of a note against another for contribution, the defendant cannot prove a want of consideration paid to the principal for a prior note, which the note paid by plaintiff was given to renew. The liability of cosureties to each other for contribution is not joint but several. See Voss v. Lewis, 126 Ind. 155, 25 N. E. 892; Truss *et al.* v. Miller, 116 Ala. 494, 22 So. 863; Smith v. Mason, 44 Nebr. 611, 63 N. W. 41; Merchants' Nat. Bank v. McAnulty, 89 Tex. 124, 33 S. W. 963. If a surety is induced by other sureties to sign a note made for their own benefit, such surety is not liable for contribution. Dullnig v. Weeks, 16 Tex. Civ. App. 1, 40 S. W. 178; Graves v. Smith, 4 Tex. Civ. App. 537, 23 S. W. 603, citing text.

68. Deering v. Earl of Winchelsea, 2 Bos. & P. 270; Mayhew v. Crickett, 2 Swanst. 184. The principle stated in the text equally applies, and settles the rights of maker of notes or other securities pledged to the payment of one debt. McBride v. Potter Lovell Co., 169 Mass. 7, 47 N. E. 242, 61 Am. St. Rep. 265. In this case it was held, on a bill in equity for contribution, brought by one of the makers of the notes against pledgor, the pledgee, and the other makers, that, all the notes being pledged as security for the same debt, the whole loss should be borne by all the makers in proportion to the amounts of the notes so pledged." See also New England Trust Co. v. New York Belting & Packing Co., 166 Mass. 42, 43 N. E. 928.

of the contract know that he had any cosureties.[69] For the purposes of contribution joint makers are cosureties.[70] The guarantor of a prior accommodation indorsement has been held not a cosurety of such indorser, and, therefore, not liable to contribution in case of payment by the latter.[71]

§ **1341.** The cosurety, in order to sustain his suit for contribution, must have made payment under a legal and fixed obligation,[72] but not necessarily under compulsion of suit or legal process.[73] The right to contribution arises out of an implied promise amongst cosureties to share equally the burdens of cosuretyship,[74] and, therefore, does not exist where there is an express understanding to the contrary.

The right of a cosurety to contribution is not prejudiced by his possessing a security against the principal, which the defendant neither has nor knows anything about.[75] And where he makes payment of a note which he might have avoided by reason of an alteration or addition made after his, but prior to the signature of other sureties, he may compel contribution from them.[76]

§ **1342. Extent of surety's recovery.**— A surety who pays a bill or note, or other obligation of his principal, is entitled to indemnity from him, and may recover back the amount with legal

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69. Craythorn v. Swinburne, 14 Ves. 169.

70. Warring v. Hill, 89 Ind. 497; Judd v. Small, 107 Ind. 399.

71. Phillips v. Plato, 49 N. Y. S. C. 190.

72. Pitt v. Purssord, 8 M. & W. 538; Davies v. Humphreys, 6 M. & W. 153.

73. 2 Parsons on Notes and Bills, 253; Nixon v. Beard, 111 Ind. 140; Hogshead v. Williams, 55 Ind. 145; Duke v. Christy, 10 Mo. App. 566; Machado v. Fernandez, 74 Cal. 362; Wyman, Recr. v. Williams, 52 Nebr. 833, 73 N. W. 285; Sharp v. Garnet, 54 Mo. App. 410; March v. Barnet, 114 Cal. 375, 46 Pac. 152.

74. Kemp v. Finden, 12 M. & W. 521; Chappell v. McKeough, 21 Colo. 277, 40 Pac. 769. The same rule obtains between joint makers and hence "payment of a joint promissory note by one of its makers operates as a full satisfaction thereof, and it cannot be thereafter enforced against the other joint makers at the suit of the one who paid it, although it may have been assigned to him. Swem v. Newell, 19 Colo. 397, 35 Pac. 734; Schram v. Werner, 85 Hun, 293, 32 N. Y. Supp. 995; Leeper v. Paschal, 70 Mo. App. 117, citing text.

75. Done v. Walley, 2 Exch. 198. A contrary view has been expressed in West Virginia. Neely v. Bee, 32 W. Va. 525, citing Brandt on Surrogates, § 238; Currier v. Fellows, 27 N. H. 366.

76. Houck v. Graham, 106 Ind. 195; Bowser v. Rendell, 31 Ind. 128.

interest thereon.[77] But the limit of the surety's recovery is simply the amount necessary to indemnify him, and, therefore, even though he take an assignment of the creditor's claim, he cannot recover the amount that the creditor was entitled to receive, but only the amount which he paid.[78] If he compromises the debt, he can only recover back the amount accepted by the creditor in compromise of it;[79] and if he pays in a depreciated currency, he cannot recover a dollar in legal tender for every dollar of such currency, but only the value of the currency paid.[80]

It has, however, been held in Massachusetts, that where an accommodation indorser, who is the payee of a note which had been negotiated by the maker for the full amount, took it up, paying only one-half of the sum, he could sue the maker as payee, and recover the full amount thereof.[81] In Virginia the accommodation indorser who makes payment has (and, as we think, justly) been held to stand on no higher footing than any other surety, and there he can only recover the amount paid by him.[82]

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77. Blow v. Maynard, 2 Leigh, 54; Kendrick v. Forney, 22 Gratt. 750; Pace v. Robertson, 65 N. C. 550; Barnett v. Cecil, 21 Gratt. 95; Burton v. Slaughter, 26 Gratt. 920; McCormal v. Redden, 46 Nebr. 776, 65 N. W. 881; Cook v. Shull, 35 App. Div. 121; Goodwin v. Davis, 5 Ind. App. 120, 54 N. Y. Supp. 696; Smith v. Mason, 44 Nebr. 611, 63 N. W. 41. But if a surety has been induced to sign the paper upon a fraudulent misrepresentation as to the financial responsibility of the maker, he may bring suit at once to recover the amount of his liability. May v. Newman, 95 Mich. 501, 55 N. W. 364.

78. Blow v. Maynard, 2 Leigh, 54; Stone v. Hammell, 83 Cal. 547; Waldrip v. Black, 74 Cal. 410; Roberts v. Coffin, 22 Tex. Civ. App. 128, 55 S. W. 597; Price v. Horton, 4 Tex. Civ. App. 526, 23 S. W. 501; Weidemeyer v. Landon, 66 Mo. App. 520.

79. Blow v. Maynard, 2 Leigh, 54; Kendrick v. Forney, 22 Gratt. 753; *Ex parte* Rushforth, 10 Ves. 409, 420; Butcher v. Churchill, 14 Ves. 567; Read v. Norris, 14 Eng. Ch. 362, 375.

80. Kendrick v. Forney, 22 Gratt. 748; Pace v. Robertson, 65 N. C. 550.

81. Fowler v. Strickland, 107 Mass. 552. *Contra*, Pace v. Robertson, 65 N. C. 550.

82. Burton v. Slaughter, 26 Gratt. 920; Barnett v. Cecil, 21 Gratt. 95. In Texas it has been held that payment of a note by a surety is not, as between himself and his principal, an extinguishment of the same, and that his right of action is not upon an *assumpsit* against the principal, but upon the note itself. Tutt v. Thornton, 57 Tex. 35, overruling Holliman v. Rogers, 6 Tex. 91. In Michigan one who indorses a note for accommodation, though not the payee therein, may recover against the principal maker and also against an accommodation maker for the amount he is compelled to pay thereon. Hanish v. Kennedy, 106 Mich. 455, 64 N. W. 459.

§ **1343. Subrogation to principal's rights.**— The surety making payment is subrogated to all the rights of the holder, and to the enjoyment of all the securities which his principal was entitled to for the payment of the debt, being substituted into his place when he pays the debt for him;[83] and where the maker of a note executes a mortgage to secure an indorsee, the payee of the note, on making payment, becomes entitled to the benefit of the mortgage.[84]

The holder of a bill or note is entitled to the benefit of any securities specifically appropriated to meet it at maturity by prior parties thereto, though a stranger to their contract, and in case of their insolvency, is entitled to have such security applied in

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83. See *ante*, § 1312; Babcock v. Blanchard, 86 Ill. 165 (guarantor); Thorp v. Gulseth, 37 Minn. 135; Schleissman v. Kallenberg, 72 Iowa, 339; Rand v. Barrett, 66 Iowa, 736; Cowgill v. Linville (Mo.), 2 West. 581; Bank of Lock Haven v. Smith, 155 N. Y. 185, 49 N. E. 680; Sternbach v. Friedman, 34 App. Div. 535, 54 N. Y. Supp. 608; Fitch v. Hammer, 17 Colo. 591, 31 Pac. 336; Becker v. Fischer, 13 App. Div. 555, 43 N. Y. Supp. 685; Central Trust Co. v. N. Y. Equipment Co., 87 Hun, 421, 34 N. Y. Supp. 349; Schram v. Werner, 85 Hun, 293, 32 N. Y. Supp. 995; Sheahan v. Davis, 27 Oreg. 279, 40 Pac. 405, 50 Am. St. Rep. 722; Springs v. McCoy, 120 N. C. 417, 27 S. E. 128; National Bank v. Forbes, 18 Utah, 225, 55 Pac. 61; Fifth Nat. Bank v. Woolsey, 31 App. Div. 61, 52 N. Y. Supp. 827, in which case it was held that where after the commencement of an action on such a guaranty, the guarantors, with one exception, pay to the plaintiff therein the amount due, they become subrogated to the rights of the plaintiff against the defendant the remaining guarantor — who has not contributed to the payment, and are entitled to receive from the plaintiff the principal undertaking itself, and to enforce it against such defendant in the same way in which the principal creditor might have enforced it. Dickey v. Pocomoke City Bank, 89 Md. 280, 43 Atl. 33. Held, in this case, that a surety on a note for which property has been pledged who pays part of the debt is entitled to be subrogated to the rights of the pledgee against the pledge to the extent of his payment when such property is sold and the proceeds are in court for distribution. Gilbert v. Adams, 99 Iowa, 521, 68 N. W. 883; Truss *et al.* v. Miller, 116 Ala. 494, 22 So. 863. But this principle does not obtain in favor of a husband who joins with his wife in a purchase-money note and mortgage upon her separate property, and he, after her death, pays the note out of his own funds, under the belief that he is the owner of the property. Cornwell v. Orton, 126 Mo. 355, 27 S. W. 536; Maffat v. Greene, 149 Mo. 48, 50 S. W. 809; Schell City Bank v. Reed, 54 Mo. App. 94.

84. O'Hara v. Haas, 46 Miss. 374; Coons v. Clifford, 58 Ohio St. 480, 51 N. E. 39; Watson v. Tindall, 150 Ind. 488, 50 N. E. 468; Yates *et al.* v. Mead, 68 Miss. 787, 10 So. 75.

payment of the bill or note.[85] And in like manner the indorser is entitled to the benefit of any securities deposited with the holder by the acceptor.[86] And a cosurety is entitled to participate in any indemnity which any of his fellows may obtain from the principal, directly or indirectly.[87]

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85. Matter of Dever, *In re* Suse, 38 Eng. 39; *Ex parte* Waring, 19 Ves. 345; *Ex parte* Smart, 4 Eng. 855; *Ex parte* Dewhurst, 7 Eng. 704; *In re* Barnett Banking Co., 12 Eng. 704; *Ex parte* Banner, 16 Eng. 740; Roberts v. Bruce, 91 Ky. 379, 15 S. W. 872.

86. Duncan v. N. & S. Wales Bank, 34 Eng. 217; Solomon v. First Nat. Bank of Meridian, 72 Miss. 854, 17 So. 383; Hackett v. Watts, 138 Mo. 502, 40 S. W. 113; Maroh v. Barnet, 114 Cal. 375, 46 Pac. 152.

87. Schaeffer v. Clendennin, 100 Pa. St. 565; Tolle v. Boeckeler, 12 Mo. App. 55.

CHAPTER XLII.

THE FORGERY OF NEGOTIABLE INSTRUMENTS.

SECTION I.

THE DEFINITION AND NATURE OF FORGERY.

§ **1344. Forgery is the counterfeit making or altering of any writing with intent to defraud.**[1]— The most usual species of forgery is fraudulently writing the name of an existing person; but where one is in possession of a paper containing a genuine signature, and fraudulently fills it up so as to make it appear to be signed as maker,[2] or indorser,[3] or other party to a bill or note,[4] it is as much a forgery as if the signature itself had been forged. So where one has authority to fill up a bill or note in blank, with a particular sum, and he fraudulently inserts a larger sum, it is as much a forgery as if he had acted without any authority at all.[5]

§ **1345. Illustrations of forgery.**— Passing a note signed by one person in his own name, as the note of another person of the same name, if done with intent to defraud, is a forgery;[6] and so appending to one's own name a false addition of description, as by residence or occupation, of another person of the same name;[7] or indorsing a note by another person of the same name

1. Byles on Bills (Sharswood's ed.) [*317], 483. See People v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; People v. Whiteman, 114 Cal. 338, 46 Pac. 99.

2. Rex v. Hales, 17 St. Tr. 161; State v. Williams, 152 Mo. 115, 53 S. W. 424, 75 Am. St. Rep. 441; Trombly v. Trombly, 106 Mich. 227, 64 N. W. 56; People v. Laird, 118 Cal. 291, 50 Pac. 431. And in fact if party whose name was forged was dead. People v. Sanders, 114 Cal. 216, 46 Pac. 153. See People v. Cole, 130 Cal. 13, 62 Pac. 274.

3. Ibid.

4. Powell v. Commonwealth, 11 Gratt. 822.

5. Regina v. Wilson, 17 L. J. M. C. 82; Rex v. Hart, 7 Car. & P. 652; People v. Dickie, 62 Hun, 400, 17 N. Y. Supp. 51.

6. Rex v. Parke, 2 Leach Cr. L. 614; The State of Iowa v. Farrell, 82 Iowa, 553, 48 N. W. 940; State v. Webster, 152 Mo. 87, 53 S. W. 423

7. Rex v. Webb, Russ. & R. C. C. 72; Rex v. Parke, 2 Leach, 775; Rex v. Rogers, 8 Car. & P. 629.

with the real payee, or special indorser.[8] So, one who, with intent fraudulently to utter a promissory note as the note of a person other than the signer, procures to it the signature of an innocent party, who does not thereby intend to bind himself, is guilty of forgery.[9] But where a person falsely represents himself to be the indorser of a bill, but writes nothing falsely himself, if there be a real person who did indorse the bill in his own proper name, the offense will not be forgery, but obtaining goods or money upon false pretenses.[10] And so as to any other genuine signature, though it be passed for another; yet if there be nothing upon the bill or note to apply it to that person, it is not a forgery.[11]

Where a party habitually uses an assumed name, the signing of it is not a forgery; but if a party assumes a name for the purpose of fraud, a bill or note under the assumed signature will be a forgery.

The signature of a fictitious name or firm, if made with intent to defraud, constitutes forgery.[12] Thus uttering a forged order for the payment of money, signed "Rt. Venest," there being no such person in existence, is a forgery.[13] So indorsing a bill in the fictitious name of "John Williams."[14]

§ 1346. A mere informality in the language of a bill or note, such as the omission of a word, or a misspelling, or other grammatical error, as where "pounds" was omitted;[15] or "pound" was used for "pounds";[16] or "I promised" for "I promise,"[17] does not impair its validity; and, therefore, the making or alter-

8. Mead v. Young, 4 T. R. 28; People v. Lundin, 120 Cal. 308, 52 Pac. 807.

9. Commonwealth v. Foster, 114 Mass. 311.

10. Hevey's Case, 1 Leach, 229; Chitty on Bills [*780]; State of Louisiana v. Taylor, 46 La. Ann. 1332, 16 So. 190, 49 Am. St. Rep. 351.

11. Chitty on Bills [*780].

12. Chitty on Bills [*782]; Commonwealth v. Chandler, Thatcher Cr. Cas. 187; State v. Givens, 5 Ala. 747. See People v. Lee, 128 Cal. 330, 60 Pac. 854; Meridan Nat. Bank of Indianapolis v. First Nat. Bank of Shelbyville, 7 Ind. App. 322, 33 N. E. 247, 34 N. E. 608, 52 Am. St. Rep. 450, citing text; State v. Warren, 109 Mo. 430, 19 S. W. 191, 32 Am. St. Rep. 681; State v. Allen, 116 Mo. 548, 22 S. W. 792; People v. Elliott, 90 Cal. 586, 27 Pac. 433.

13. Lockett's Case, 1 Leach, 94; State v. Patterson, 116 Mo. 505, 22 S. W. 696.

14. Taft's Case, 1 Leach, 172.

15. Chisholm's Case, Russ. & R. 297.

16. Rex v. Post, Russ. & R. 101.

17. Perkins v. Commonwealth, 6 Gratt. 651.

ing of such an instrument is a forgery. But if a paper were made or altered in such a way as to be upon its face void, or fatally defective in law, it would seem to be otherwise.[18] Thus a bill drawn payable to "——— or order," and signed with a forged signature, is not a forgery, because without a payee, and, therefore, a mere nullity.[19] But if payable to bearer it would be different.[20] A note without a signature is the same as a mere blank, and cannot be deemed a forgery.[21] But the total absence of any stamp, or defect in the proper stamp, will not prevent the instrument from being a forgery.[22]

§ **1347. Alteration is forgery.**— The alteration of a completed instrument, by a material change in its terms, with intent to defraud, is as plain a forgery as the making of it altogether; for it fraudulently assumes to bind the parties to a contract to which their consent is wanting.[23] Thus, where a clerk broke the seal of a letter, and altered a check which it contained to a larger amount, it was deemed a forgery;[24] and so any fraudulent material change in the terms of the paper, whether in amount,[25] place of payment,[26] or time of payment.[27]

§ **1348. What fraud is not forgery.**— The making of the bill or note must be counterfeit and false in order to amount to a forgery, and if real, though fraudulently procured, it will be a fraud, but not a forgery. Thus, where a person writes a note for a certain sum, and procures another to sign it as maker, un-

18. See Clarke v. State, 8 Ohio St. 630; State v. Humphreys, 10 Humphr. 442; Rex v. Burke, Russ. & R. 496; Wall's Case, 2 East P. C. 953 (a will); Chitty on Bills [*774].

19. Rex v. Richards, Russ. & R. C. C. 193. But it has been held in Oregon that forgery may be predicated of an instrument bound by the Statute of Limitations, since the defense of limitation may be waived by the maker and the note become the foundation of a valid judgment and establish a legal liability. State v. Dunn, 23 Oreg. 562, 32 Pac. 621, 37 Am. St. Rep. 704.

20. People v. Brigham, 2 Mich. 550.

21. Rex v. Pateman, Russ. & R. C. C. 496; Regina v. Keith, 29 Eng. L. & Eq. 558.

22. Rex v. Reculist, 2 Leach, 703; Rex v. Hall, 3 Stark. 67; Chitty on Bills [*779].

23. Wheelock v. Freeman, 13 Pick. 165. See § 1373 *et seq.*

24. Belknap v. National Bank, 100 Mass. 379.

25. Rex v. Post, Russ. & R. 101; People v. Dole, 122 Cal. 486, 55 Pac. 581, 63 Am. St. Rep. 50.

26. Rex v. Treble, 2 Taunt. 328.

27. Rex v. Atkinson, 7 Car. & P. 669.

der the false representation that it is for a smaller sum, it is not a forgery.[28]

§ 1349. The intent to defraud is essential to constitute forgery; and although a bill or note will not be binding upon those whom it purports to bind if their names have been signed to it, or it has been altered without authority, the party who has ignorantly or innocently executed or altered it under a supposed authority, will not be deemed guilty of a forgery.[29] Nor will the mere imitation of another's writing, the assumption of a name, or the alteration of a written instrument, where no person can be injured thereby, amount to forgery.[30]

§ 1350. Uttering instrument essential to forgery.— The delivery of a bill or note, or other written contract, is necessary to its validity; and so the "uttering," which is the term used to describe the delivery by a forger or counterfeiter to some person of the forged instrument, is necessary in order to complete the crime of forgery. Giving the bill or note to a confederate to utter is an uttering thereof.[31] But merely displaying forged instruments with fraudulent intent, or handing them over to another without designing to pass them off, is not.[32] If the note be payable to the forger's order, his transfer of it without indorsement is an uttering thereof.[33] When forgery of a signature is alleged, it will not be competent to prove that the party charged to be guilty has committed a forgery of a similar character, and absconded on that account.[34]

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28. Commonwealth v. Sankey, 22 Pa. St. 390; People v. Getchell, 6 Mich. 496; Regina v. Coulsen, 1 Eng. L. & Eq. 550; 1 Parsons on Notes and Bills, 586, note *x*.

29. Roscoe's Cr. Ev. 505; Seaver v. Weston, 163 Mass. 202, 39 N. E. 1013. See State v. Samuels, 144 Mo. 68, 45 S. W. 1088; People v. Mitchell, 92 Cal. 590, 28 Pac. 597.

30. Chitty on Bills (13th Am. ed.) [*785].

31. Rex v. Palmer, Russ. & R. C. C. 72; Commonwealth v. Clune, 162 Mass. 206, 38 N. E. 435. In Missouri it is held that it is necessary to allege, in order to convict under the statute, that the forged note was uttered for a consideration. State v. Hesseltine, 130 Mo. 468, 32 S. W. 983. See People v. Mitchell, 92 Cal. 590, 28 Pac. 597.

32. Rex v. Shukard, Russ. & R. 200; The State v. Turner, 148 Mo. 206, 49 S. W. 988.

33. Rex v. Beckett, Russ. & R. 86; Rex v. Post, Russ. & R. 101.

34. Balcetti v. Serani, Peake, 142; People v. Whiteman, 114 Cal. 338, 46 Pac. 99; People v. Bird, 124 Cal. 32, 56 Pac. 639. *Contra*, State v. Hodges, 144 Mo. 50, 45 S. W. 1093.

SECTION II.

LIABILITY OF PARTY WHO ADOPTS A FORGED SIGNATURE AS HIS OWN.

§ **1351.** When a person's signature is forged as maker, acceptor, drawer, or indorser, it is, as a general rule, a mere nullity as to him. And ordinarily such person may deny the genuineness of his signature, or show that, although the signature be genuine, the writing attached to it has been materially altered, in which cases he would not be bound. But if the person whose signature has been forged pronounces it genuine, or the instrument valid, the question arises whether or not such declaration renders him liable as if he were a party to a genuine instrument; and a variety of circumstances affects its just solution.

In the *first* place, when third parties buy the paper on his assurances, or representations of the genuineness of his signature, or of the validity of the instrument, or are induced to act upon such assurances or representations, and would suffer loss if he were permitted to set up forgery as a defense, it is quite clear upon principles of estoppel that such defense cannot be made.[35] If he tells the holder of the paper to "hold on" and that "he will pay him," thereby inducing delay, during which other parties to the paper become insolvent and abscond, these principles would apply;[36] and so if, confiding in the admission of genuineness, the holder loses an opportunity of obtaining security or attaching property and sustains injury thereby.[37]

§ **1352. Second: Acknowledgment of genuineness or validity by mistake.**— When no principle of estoppel applies, and when through mistake a party states that his signature is genuine, and afterward discovering his error speedily corrects it — that is to say, before the holder has changed his relations to the paper,

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35. Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546; Woodruff v. Munroe, 33 Md. 158; Casco Bank v. Keene, 53 Me. 104; Greenfield Bank v. Crafts, 4 Allen, 447; Dow v. Sperry, 29 Mo. 390; Crout v. De Wolf, 1 R. I. 393; Beeman v. Duck, 11 M. & W. 251; Leach v. Buchanan, 4 Esp. 226; Rudd v. Mathews, S. C. of Ky., Oct., 1881, reported in Cent. L. J., Nov. 18, 1881, p. 387, 37 Am. Rep. 704; Henry v. Heeb, 116 Ind. 280, citing the text. See *ante*, § 859; Pearson v. Hardin, 95 Mich. 360, 54 N. W. 904; Buck v. Wood, 85 Me. 209, 27 Atl. 103.

36. Hefner v. Dawson, 63 Ill. 403. *Contra*, see Lewis v. Hodapp, 14 Ind. App. 111, 42 N. E. 649, 56 Am. St. Rep. 295.

37. Casco Bank v. Keene, 53 Me. 103.

or any one has dealt with it upon the faith of his admissions, we know of no principle of law which prevents the forgery from being pleaded.[38] No innocent person can suffer, and simple justice is done the party whose name has been forged by allowing him under such circumstances to prove the truth of the case. But as mere matter of testimony, a prior admission of the genuineness of a signature would weigh heavily; and a subsequent denial, as it seems to us, should be supported by very satisfactory explanations in order to overcome it.

§ 1352a. Third: Deliberate adoption of forged signature.— Where the party knowing his signature to be a forgery deliberately adopts it as his own, a more difficult question arises, a question which has divided the courts, and upon which the decisions are in conflict. There are authorities, both English and American, which hold that the party under such circumstances is bound. Where the holder of a bill in an English case went to a father whose son had signed his name and said: "We shall proceed against your son; is this your acceptance?" and the father said, "It is," he was held liable, being regarded as estopped to deny it.[39] In New York, where the name of a person had been forged as a joint maker of a note, and after delivery he told the payee of a note it was all right, he was bound, and Mullen, P. J., said: "I cannot perceive any reason why a person whose name has been forged may not adopt and affirm the signature as his own act, and thereby subject himself to whatever civil liability may follow from it."[40] In Massachusetts the ruling has been to the same effect, the court declaring that such admissions or declarations are acts of ratification, that such ratification is binding, though there had been no pretense of agency, and that no principle of public policy applies to forbid it unless there be an agreement not to prosecute the for-

38. Woodruff v. Munroe, 33 Md. 158.

39. Ashpitel v. Bryan, 3 B. & S. 492, 32 L. J. Q. B. 91, 7 L. T. R. (N. S.) 706; Hensinger v. Dyer, 147 Mo. 219, 48 S. W. 912.

40. Howard v. Duncan, 3 Lans. 175; Seaver v. Weston, 163 Mass. 202, 39 N. E. 1013. It is here held that "If the wife of a payee of a promissory note in good faith indorsed the note in his name without his authority, he being unconscious by reason of illness, and the note having been indorsed also by a third person for the payee's accommodation, and at the wife's request, is discounted and its proceeds go into his estate before his death, and the maker pays the note at maturity in ignorance of the nature of the indorsement, the administrator of the payee's estate may ratify the act of the wife in so indorsing the note."

ger.[41] On the other hand, the view has been forcibly presented that though a voidable act may be ratified, as where an agent has exceeded his powers, or there has been an assumption of agency without proper authority, it is otherwise when the act was originally and in its inception void. A distinction has also been made between civil acts which may be made, it is said, good by subsequent recognition, and a criminal offense which, it is said, is not capable of ratification. And where the status of parties has not been changed by the adoption of the signature, it has been urged that there is no consideration for it, and that it is, therefore, null and void. And a number of cases resting on these views in whole or in part have held that the mere adoption or ratification of a forged signature, without additional circumstances of estoppel or consideration, is void.[42] Chief Baron Kelly in an

41. Greenfield Bank v. Crafts, 4 Allen, 447, the court saying: "It was clearly competent, if duly authorized, thus to sign the note. It is, as it seems to us, equally competent for the party, he knowing all the circumstances as to the signature and intending to adopt the note, to ratify the same, and thus confirm what was originally an unauthorized and illegal act. * * * It is difficult to perceive why such adoption should not bind the party whose name is placed on the note as promisor as effectually as if he had adopted the note when executed by one professing to be authorized, and to act as an agent, as indicated by the form of the signature, but who in fact had no authority. It is, however, urged that public policy forbids sanctioning the ratification of a forged note, as it may have a tendency to stifle a prosecution for the criminal offense. It would seem, however, that this must stand upon the general principles applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted, the guilty party was not to be prosecuted for the criminal offense." See this case cited in 31 Am. Rep. 555. See also 31 Am. Rep. 551, 552; and the dissenting opinion of Martin, B., in Brook v. Hook, there *quoted;* Wellington v. Jackson, 121 Mass. 157; Casco Bank v. Keene, 53 Me. 103; Forsythe v. Bonta, 5 Bush, 547; Bowlin v. Creel, 63 Mo. App. 229.

42. Wilson v. Hayes, 40 Minn. 531. Held void for want of consideration, as against the holder who had made the fraudulent alteration. In Shisler v. Van Dyke, 92 Pa. St. 449, 31 Am. Rep. 553, the court said: "The question, however, remains: Could the forged indorsement, conceding it to be such, be ratified and thus made good? This question must be answered in the negative if we accept as authority the case of McHugh v. Schuylkill County, 7 P. F. Smith, 391, 5 Am. Rep. 447. This case is in point; there as here the question was whether there could be an after ratification of a forged obligation, and it was held that there could be no such ratification. It is true the dictum of this case, going as it does beyond the point ruled, indicates that no contract, vitiated by fraud of any kind, is the subject of subsequent ratification. * * * Where the fraud is of such a character as to involve a crime, the ratification

English case has clearly analyzed and well presented this question.[43]

§ 1352b. Observations on conflicting views.—It is essential in order to charge a party upon a forged signature on the ground of ratification or adoption, as in other cases of ratification, that he should have known all the facts affecting his rights in the premises.[44] And if the adverse party has acted in bad faith, or there be actual fraud practiced on the party sought to be charged, he is not bound by his ratification or adoption of the forgery.[45] It is also quite clear that if there be an agreement, express or implied, to suppress a criminal prosecution of the forger, it would render the ratification or adoption void;[46] and also clear, as already seen, that such ratification would bind the party making it to any third

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of the act from which it springs is opposed to public policy, and hence cannot be permitted; but where the transaction is contrary only to good faith and fair dealing, where it affects individual interests and nothing else, ratification is allowable." To same effect, see Pearsoll v. Chapin, 8 Wright, 9; Negley v. Lindsay, 17 P. F. Smith, 217. In Workman v. Wright, 32 Ohio St. 405 (1878), 31 Am. Rep. 547, it was held that a simple promise to pay a forged note made to the holder after he acquired it was not binding, being without consideration. Smith v. Tramel, 68 Iowa, 488; Henry v. Heeb, 114 Ind. 280, citing the text.

43. Brook v. Hook, 3 Alb. L. J. 255, 24 Law Times, 34, 31 Am. Rep. 549. In this case defendant denied his signature, and said it must be a forgery of J.'s, upon which plaintiff said he should consult a lawyer, with a view to proceeding criminally against J. The defendant said rather than that he would pay the money, and wrote as fellows: "Memorandum, that I hold myself responsible for a bill dated Nov. 7th, 1869, for £20, bearing my signature and J.'s, of Mr. Brook," and signed his name to it. Held, he was not bound. Chief Baron Kelly (with whom Channell and Piggott, BB., concurred) placed his opinion on the grounds: 1. That defendant's agreement to treat the note as his own was in consideration that plaintiff would not prosecute the forger; and 2. That there was no ratification as to the act done, the signature to the note was illegal and void, and that though a voidable act may be ratified by matter subsequent, it is otherwise when an act is originally and in its inception void. Martin, B., dissented. See also McKenzie v. British Linen Co., 44 L. T. R. 431 (1881). In Kernan v. London Discount & M. Bank, 4 Vict. 279, the defendant said the signature was his. It was forged. The Supreme Court of Victoria said: "His telling a falsehood is not a ratification. * * * Had the defendant previously paid a forged note, and thereby misled an innocent holder, possibly the case might have been different.

44. Gleason v. Henry, 71 Ill. 109; Buck v. Wood, 85 Me. 209, 27 Atl. 103.

45. Chamberlain v. McClurg, 8 Watts & S. 36; McHugh v. County of Schuylkill, 67 Pa. St. 391.

46. See § 196.

innocent party who has been induced to act upon the faith of it in such a way as to suffer loss by its repudiation.[47] But in the absence of other circumstances the question is difficult. If A., without any authority whatsoever, but with intent to defraud, sign the name of B. to a promissory note, or other obligation, A. is simply a forger, liable to prosecution, and B. is not bound. But suppose that C., the payee and holder of the note, present the note to B. for payment, and B. with knowledge of all the facts answers, "All right, that is my note, and I will pay it to-morrow," and on the morrow discloses that it is forged and refuses to pay, is B. then bound? It is clear that unless C., the holder, has lost some recourse that he would have had against A., the forger, or his property, to secure the debt, he is in the same status that he would have been if B. had instantly repudiated his signature. It is clear also that B., unless some new consideration has moved to him, is under no additional obligation to pay except that which arises out of a false acknowledgment. Is that *alone* sufficient to hold him? If the original act were innocent in itself he would be bound, because ratification understandingly made is equivalent to a previous authority, and in cases of agency is nothing more than confirmation of previously assumed authority. But when the act without authority constitutes a crime, it is difficult to attribute any motive to the ratifying party but that of concealing it, and suppressing its prosecution; for why should any man pay money without consideration when he himself had been wronged, unless constrained by desire to shield the guilty party? For these reasons public policy would seem to interdict the ratification of a forged signature, except as to those who, acting innocently, so change their relations upon its faith as to estop the party from pleading the truth of the matter.[48]

In Maine where one makes payments on forged paper for the purpose of preventing exposure of the forger, and the holder is misled and prevented from causing his arrest, it is held that such conduct operates as an estoppel against the defense of forger.[49]

§ 1353. Liability upon forged paper by course of conduct.— So a party may, by his acts and course of conduct, be bound, although his signature be forged. Thus, if it be shown against an acceptor who proves his signature a forgery, that he has custom-

47. § 1351.

48. Robinson v. Barnett, 19 Fla. 670, 45 Am. Rep. 26, citing the text.

49. Buck v. Wood, 85 Me. 209, 27 Atl. 103.

arily paid similar drafts of the party forging, knowing the forgery, he will be held liable upon the bill, as having adopted such acceptances.[50] If the acceptor, upon presentment of the bill, gives the holder another bill in payment, he cannot show in a suit on the second bill that the first was a forgery, for he is bound to know his own signature.[51] But a party would not be bound upon a bill, by a forged acceptance in his name, by the mere fact that he had previously paid another bill similarly accepted, if he had not led the holder to believe that the second bill was genuine.[52] If a person whose name has been forged, knows that the holder, a bank, is relying upon the forgery, he will not be permitted to remain silent to its injury; but he will not be held liable, nor estopped to deny the signature, where the bank has been in no way prejudiced by his silence.[53]

SECTION III.

WHEN ONE PARTY IS ESTOPPED FROM DENYING THE GENUINENESS OF ANOTHER'S SIGNATURE.

§ 1354. The relation of one party to a bill or note is often such that he cannot deny the genuineness of another's signature — for having treated it himself as genuine, it would be a fraud to permit him to assert the contrary. *And first, in respect to the maker of a note,* this doctrine is not often applicable to him. If he makes and delivers the note to the payee, and there is no sig-

50. Barber v. Gingell, 3 Esp. 60; Crout v. De Wolf, 1 R. I. 393.

51. Mather v. Lord Maidstone, 18 C. B. (N. S.) 273 (1856), 37 Eng. L. & Eq. 335. And where the payee of a promissory note called upon the surety before the note was due, and while the principal was solvent, to see if he would buy it, and the surety examined the note and his signature, and made no claim of forgery but arranged for a subsequent meeting to purchase or take up the note, and the payee by reason thereof delayed bringing suit on the note until after the insolvency and death of the principal, the surety will be estopped from setting up the defense of forgery. See Kuriger v. Joest, 22 Ind. App. 633, 52 N. E. 764, 54 N. E. 414.

52. Morris v. Bethell, L. R., 5 C. P. 47 (1869), Bovill, C. J., saying: "If it had been made to appear that there had been a regular course of mercantile business, in which bills have been accepted by a clerk or agent whose signature has been acted upon as the signature of the principal, there would be evidence, and almost conclusive evidence, against the latter, that the acceptance was written by his authority. That was the case of Barber v. Gingell. It would have been idle to contend there that the defendant was not responsible for the signature."

53. McKenzie v. British Linen Co., 34 Eng. Rep. 317.

nature upon it but his own, it is obvious that should it come into the hands of a *bona fide* holder thereafter, bearing at the time the forged indorsement of the payee to whose order it was made payable, the maker could not be regarded as responsible for the forgery, or as warranting the genuineness of the signature, and no recovery could be had against him as such holder, as he would be unable to trace his legal title to the instrument.[54] Nor, indeed, would the maker be at all justified in making payment to him, as the payee, not having indorsed the note, still holds the legal title, and could require payment to be made again to him, if without his indorsement it were paid to another.[55] But if the forged name of the payee were indorsed upon the note, or the name of the payee were fictitious and were indorsed upon the note, at the time when it was delivered by the maker, the case would be different. Having issued the note as genuine in all respects, it would be unjust, and fraudulent upon others to permit him to deny it; and proof of his having so issued it would be sufficient to entitle the holder to recover against him.[56]

§ **1355.** Under such circumstances — that is, where the forged indorsements were on the note when he issued it — the maker could not, of course, recover back the amount paid to the holder; for, in addition to the reasons already given, such payment could not be regarded as having been made under a mistake. Under other circumstances, however, the maker may recover back the amount from the party to whom he paid it,[57] for the holder, by the very act of assuming ownership and demanding its payment, impliedly asserts, even though it be without his indorsement, that he has clear title and is entitled to receive payment.[58]

§ **1356. Secondly, in respect to the drawer of a bill,** his relation to other parties is ordinarily like that of the maker of a note.

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54. Story on Notes, §§ 379, 380, 387. But where one of two joint makers signed under the belief that the name of his comaker was genuine, he was held bound to the payee, who accepted the note without notice of the forgery. Hunter v. Fitzmaurice, 102 Ind. 450; Helms v. Agricultural Co., 73 Ind. 325; Roach v. Woodall, 91 Tenn. 206, 18 S. W. 407, citing and approving text.

55. 2 Parsons on Notes and Bills, 596; Story on Notes, §§ 379, 380, 387.

56. Meacher v. Fort, 3 Hill (S. C.), 227 (1837); Hortsman v. Henshaw, 11 How. 177 (1850). See also Beeman v. Duck, 11 M. & W. 251, Redf. & Big. Lead. Cas. 62; Alleman v. Wheeler, 101 Ind. 144, citing the text; First Nat. Bank of Mexico v. Ragsdale, 158 Mo. 668, citing text.

57. See *post*, § 1359, as to Acceptor; Story on Notes, §§ 379, 380, 387.

58. See § 1361, *infra*.

If he issues the bill, as is generally the case, without any other name upon it but his own, he cannot be made responsible for the subsequent forgery of an indorsement or acceptance; and if the name of the payee to whose order the bill is payable, or of a special indorsee, be forged, no recovery can be had against him.[59] But if the drawer puts the bill in circulation with the name of the payee indorsed upon it, he will be understood, by so doing, as affirming that the indorsement is in the handwriting of the payee, or written by his authority; and if it be forged, the amount paid under such indorsement may be credited against him by the acceptor, or recovered against him by the holder of the bill.[60]

§ 1357. **Thirdly, in respect to the indorser of a negotiable instrument,** upon which the name of the drawer, maker, acceptor, or of a prior indorser is forged, he, by indorsing it, warrants that he has clear legal title thereto, and that the instrument is the genuine article it purports to be, and he is, therefore, bound by his indorsement to all parties subsequent to him,[61] even though the paper has been discounted for a prior party.[62] He is like the drawer of a bill who issues it with such names upon it. But if all the names of parties antecedent to his own are genuine, he is then like the drawer of a bill who issues it without any names upon it; and if he pays it to any one holding under a forged indorsement subsequent to his own, he may recover back the amount.[63]

§ 1358. **In the fourth place, as to the transferrer by delivery,** the act of transfer by delivery of a negotiable instrument falls under the general rule of law, that in every sale of personal property the vendor impliedly warrants that the article is in fact what it is described and purports to be, and that the vendor has a good title or right to transfer it.[64] Therefore, if the signature of the

59. See § 735, vol. I; and *post*, § 1361.

60. Hortsman v. Henshaw, 11 How. 177; Meacher v. Fort, 3 Hill (S. C.), 227; Coggill v. American Exchange Bank, 1 N. Y. 113; *ante*, § 1354.

61. MacGregor v. Rhodes, 6 El. & Bl. 266 (indorser cannot deny indorsement to himself). See chapter XXI, on Transfer by Indorsement, §§ 672, 673 *et seq.*, vol. I; Bigelow on Estoppel, 429; Story on Notes, § 380; Star Ins. Co. v. Bank, 60 N. H. 445, citing the text; Lennon v. Grauer, 159 N. Y. 433, 54 N. E. 11, citing text.

62. State Bank v. Fearing, 16 Pick. 533. Note was offered for discount by maker. The name of the payee who was first indorser was forged. Held, that the bank could recover of the second indorser, whose indorsement was genuine.

63. *Ante*, §§ 1225, 1355.

64. See *ante*, § 731; Smith v. McNair, 19 Kan. 330.

indorser be forged, the bank discounting the bill or note offered for discount with such indorsement upon it may recover back the amount from the party from whom it received it.[65] And on the same principle, the maker of a note, or the acceptor of a bill, making payment to a holder under a forged indorsement, would be entitled to recover back the money. And this principle would apply even if the holder who transfers the paper is an agent, unless he discloses his principal.[66] As to the holder of a bill who presents it to the drawee for payment, "He," says Allen, J., "is held to a knowledge of his own title, and the genuineness of the indorsements, and of every part of the bill other than the signature of the drawers, within the general principle which makes every party to a promissory note or bill of exchange a guarantor of the genuineness of every preceding indorsement, and of the genuineness of the instrument." [67] How far he may warrant the drawer's signature we shall presently consider.[68]

§ **1359. When drawee or acceptor bound, though drawer's name be forged.**— *Fifthly:* In respect to the drawee or acceptor of a bill, it is obvious that his relation to the instrument is very different from that of the parties who issued it. He should know his own correspondent's handwriting; and, therefore, the doctrine is laid down by numerous authorities that if he accepts the bill, or pays it, he cannot afterward, on discovering that the signature of the drawer was a forgery, revoke the acceptance, or recover back the amount paid under mistake from the holder to whom he paid it.[69]

§ **1360.** A leading case on this subject, which is often quoted as authority, is Price v. Neal,[70] which was an action by Price to recover from Neal the amount paid him on two bills of exchange,

65. Burgess v. Northern Bank of Kentucky, 4 Bush, 600 (1868); Cabot Bank v. Morton, 4 Gray, 157. See chapter XXII, on Transfer by Assignment, vol. I, §§ 731, 732 *et seq.*

66. Lyons v. Miller, 6 Gratt. 439.

67. White v. Continental Nat. Bank, 64 N. Y. 320.

68. § 1361.

69. Byles on Bills (Sharswood's ed.) [*324], 491; 2 Parsons on Notes and Bills, 590, 591; Story on Bills, § 411; Howard v. Mississippi Valley Bank, 28 La. 728–729, the drawee bank having other genuine drafts of the drawer in its hands, and the means of comparing signatures. United States Bank v. National Park Bank, 59 Hun, 495, 13 N. Y. Supp. 411; First Nat. Bank v. First Nat. Bank, 58 Ohio St. 207, 50 N. E. 723, 65 Am. St. Rep. 748; Northwestern Nat. Bank v. Kansas City Bank, 107 Mo. 402, 17 S. W. 982.

70. 3 Burr. 1355 (1763). See Allen v. Fourth Nat. Bank, 59 N. Y. 12, for explanation and limitation of this case.

of which Price was the drawee. One of the bills had been paid by Price without acceptance, and the other was duly accepted and paid at maturity. Both bills had been forged. It was held the action could not be maintained, chiefly upon the ground that the acceptor is presumed to know the drawer's handwriting, although there were intimations that there had been laches in notifying the holder of the forgery.

There are other English cases which maintain this doctrine,[71] and in the United States Mr. Justice Story has declared, in an opinion of the Supreme Court, that "after some research we have not been able to find a single case in which the general doctrine, thus asserted, has been shaken or even doubted; and the diligence of the counsel for the defendants on the present occasion has not been more successful than our own."[72] And in commenting on the case of Price v. Neal, he observed: "In regard to the first bill, there was no new credit given by any acceptance, and the holder was in possession before the time it was paid or acknowledged. So that there is no pretense to allege that there is any legal distinction between the case of a holder before or after the acceptance. Both were treated on this judgment as being in the same predicament and entitled to the same equities."

§ 1361. Notwithstanding these high authorities, and numerous other cases which decide that the drawee paying a forged draft cannot recover back the amount from the party to whom he paid it, whether such party received it before acceptance,[73] or afterward,[74] a distinction has been taken between the two cases which is clearly philosophical, and, as it seems to us, much better calculated to effectuate justice than the doctrine of Mansfield and Story.[75]

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71. Smith v. Mercer, 6 Taunt. 76, 1 Marsh. 453 (1815). There had been delay of a week in returning the bill, but this was not the ground of decision. See Smith v. Chester, 1 T. R. 654 (1787).

72. Bank of United States v. Bank of Georgia, 10 Wheat. 333 (1825).

73. National Park Bank v. Ninth Nat. Bank, 46 N. Y. 81; Gloucester Bank v. Salem Bank, 17 Mass. 43, Parker, C. J.; Bank of Commerce v. Union Bank, 3 N. Y. 235, Ruggles, J.; Goddard v. Merchants' Bank, 4 N. Y. 149, Bronson, C. J.; Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 239, Cowen, J.; Bernheimer v. Marshall, 2 Minn. 81; Stout v. Benoist, 39 Mo. 280. See also National Bank of Commerce v. National M. B. Assn., 55 N. Y. 213; White v. Central Nat. Bank, 64 N. Y. 322.

74. Ellis v. Ohio Life Ins., etc., Co., 4 Ohio St. 632, Ranney, J.

75. See an able article on this subject in Am. Law Rev. for April, 1875, p. 411.

When the holder has received the bill after its acceptance, the acceptor stands toward him as the warrantor of its genuineness, and receiving the bill upon faith in the acceptor's representation, there is obvious propriety in maintaining his right to hold the acceptor absolutely bound. Indeed, the acceptor, being the primary debtor, stands just as the maker of a genuine promissory note. But when the holder of an unaccepted bill presents it to the drawee for acceptance or payment, the very reverse of this rule would seem to apply; for the holder then represents, in effect, to the drawee, that he holds the bill of the drawer, and demands its acceptance or payment, as such. If he indorses it, he warrants its genuineness;[76] and his very assertion of ownership is a warranty of genuineness in itself.[77] Therefore, should the drawee pay it or accept it upon such presentment, and afterward discover that it was forged, he should be permitted to recover the amount from the holder to whom he pays it, or as against him to dispute the binding force of his acceptance, provided he acts with due diligence.

§ 1362. Questions of negligence in mistaken payments; amounts paid by mistake recoverable unless situation of parties changed.— In all the cases which hold the drawee absolutely estopped by acceptance or payment from denying genuineness of the drawer's name, the loss is thrown upon him on the ground of negligence on his part in accepting or paying, until he has ascertained the bill to be genuine.[78] But the holder has preceded him in negligence, by himself not ascertaining the true character of the paper before he received it, or presented it for acceptance or payment. And although, as a general rule, the drawee is more likely to know the drawer's handwriting than a stranger is, if he is in fact deceived as to its genuineness, we do not perceive that he should suffer more deeply by a mistake than a stranger, who, without knowing the handwriting, has taken the paper without previously ascertaining its genuineness. And the mistake of the drawee

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76. National Bank v. Bangs, 106 Mass. 445; Rouvant v. San Antonio Nat. Bank, 63 Tex. 612; First Nat. Bank of Crawfordsville v. First Nat. Bank of Lafayette, 4 Ind. 355, 30 N. E. 808, 51 Am. St. Rep. 221, citing text; Warren-Scharf Asphalt Paving Co. v. Commercial Nat. Bank, 38 C. C. A. 108, 97 Fed. 181.

77. See §§ 731, 732, vol. I.

78. Ellis v. Ohio Life Ins., etc., Co., 4 Ohio St. 662; Continental Bank v. Tradesmen's Bank, 36 App. Div. 112, 55 N. Y. Supp. 545, quoting with approval the text. See also, in this connection, Bank of Commerce v. Union Bank, 3 N. Y. 230.

should always be allowed to be corrected, unless the holder, acting upon faith and confidence induced by his honoring the draft, would be placed in a worse position by according such privilege to him. This view has been applied[79] in a well-considered case, and is intimated in another;[80] and is forcibly presented by Mr. Chitty, who says it is going a great way to charge the acceptor with knowledge of his correspondent's handwriting, "unless some *bona fide* holder has purchased the paper on the faith of such an act."[81] Negligence in making paper under a mistake of fact is

79. McKleroy v. Southern Bank of Kentucky, 14 La. Ann. 458. In this case the drawees, McK. & B., accepted the draft about the 1st of December, and paid it on the 18th. It turned out that the drawer's signature was forged. The Southern Bank of Kentucky had purchased the draft before acceptance, and had received payment of it; and McK. & B. sued the bank to recover back the amount. The court said: "The defendant became the holder of the draft before it was accepted by the plaintiffs, and before they had any knowledge of its existence, and consequently before the defendant had any right of action against them for its recovery. The plaintiffs, therefore, had done no act which induced the defendant to believe the signature of the drawer to be genuine at the time the bill was purchased. How, then, can it be said that the defendant purchased the bill on the faith of the plaintiff's acceptance, or on their guarantee of the genuineness of the drawer's signature? Or how can it be said that the plaintiffs misled the defendant at the time of the purchase of the bill, or were then guilty of the omission of any duty toward the defendant as the purchaser of the bill? If the defendant had purchased the bill on the faith of the acceptance of plaintiffs, or had sustained any loss in consequence of their negligence, we would have no difficulty in affirming the judgment of the lower court; but such are not the facts made known to us by the record. The defendant purchased the bill on the faith of the indorsement of Shotwell & Son, which was a warranty of the genuineness of the drawer's signature to the bank; and there was no good reason why the accidental payment made by the plaintiffs should inure to the benefit of the defendant."

80. Canal Bank v. Bank of Albany, 1 Hill, 287, Cowen, J.

81. Chitty on Bills (13th Am. ed.) [*431], 485, where it is said: "It has been contended that if the party paid was a *bona fide* holder, ignorant of the forgery, then he ought not to be obliged to refund under any circumstances, although he could not have enforced payment, and although he had immediate notice of the forgery, because the drawee was bound to know the handwriting of the drawer, and the genuineness of the bill, and because the holder, being ignorant of the forgery, ought to have the benefit of the accident of such payment by mistake, and not to be compelled to refund. But on the other hand, it may be observed, that the holder who obtained payment cannot be considered as having altogether shown sufficient circumspection; he might, before he discounted or received the instrument in payment, have made more inquiries as to the signatures and genuineness of the instrument even of the drawer or indorsers themselves; and if he thought fit to rely on the bare

not now deemed a bar to recovery of it,[82] and we do not see why any exception should be made to the principle, which would apply as well to release an obligation not consummated by payment.

§ **1363. The admission of the acceptor** extends only to the signature of the drawer, and not to the terms of the instrument itself. And when the signature is genuine, but the amount in the body of it has been altered after it left the drawer's hand, and he has paid the excessive amount to a *bona fide* holder, he may recover it back from him, provided he was not himself negligent in disregarding evidences that the instrument had been tampered with, which appeared upon its face.[83] And as the holder demanding

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representation of the party from whom he took it, there is no reason why he should profit by the accidental payment, when the loss had already attached upon himself, and why he should be allowed to retain the money, when by an immediate notice of the forgery he is enabled to proceed against all other parties precisely the same as if the payment had not been made, and, consequently, the payment to him has not in the least altered his situation, or occasioned any delay or prejudice. It seems, that of late, upon questions of this nature, these latter considerations have influenced the court in determining whether or not the money shall be recoverable back; and it will be found, in examining the older cases, that there were facts affording a distinction, and that upon attempting to reconcile them, they are not so contradictory as might, on first view, have been supposed." Shepard & Morse Lumber Co. v. Eldridge, 171 Mass. 516. See also Winslow v. Everett Nat. Bank, 171 Mass. 534, 51 N. E. 16, following Lumber Co. v. Eldridge, *supra;* First Nat. Bank of Crawfordsville v. First Nat. Bank of Lafayette, 4 Ind. App. 355, 30 N. E. 808, 51 Am. St. Rep. 221, citing text.

82. See *post*, § 1369, and chapter XLIX, on Checks, sections XIII, XIV.

83. White v. Continental Nat. Bank, 64 N. Y. 317; Kingston Bank v. Eltinge, 40 N. Y. 323; Young v. Lehman, 63 Ala. 519. See *ante*, § 540, vol. I; Bank of Commerce v. Union Bank, 3 N. Y. 230. The draft in this case was originally drawn upon the bank plaintiff, payable to order of J. Durand, for $105. The name of Durand was altered to Bennet, and the word hundred to thousand; and as altered, was paid. And the plaintiff sued the indorsee to whom it had been paid, to recover back the whole amount. Ruggles, J., delivering the opinion of the court that the plaintiff should recover, said: "There is no ground for presuming the body of the bill to be in the drawer's handwriting, or in any handwriting known to the acceptor. In the present case, that part of the bill is in the handwriting of one of the clerks of the canal and banking company of New Orleans. The signature was in the name and handwriting of the cashier. The signature is genuine. The forgery was committed by altering the date, number, amount, and payee's name. No case goes the length of saying that the acceptor is presumed to know the handwriting of the body of the bill, or that he is better able than the indorsers to detect an alteration in it. The presumption that the drawee is acquainted with the

payment warrants the genuineness of the instrument under which such demand is made, we should say that the negligence of the payor should be very great and positive, to deprive him of the right of restitution. But if the drawer had drawn the bill so carelessly as to afford an opportunity for the alteration to be made without disfiguring, marring, or marking the instrument in such a way as to attract the attention of a prudent man, it has been held that he would then be chargeable in his account with the drawee;[84] and, therefore, he could not recover back the amount paid to the holder.[85]

§ 1364. Acceptance no admission of indorser's signature.— But the drawee who accepts or pays a bill is never regarded as thereby admitting the genuineness of the signature of an indorser; for although it is true that every indorser is in respect to his liability the same as a new drawer to the bill, yet the acceptor cannot be presumed to have any such knowledge of this signature as he has of the drawer's, and, therefore, he is not presumed to admit it.[86] If the drawee or acceptor of a bill were to pay

drawer's signature, or able to ascertain whether it is genuine, is reasonable. In most cases it is in conformity with the fact. But to require the drawee to know the handwriting of the residue of the bill is unreasonable. It would, in most cases, be requiring an impossibility. Such a rule would be not only arbitrary and rigorous, but unjust. The drawee would be answerable for negligence in paying an altered bill, if the alteration were manifest on its face." See chapter on Checks; Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 So. 440, 49 Am. St. Rep. 17.

84. Young v. Grote, 4 Bing. 253 (see chapter XLIX, on Checks, section XIV). This case does not conflict with the case of Bank of Commerce v. Union Bank, cited above, as in that case there was no negligence on the part of the drawer. Following the principle announced in the text, it has been held in Indiana that where a person deposits money with a bank and receives a certificate of deposit therefor, and the certificate is stolen from the depositor, and his name forged thereon by way of indorsement, and the bank without the authority or consent of the depositor pays the money evidenced by the certificate on the forged indorsement, after the certificate, in the due course of banking business, has passed through two other banks, and has by them been indorsed, the obligation of the bank of deposit to the depositor could not be changed by such transaction, without some affirmative act or negligent conduct on the part of the depositor. See First Nat. Bank of Frankfort v. Bremer, 7 Ind. App. 685, 34 N. E. 1012, 52 Am. St. Rep. 461.

85. Bank of Commerce v. Union Bank, 3 N. Y. 230. See Hortsman v. Henshaw, 11 How. 177.

86. See *ante*, § 538, vol. I; Story on Bills, §§ 262, 412; Edwards on Bills, 190, 290, 400; 2 Parsons on Notes and Bills, 590; White v. Continental Nat. Bank,

it, and it turned out that the indorsement of the payee or a special indorsee were forged, the result would be that he could not charge the amount in account against the drawer, and that the payment would be invalid; but as his act implies no admission of the genuineness of the indorser's signature, he could recover back the amount from the holder to whom he paid it.[87] "Neither acceptance nor payment," says Cowen, J., in a case cited below, "at any time nor under any circumstances, is an admission that the first or any other indorser's name is genuine."[88] The payee or indorsee of a bill, or note, whose signature has been forged to an indorsement upon it, may recover upon it; and such a payee or indorsee of a check paid by a bank upon his forged indorsement may recover the amount of the bank.[89]

§ **1365.** The distinction between the acknowledgment of the drawer's and of the indorser's signature is carried so far, that, if the bill be made payable to the drawer's own order, and indorsed by him, the acceptance is regarded as admitting the drawing only, and not the indorsement, although the name is the same, and they profess to be, and apparently are, written by the same party.[90] If, however, the name of the drawer be fictitious, and the indorsement is in the same name and handwriting, it would be different; for then acceptance by acknowledging the drawing would impliedly acknowledge the indorsing also.[91]

§ **1366. When money paid on forged indorsement cannot be recovered.**— Yet there may be circumstances under which the acceptor, who has paid a bill under a forged indorsement, could not recover the amount from the holder. Thus, if the forged

64 N. Y. 320; Lyndonville Nat. Bank v. Fletcher, 68 Vt. 85, 34 Atl. 38, 54 Am. St. Rep. 874; First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 43 Am. St. Rep. 247, citing text.

87. Ibid.; Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 287; United States v. National Park Bank, 6 Fed. 852; Smith v. Chester, 1 T. R. 654; Robinson v. Yarrow, 7 Taunt. 455; 2 Parsons on Notes and Bills, 590.

88. Canal Bank v. Bank of Albany, *supra.*

89. Johnson v. First Nat. Bank, 6 Hun, 124; Talbot v. Bank of Rochester, 1 Hill (N. Y.), 295; First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 43 Am. St. Rep. 247, citing text.

90. Beeman v. Duck, 11 M. & W. 251; Robinson v. Yarrow, 7 Taunt. 455; Williams v. Drexel, 14 Md. 566; Story on Bills, §§ 412, 538, vol. I; First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 43 Am. St. Rep. 247.

91. Cooper v. Meyer, 10 B. & C. 468, 5 M. & G. 387.

indorsement were upon the bill at the time when the bill was issued by the drawer, the drawer or acceptor paying it could not maintain an action to recover the amount from the holder, for the reason why such actions are generally allowed would not apply. The holder could himself recover from the drawer, as the latter could not deny the genuineness of signatures which he had himself sent into the world. For the like reason the drawer or acceptor could charge the amount in account against the drawer. And the rule would not be altered where the acceptor had no funds of the drawer in his hands; for if he chose to accept for the drawer's accommodation, that is no reason why he should recover from the holder.[92] This view has been taken by the United States Supreme Court, and seems also to obtain in New York; but in that State it is confined in its application to cases where the payee whose name is forged had no interest in the bill.[93]

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92. Hortsman v. Henshaw, 11 How. 177 (1850); Coggill v. American Exch. Bank, 1 N. Y. 113 (1847). It is not stated in this case that the bill was put in circulation by the drawer.

93. In Bigelow on Estoppel, 432, and in Redfield & Bigelow's Lead. Cas. 61, it is said, in remarking on the case of Hortsman v. Henshaw: "A similar case arose in 1847, in Coggill v. American Exch. Bank. In that case one of the drawers of the bill forged the payee's name, and then procured it to be discounted, and at maturity the plaintiff (the drawee) paid it. On discovering the forgery, he sued the defendant, a *bona fide* holder, to whom he had paid the bill, to recover the sum paid. The court held that the action could not be maintained, but based their decision on the fact stated in the report that the payee had no interest in the bill, comparing it to a bill payable to a fictitious person, such a bill being in effect payable to bearer. The point made in Hortsman v. Henshaw was not noticed — that in such cases the drawer is estopped to deny the genuineness of the indorsement; that he is thus liable to a *bona fide* holder; and that, therefore, the drawee is entitled on payment to a credit against the drawer. Whence it would follow that it is immaterial that the payee had no interest in the bill, when the drawee himself puts it into circulation bearing the payee's indorsement. But, according to Coggill v. American Exch. Bank, explaining on this point Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 287, if the payee owned the forged bill, the acceptor would be entitled to recover the sum paid to the holder. The two cases cannot be reconciled, unless the language of the court in Hortsman v. Henshaw is used with reference to the case of a payee having no interest in the bill. But that cannot be true; for how, then, could it be said that in such case the drawee has paid to one not entitled to receive the money? The case clearly covers the whole ground of a payee who owned the bill, and of one who had no interest in it."

If the acceptor of a bill accept and negotiate the bill with knowledge that there is a forged indorsement upon it, he would be thereby estopped to deny its genuineness.[94]

§ 1367. Recognized exceptions to general rule that drawee or acceptor cannot recover where drawer's signature is forged.— Several exceptions are taken, even where the general rule is recognized, to the doctrine that the drawee or acceptor is precluded from recovering back the amount paid on a forgery of the drawer's signature. *First:* Where payment is made to the payee; for it is said the payee can be no loser by refunding money paid under such a forgery. His debt against the one whose name was forged as drawer, if the latter owed the payee anything, would remain — it could not be paid by a forgery. He could still recover it, whether he refunded to the acceptor or not. And so, not being involved in any loss by being required to refund, it would be great injustice to the acceptor to allow the payee to retain the money.[95] *Secondly:* It has been considered that the general rule would not apply where either by express agreement, or a settled course of business between the parties, or by a general custom in the place applicable to the business in which both parties engaged, the holder takes upon himself the duty of exercising some material precaution to prevent the fraud, and by his negligent failure to perform it has contributed to induce the drawee to act upon the paper as genuine, and to advance the money upon it. And so, also, where the parties are mutually in fault.[96] We think it far better not

94. Beeman v. Duck, 11 M. & W. 251.

95. Redfield & Bigelow's Lead. Cas. 664.

96. Redfield & Bigelow's Lead. Cas. 665; Bigelow on Estoppel, 428, note 2, 445; Ellis v. Ohio Life Ins., etc., Co., 4 Ohio St. 628. In this case it was shown that, by the course of dealing between banks in Cincinnati, checks presented by one bank, drawn by individuals on other banks, were always received from the bankers presenting them in bundles, with a ticket mark on the back stating the amount of the checks, and that, when such checks were presented, the banks were not accustomed to exercise that scrutiny which was usual when the checks were presented by a stranger, it being presumed that caution had already been exercised by the bank taking the check. The check in this case had been added up against the drawer, and the forgery was not discovered for ten days. It was held that, under the circumstances, the bank on which it was drawn could recover the amount from the bank which presented the check. See also National Bank of North America v. Bangs, 106 Mass. 441; Shipman v. The Bank of the State of New York, 126 N. Y. 318, 27 N. E. 371, 22 Am. St. Rep. 821. In this case, the bank paid certain checks,

to recognize the general principle at all save in favor of a holder who has taken the paper on the faith of the drawee's recognition of it as genuine.

§ 1368. Where a party makes payment for the honor of the drawer, without having first seen the bill, and without negligently omitting to do so, he would not be precluded from recovering back the amount upon discovering, as soon as he saw the bill, that it was a forgery, and pronouncing it such; and it would make no difference that it was too late to send due notice of dishonor to the indorser.[97]

SECTION IV.

RECOVERY OF MONEY PAID UPON FORGED INSTRUMENTS.

§ 1369. It is a general principle of law that money paid under a mistake of fact may be recovered back.[98] And accordingly, where one pays money on forged paper by discounting or cashing it, he can always recover it back, provided he has not himself contributed materially to the mistake by his own fault or negligence, and provided that by an immediate or sufficiently early notice he enables the party to whom he has paid it to indemnify himself as far as possible.[99] And now the doctrine is favored that even negligence in making the mistake is no bar to recovery,

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the indorsements of the payees thereof being forged. In balancing the account of the depositor, the bank returned depositor's pass-book with the vouchers, including the checks with the forged indorsements thereon. Held, that the silence of the depositor upon receipt of his book thus balanced, unless he is chargeable with *laches*, simply puts upon him the burden of showing the fraud or mistake. Further held, that depositor has the right to assume that the bank has ascertained that the indorsements are genuine and he is not presumed to know the signature of the payees. See also Clark v. Nat. Shoe & Leather Bank, 32 App. Div. 316.

97. Goddard v. Merchants' Bank, 4 N. Y. 149.

98. Louisiana v. Wood, 102 U. S. (12 Otto) 298; Moses v. McTerlar, 2 Burr. 1005; Carpenter v. Northborough Nat. Bank, 123 Mass. 69; National Bank of North America v. Bangs, 106 Mass. 441; Boylston Nat. Bank v. Richardson, 101 Mass. 287; Merriam v. Wolcott, 3 Allen, 258; Welch v. Goodwin, 123 Mass. 71; Young v. Lehman, 63 Ala. 523. See § 1655 *et seq.*

99. Allen v. Sharpe, 37 Ind. 73; 2 Parsons on Notes and Bills, 597; First Nat. Bank v. State Bank, 22 Nebr. 769. See § 1661; Frank v. Lazier, 91 N. Y. 115; Atlanta Nat. Bank v. Burke, 81 Ga. 598; Lovinger v. First Nat. Bank, 81 Ind. 358, citing the text; Ryan v. Bank of Montreal, 12 Ont. 44; Levy v. First Nat. Bank, 43 N. W. 355; Continental Bank v. Tradesmen's Bank, 36 App. Div. 112, 55 N. Y. Supp. 545; National Park Bank v. Eldred, 90 Hun, 285, 35 N. Y. Supp. 752; Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 So. 440, 49 Am. St. Rep. 17.

unless it results in loss or damage.[1] This rule is of general application; but in order to understand it, it will be necessary to consider the circumstances and relations of the parties who contend for or against it; and this we shall presently proceed to do.

It follows from the rule as stated, that if a valid instrument be rendered up, and one that is forged given in place thereof, it will constitute no valid payment;[2] and even an indorser of the note surrendered up will not be discharged — his liability having been fixed by due demand and notice.[3] In Massachusetts, where A., through fraud, obtained a promissory note from B., signed by him, payable to the order of C., and then forged the indorsement of C. and got the note discounted at a bank, and B. paid the note at maturity to the bank, it was held that B. could maintain an action for money had and received against the bank, although it acted in good faith in taking the note.[4] A party making payment upon a security bearing a forged signature of himself, supposing it to be genuine, may recover back the amount if he is diligent in giving notice, and if rights of third parties have not intervened to estop him.[5] And if his signature be genuine, but the instrument has been so altered as to render it void, the accommodation party, who pays it by mistake in

1. Lawrence v. American Nat. Bank, 54 N. Y. 435; National Bank of Commerce v. National M. B. A., 55 N. Y. 211; Young v. Lehman, 63 Ala. 523; Fraker v. Little, 24 Kan. 599; United States v. National Park Bank, 6 Fed. 852. See *ante*, § 1362.

2. Allen v. Sharpe, 37 Ind. 68; Bell v. Buckley, 11 Exch. 631; Goodrich v. Tracy, 43 Vt. 319; Ritter v. Singmaster, 73 Pa. St. 400.

3. Ritter v. Singmaster, 73 Pa. St. 400.

4. In Lyndonville Nat. Bank v. Fletcher, 68 Vt. 81, 34 Atl. 38, it was held that a bank owes a surety of a note discounted by it no duty to examine into the genuineness of his signature upon a renewal; and is not liable for the neglect in failing to discover that such signature is a forgery unless, perhaps, its negligence was so gross as to amount to bad faith. In Carpenter v. Northborough Nat. Bank, 123 Mass. 69, Lord, J., said: "This is simply the payment of a note to a party who has no legal or equitable right or interest in the promise of the maker. * * * The money having been paid by mistake to a person who has no right to demand it, the case is within the general rule, and the party paying may recover back the amount thus paid."

5. In Welch v. Goodwin, 123 Mass. 77, Lord, J., said: "The question we are called upon to decide is whether, under any circumstances, a party may recover back money paid upon a security bearing a forged signature of himself, supposing it, at the time of payment, to be his genuine signature. We can have no doubt that he may. This is entirely clear in case he was induced to make the payment by fraud or misrepresentation. Nor is it necessary that fraud or misrepresentation should exist. An innocent mistake,

ignorance of the alteration, may recover back the amount.[6] And so, if a party execute a note in renewal of one that was materially altered, no recovery can be had against him if he was ignorant of the fact, except by a *bona fide* holder without notice.[7]

§ 1370. Bank paying forged paper of depositor.— When a bank pays forged paper of a depositor, and returns it to him with his check-book or account-book, such depositor may, of course, immediately repudiate the charge entered up against him, as it has been improperly made.[8] And it has been considered that the depositor owes the bank no duty which requires him to examine his pass-book or vouchers, with a view to detection of forgeries of his name, and may, therefore, repudiate such a charge whenever the forgery is discovered. And accordingly, where it appeared that checks were forged by the confidential clerk of the depositor, paid by the bank, and charged to the depositor on his bank-book, the book balanced, and the forged checks returned to the clerk, who examined the account at the principal's request, and reported it correct, and the principal did not discover the forgery until several months afterward, when he immediately informed the bank, it was held that the amount could not be retained by the bank, as the depositor had done nothing to contribute to or facilitate the fraud.[9] But it is unsafe for the depositor to ignore examination of his vouchers, and if the bank, by his negligence in that respect, loses its rights against others, the tenor of recent decisions is to exonerate it from liability.[10] Where forged commercial paper is paid without inspection, under circumstances giving the party paying no previous

whether arising from natural or temporary infirmity, or otherwise, made without fault upon his part, entitles him to the same relief."

6. Fraker v. Little, 24 Kan. 598. 7. Fraker v. Cullum, 21 Kan. 555.

8. Macintosh v. Eliot Nat. Bank, 123 Mass. 393. Held, bank not absolved from liability to depositor, because his name was forged by a clerk on a blank form taken from depositor's check-book, and stamped with his office stamp. Hattan v. Holmes, 97 Cal. 208, 31 Pac. 1131.

9. Weisser v. Dennison, 10 N. Y. 69; Welsh v. German-American Bank, 73 N. Y. 424; Bank of British North America v. Merchants' Nat. Bank, 91 N. Y. 109; Atlanta Nat. Bank v. Burk (Ga.), 2 Law. Rep. Annot. 96; National Bank v. Tappan, 6 Kan. 465. See § 1655 *et seq.*, and Hardy v. Chesapeake Bank, 51 Md. 562.

10. Leather Mfrs. Bank v. Morgan, 117 U. S. 116. In this case it was held that the question whether the depositor exercised, in regard to the examination of his pass-book and paid checks, the proper degree of care in view of the relations of the parties and the established usages of business, was for the jury to determine under proper instructions as to the law. See

opportunity for inspection, he is not precluded from receiving back the amount paid. But he is bound to use due diligence in making the inspection, as soon as he has the opportunity, and in giving notice of the forgery.[11]

§ 1371. When notice of forgery must be given, and demand for restitution made.—It is undoubtedly necessary that the maker, acceptor, or other party who demands restitution of money paid under a forged indorsement, or under a forged signature of the drawer of a bill, should make the demand without unreasonable delay.[12] Where there is an indorser upon the instrument, which was surrendered up by the holder, who was entitled to notice, the return of the instrument and demand for the money must be made in time for the holder to notify the indorser, according to the English authorities. And a delay until the day after payment has been considered fatal.[13] Seven,[14] ten,[15] fourteen,[16]

also Railroad Co. v. Stout, 17 Wall. 657; Wiggins v. Burkham, 10 Wall. 129. In Weinstein v. National Bank, 69 Tex. 38, the court said: "Should he negligently fail to make the examination and consequent discovery (when he could have discovered it) it is as if he had expressly admitted the genuineness of the checks, and he will not be permitted to deny the fact, provided the bank be prejudiced by his failure." Dana v. National Bank of the Republic, 132 Mass. 156.

11. Allen v. Fourth Nat. Bank, 59 N. Y. 12.

12. United States v. Clinton Nat. Bank, 28 Fed. 357, citing the text and applying the same principles to Government as to individuals.

13. Cocks v. Masterman, 1 B. & C. 902 (17 Eng. C. L.). In this case, bankers who had paid a forged bill gave notice of the forgery, and demanded the money by one o'clock on the following day. The court said: "In this case we give no opinion on the point whether the plaintiffs would have been entitled to recover if notice of the forgery had been given to the defendants on the very day on which the bill was paid, so as to enable the defendants on that day to have sent notice to the other parties to the bill. But we are all of opinion that the holder of a bill is entitled to know, on the day when it became due, whether it is an honored or dishonored bill; and that, if he receives the money, and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. The holder, indeed, is not bound by law (if the bill be dishonored by the acceptor) to take any other steps against the other parties to the bill till the day after it is dishonored. But he is entitled so to do if he thinks fit; and the parties who pay the bill ought not, by their negligence, to deprive the holder of any right to take steps against the parties to the bill on the day when it becomes due." Mather v. Maidstone, 18 C. B. 273; Bigelow on Estoppel, 442.

14. Smith v. Mercer, 6 Taunt. 76.

15. Ellis v. Ohio Life, etc., Co., 1 Handy, 97, overruled in same case, 4 Ohio St. 648.

16. Davies v. Watson, 2 Nev. & M. 709.

fifteen[17] days have been held to be too great delays, independent of any question in regard to an indorser, whom it was then too late to notify of dishonor.

§ 1372. Demand for restitution may be made in reasonable time.— But there is high authority for the more liberal, and, we think, wiser and juster doctrine, that the demand for restitution may be made within a reasonable time after the forgery is discovered, and that the mere space of time is not important, provided it be clearly shown that the holder will be put to no more liability, trouble, or expense by a restoration then, than if it had been called for on the day of payment.[18] Nor does the circumstance that there are genuine indorsers prior to the holder, but subsequent to the forged name, seem to us to alter the case. Their indorsement of the instrument being a warranty of its genuineness, they would not be entitled to notice, as it was not genuine in all respects;[19] and besides the right to sue them as indorsers, the holder, on being compelled to refund the money, could recover back the amount paid by him to his predecessor, and so on, until the instrument rested where the loss should fall. This view was most forcibly presented in New York, where the drawee paid the bill upon which the payee's name had been forged; and it was held that he could recover back the amount, although over two months had elapsed before notice of the forgery was given, and there were indorsers prior to the holder, whom it was, of course, too late to notify of dishonor in due form.[20]

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17. Gloucester Bank v. Salem Bank, 17 Mass. 33.

18. Third Nat. Bank v. Allen, 59 Mo. 310; Koontz v. Central Nat. Bank, 51 Mo. 275; 2 Parsons on Notes and Bills, 598. See White v. Continental Nat. Bank, 64 N. Y. 316; Welch v. Goodwin, 123 Mass. 77; First Nat. Bank of Crawfordsville v. First Nat. Bank of Lafayette, 4 Ind. App. 355, 30 N. E. 808, 51 Am. St. Rep. 221, citing text; First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 43 Am. St. Rep. 247, citing text.

19. See chapter XXXIII, on Excuses for Want of Notice, § 1113; Goddard v. Merchants' Bank, 4 N. Y. 149; Ellis v. Ohio Life, etc., Ins. Co., 4 Ohio St. 658.

20. In Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 291 (1841), Cowen, J., said: "I am not willing to concede that delay in the abstract, as seems to be supposed, can deprive the party of his remedy to recover back money paid under the circumstances before us. It is said the defendants had indorsers behind them, and by delay they were prevented from charging them, by giving seasonable notice. Admit this to be so; the plaintiffs did not stand in the relation of a holder. They were the drawees, and advanced the money by way of payment. They would never, therefore, think of notice to the defend-

§ **1372a. When forged paper need not be returned.**— If the party has paid money for or upon a forged instrument, and some parties to it are genuine, he must in a reasonable time after discovering the forgery offer to return the paper, so as to enable the party responsible to him to make the best of it he can; but if it be an utter forgery, with no genuine party to it but the transferrer, it would be an idle ceremony to do it, and the consideration paid may be recovered without doing so.[21]

§ **1372b.** If a person wrongfully convert a bill or note and receive the amount, the owner may either sue in tort, or may waive the tort and recover the money as received to his use.[22] And the party wrongfully collecting, and holding on deposit, the amount paid to him, upon a check bearing a forged indorsement, is liable to the owner, notwithstanding he may have forwarded the check in a negligent manner; such negligence being collateral to the transaction, and not the proximate cause of leading the third party into the mistake committed.[23]

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ants till they accidentally discovered the forgery. If there had been any unreasonable delay after such discovery, another question would be presented. I infer from the rigor of the case cited by the defendants' counsel (Cocks v. Masterman, 9 B. & C. 902), that he would exact as great, indeed greater, diligence in giving notice than is necessary to fix an indorser." * * * "I doubt whether this case can be sustained, except upon its own peculiar circumstances, if it can be sustained at all. In all the previous cases, where a recovery had been denied, there was carelessness or delay, or both." Alabama Nat. Bank v. Rivers, 116 Ala. 1, 27 So. 580, 67 Am. St. Rep. 95.

21. Brewster v. Burnett, 125 Mass. 68; Smith v. McNair, 19 Kan. 382; First Nat. Bank v. Peck, 8 Kan. 660; Alabama Nat. Bank v. Rivers, 116 Ala. 1, 22 So. 580, 67 Am. St. Rep. 95.

22. Lamine v. Dorrell, 2 Ld. Raym. 1216; Neate v. Harting, 6 Exch. 349; Hollins v. Fowler, 44 L. J. Q. B. 169; Arnold v. Cheque Bank, L. R., 1 C. P. Div. 578.

23. Arnold v. Cheque Bank, L. R., 1 C. P. Div. 578 (1876); 18 Moak's Eng. Rep. 204.

CHAPTER XLIII.

ALTERATION OF NEGOTIABLE INSTRUMENTS.

SECTION I.

DEFINITION AND NATURE OF ALTERATION.

§ **1373.** Any change in the terms of a written contract which varies its original legal effect and operation, whether in respect to the obligation it imports, or to its force as matter of evidence, when made by any party to the contract, is an alteration thereof, unless all the other parties to the contract gave their express or implied consent to such change. And the effect of such alteration is to nullify and destroy the altered instrument as a legal obligation,[1] whether made with fraudulent intent or not.[2]

§ **1373a. Difference between spoliation and alteration.**— This principle of law is essential to the integrity and sanctity of contracts; and in England it has been extended to a degree which has not found favor in the American courts. There it has been adjudged that a deed, bill, note, guaranty, or other written executory contract is avoided by any material change in the terms thereof, although that change be made by a stranger, upon the ground that the custodian of an instrument is bound to preserve its integrity; and as it would be avoided if altered by himself, so

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1. Mersman v. Werges, 112 U. S. 141; Wood v. Steele, 6 Wall. 80; Angle v. N. W. Ins. Co., 92 U. S. 330; Greenfield Sav. Bank v. Stowell, 123 Mass. 196; Eckert v. Louis, 84 Ind. 101, citing the text; Adair v. England, 58 Iowa, 316, citing the text; Kulb v. United States, 18 Ct. of Cl. 565, citing the text; Hodge *et al.* v. Farmers' Bank of Frankfort (Ind.), 7 Ind. App. 94, 34 N. E. 123, quoting the text; Greene v. Beckner, 3 Ind. App. 39, 29 N. E. 172; Middaugh v. Elliott, 61 Mo. App. 601.

2. Heath v. Blake, 28 N. C. 406; Stutts v. Strayer, 60 Ohio St. 384, 54 N. E. 368, 71 Am. St. Rep. 723; Casto *et al.* v. Evinger *et al.*, 17 Ind. App. 298, 46 N. E. 648; Green v. Sneed, 101 Ala. 205, 13 So. 277, 49 Am. St. Rep. 119; Kingston Sav. Bank v. Bosserman, 52 Mo. App. 269; McMurtrey v. Sparks, 71 Mo. App. 126.

it should be avoided if, through his negligence, it were altered by another.[3] And the like views prevail in Scotland.[4]

In the United States a more liberal view prevails as to the rights of the beneficiary of a written contract, and if a stranger, without any complicity with him, intermeddles and changes its terms, he is deemed a spoliator, and the act is termed a spoliation, being an infringement of the right of all parties; but it is considered more the misfortune than the fault of the holder, that a third party should have trespassed on his property, and he is not, therefore, made the victim of his conduct. Therefore, the term "alteration" in this country is understood to signify a material change in the contract by a party thereto, and no spoliation will avoid a bill or note (being the act of a stranger), unless it be so great as to render the words unintelligible or uncertain, in which case it is regarded as a virtual destruction of it.[5]

The English doctrine that spoliation by a stranger avoided the instrument, has been characterized by Judge Story as repugnant to common sense and justice, and deserving no better name than a technical quibble.[6] In California, where a draft was delivered to S. for plaintiff, and S. altered it, it was held, in the absence of proof, that the plaintiff authorized the alteration, to be a spoliation, and not to vitiate the draft.[7] Alteration may

3. Master v. Miller, 4 T. R. 320; 2 H. Bl. 140, where the alteration was made by a stranger. Davidson v. Cooper, 11 M. & W. 778, 13 M. & W. 243.

4. Rob. Pr. (new ed.) 137; Byles on Bills (Sharswood's ed.), 472; Murchie v. Macfarlane, Thompson on Bills, 110.

5. Tutt v. Thornton, 55 Tex. 96, citing the text; Church v. Fowle, 142 Mass. 13; Andrews v. Callaway, 50 Ark. 359, citing the text; Eckert v. Louis, 84 Ind. 99, in which case it was held that an agent of the payee is not a stranger within the rule. *Contra*, if the agent acts without authority. Ballard v. Insurance Co., 81 Ind. 242; Whitlock v. Manciet, 10 Oreg. 166; Piersol v. Grimes, 30 Ind. 129 (1868); Crockett v. Thomason, 5 Sneed, 342; Bigelow v. Stephen, 35 Vt. 521; Terry v. Hazlewood, 1 Duv. 101; Lubbering v. Kohlbrecher, 22 Mo. 596; Medlin v. Platte & Co., 8 Mo. 235; Ford v. Ford, 17 Pick. 418; Lee v. Alexander, 9 B. Mon. 25; Waring v. Smith, 2 Barb. Ch. 119; Davis v. Carlisle, 5 Ala. 707; Vogle v. Ripper, 34 Ill. 106; Blakey v. Johnson, 13 Bush, 197; Laugenberger v. Kroeger, 48 Cal. 147; Cochran v. Nebeker, 48 Ind. 459; Bucklen v. Huff, 53 Ind. 474; Union Nat. Bank v. Roberts, 45 Wis. 373; Murry v. Peterson, 6 Wash. 418, 33 Pac. 969; Waldorf v. Simpson, 15 App. Div. 297, 44 N. Y. Supp. 921; Kingan & Co., Lmtd. v. Silvers *et al.*, 13 Ind. App. 80, 37 N. E. 413; Perkins Windmill, etc., Co. v. Tillman, 55 Nebr. 652, 75 N. W. 1098; Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115.

6. United States v. Spalding, 2 Mason, 478.

7. Laugenberger v. Kroeger, 48 Cal. 147; Kingan & Co., Lmtd. v. Silvers *et al.*, 13 Ind. App. 80, 37 N. E. 413; Hays *et al.* v. Odom, 79 Mo. App. 425.

be made before delivery to the payee as well as afterward. Thus if a note be signed by a surety, or coparty, and left in the hands of a coprincipal, be altered before delivery by one of the promisors, the surety copromisor is discharged, although the alteration be made without the payee's knowledge.[8] And if a note be indorsed by the payee for the maker's accommodation, be materially altered, however innocently, by the accommodation maker, and then discounted, the holder cannot recover.[9]

§ **1374.** It was insisted at one time that the avoidance by alterations applied only to deeds, because of their solemn character; but where the date of a bill was altered by the payee, and then indorsed by him to a holder for value without notice, it was held that the latter could not recover, and it was well said by Ashurst, J.:[10] "There is no magic in parchment or wax, and the principle to be extracted from the cases is that any alteration avoids the contract." And such are the constant and essential uses to which negotiable instruments are put, that it has been considered that more dangerous consequences would flow from a leniency toward alterations in bills and notes than in deeds.[11]

§ **1375. In what alteration consists.**— The alteration may consist in changing (1) its date, or (2) the time or (3) place of payment, or (4) the amount of principal or (5) interest to be paid, or (6) the medium or currency in which payment is to be made, or (7) the number or the relations of the parties, or in (8) the character and effect of the instrument as matter of obligation or evidence.[12]

And the alteration may be effected by adding to the instrument some new provision, or by substituting one provision for another, or by obliterating or subtracting from it some provision incorporated in it.

It will be no answer to a plea of alteration that its operation is favorable to the parties affected by it, whether in lessening the

8. Greenfield Sav. Bank v. Stowell, 123 Mass. 196; Draper v. Wood, 112 Mass. 315; Wood v. Steele, 6 Wall. 80; Fay v. Smith, 1 Allen, 477; Flanigan v. Phelps, 43 N. W. 1113; Goodman v. Eastman, 4 N. H. 455, 17 Am. Rep. 92, 97; Blakey v. Johnson, 13 Bush, 202; Bank of United States v. Russell, 3 Yeates, 391; Aldrich v. Smith, 37 Mich. 470; Bradley v. Mann, 37 Mich. 1. *Contra*, Bingham v. Reddy, 5 Bened. 266.

9. Aldrich v. Smith, 37 Mich. 470.

10. Master v. Miller, 4 T. R. 320; 2 H. Bl. 140.

11. United States Bank v. Russell, 3 Yeates, 391.

12. Drexler v. Smith, 30 Fed. 757, citing the text; Little Rock Tr. Co. v. Martin, 57 Ark. 277, 21 S. W. 468.

amount to be paid, enlarging the time of payment, or otherwise. No man has a right to vary another's obligations at his discretion, whether for his good or ill. It ceases when varied to be that other's act, and it suffices for him to say, "*Non hæc in fœdera veni.*"[13] It may be questioned whether or not prolongation of time, decrease of amount, or other apparently beneficial alteration, is really so. A debtor may make provision for payment on one day, and not be ready on another. A decrease of the amount destroys the identity, and confuses the traces of his obligation, and every reason of policy and principle forbid that the laws should tolerate tampering with the rights and engagements of others. In Indiana, where the note bore interest at ten per cent., and the holder inserted the words "after maturity," it was held that these words avoided it "because they changed in a material matter the legal effect of the note," although they did not operate to the prejudice of the maker.[14] An alteration of a bill before acceptance discharges drawer and indorsers.[15] Evidence of alteration is admissible under a plea of *non assumpsit*, or *nil debet*,[16] but it is safer to allege the alteration.[17]

SECTION II.

ALTERATIONS OF DATE, TIME, PLACE, AMOUNT, AND MEDIUM OF PAYMENT.

§ **1376.** In the *first* place, as to the DATE of the bill or note, it is obviously a most material part of it, indicating the time it became a subsisting contract, and the time when the contract is to be performed in many cases, and a thousand circumstances may arise adding consequence to the question when the instrument was issued. Therefore, any change in the date imparts a new legal effect and operation to it, and is a material alteration, which avoids it as against prior parties and sureties even in the hands of a *bona fide* holder without notice.[18]

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13. Weir v. Walmsley, 110 Ind. 246; Warden v. Ryan, 37 Mo. App. 466; Wager v. Brooks, 37 Minn. 392; Stutts v. Strayer, 60 Ohio St. 384, 54 N. E. 368, 71 Am. St. Rep. 723; Payne, Exr. v. Long, 121 Ala. 385, 25 So. 780.

14. Coburn v. Webb, 56 Ind. 100.

15. Bathe v. Taylor, 16 East, 412.

16. Boomer v. Koon, 6 Hun, 645; Cock v. Coxwell, 2 C. M. & R. (Exch.) 291.

17. Van Santvoord on Pleading (3d ed.), 565.

18. Master v. Miller, 4 T. R. 320; 2 H. Bl. 140; Owings v. Arnott, 33 Miss. 406; Britton v. Dierker, 46 Mo. 592; Brown v. Straw, 6 Nebr. 536; Overton

It matters not that the time of payment by relation to the date, may be prolonged, for suffice it to say it was not the time agreed on. Thus, in a case before the United States Supreme Court, where the maker of the note, drawn payable one year from date, changed "September 11" to "October 11" before delivery, without consent of his surety, it was held that the note was avoided as to him.[19]

The alteration may be in the year,[20] or the month,[21] or the day of the month,[22] or in all three.[23]

Even where a note was altered in date to one day previous, and the effect as to its time of maturity remained unchanged, because of the circumstance that originally it would have fallen due, as its face imported, on Sunday, and, therefore, would have been legally due on Saturday, and by the change of date it fell due on Saturday, so that in point of fact Saturday in either case was its day of payment, it was held that it was avoided by the alteration.[24] And the decision seems clearly right. The maker appeared to be bound as of a day prior to his binding himself. The identity of his contract was destroyed, and its legal effect changed. Questions of his own and of others' solvency might

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v. Matthews, 35 Ark. 147; Crawford v. West Side Bank, 100 N. Y. 56, citing the text; Stayner v. Joice, 82 Ind. 35. See, as to Checks, § 1658; Newman v. King, 54 Ohio St. 273, 43 N. E. 683, 56 Am. St. Rep. 705; Lesser v. Scholze, 93 Ala. 338, 9 So. 273; McMillan v. Hefferlin, 18 Mont. 385, 45 Pac. 548; Powell v. Banks, 146 Mo. 620, 48 S. W. 664.

19. In Wood v. Steele, 6 Wall. 80 (1867), Swayne, J., said: "The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed; another is substituted without his consent, and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. If the instrument be under seal, he may well plead that it is not his deed, and if it be not under seal, that he did not so promise. In either case the issue must necessarily be found for him. To prevent such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument, as to the party sought to be wronged."

20. Russel v. McNab (Scotch case), Thompson on Bills, 111; Bradford Nat. Bank v. Taylor, 75 Hun, 297, 27 N. Y. Supp. 96.

21. Jacob v. Hart, 2 Stark. 45.

22. Outhwaite v. Luntley, 4 Campb. 179; Master v. Miller, 4 T. R. 320. See *supra*.

23. Walton v. Hastings, 4 Campb. 223.

24. Stephens v. Graham, 7 Serg. & R. 505. Approved in Craighead v. McLoney, Sup. Ct. Pa., Jan., 1882, Cent. L. J., March 10, 1882, p. 193.

arise, making a day material. His memory and his memoranda might be challenged or contradicted. And then, although no actual injury might result, the inflexibility of the principle is essential to prevent its possibility.

It has been held, that the date of an indorsement or assignment is not a material part of it, and that an alteration of it will not vitiate the holder's title to the whole amount;[25] but the date may be very material when the question arises whether or not the indorsement was made before or after maturity, and this doctrine does not seem to us maintainable. The insertion of a date in a blank left for that purpose in a note intrusted to the maker by the indorser, has been held not an alteration, as an authority to fill the blank will be implied from the relations of the parties.[26]

§ **1377. Alteration in time of payment.**— In the *second* place, as to the TIME of payment, specified or implied in the bill or note, a change of such time is obviously of the same nature as a change in the date, identical in principle and effect; and whether such change delays, accelerates, or preserves in legal effect the time specified or implied for payment, it constitutes a material alteration.[27] Thus, if the note be changed so as to fall due a year later,[28] or if the bill be payable on demand, and is altered to read one day after date, it is materially varied;[29] so a substitution of "after date" for "after sight;"[30] or the date of day, or month, or year, effects the same result.[31] And where a party gave authority to another to draw a bill upon him at "ninety days from the 10th of April," an alteration to the "16th of April," unauthorized by him, was held to discharge his liability as acceptor under the authority, although the time of payment

25. Griffith v. Cox, 1 Tenn. 210.

26. Mitchell v. Culver, 7 Cow. 336; *ante*, § 83; Shultz v. Payne, 7 La. Ann. 222.

27. Miller v. Gilleland, 19 Pa. St. 119; Lesler v. Rogers, 18 B. Mon. 528; Onthwaite v. Luntley, 4 Campb. 179; Bathe v. Taylor, 15 East, 412; Taylor v. Taylor, 12 Lea, 714. *Contra*, held in Wolverman v. Bell, 6 Wash. 84, 32 Pac. 1017, 36 Am. St. Rep. 126, note, provided there is no proof of fraud on the part of the payee or holder.

28. Wyman v. Yeomans, 84 Ill. 403.

29. Murdoch v. Lee, 4 Pat. Ap. Cas. 261 (Scotch case), Thompson on Bills, 111, the object being, as the annotator observes, to make the bill bear interest.

30. Long v. Moor, 3 Esp. 155, note; Anderson v. Langdale, 3 B. & Ad. 660.

31. Thompson on Bills (Wilson's ed.), 111; Lewis v. Kramer, 3 Md. 265.

was extended six days.[32] A mere extension of the time of payment of a note by the holder, by writing such an extension on the face of the instrument without altering any of its words or figures, has been held unobjectionable as against the maker.[33]

§ 1378. Alteration in the place of payment.—In the *third* place, as to PLACE of payment, when the bill or note has been drawn payable at a particular place, the obliteration of such place so as to make it payable generally constitutes a material alteration as against all parties not consenting;[34] and likewise where no place is designated, it is a material alteration to insert one.[35] And *a fortiori* it is a material alteration to obliterate one place and insert another; as, for instance, to erase an acceptance payable at "Bloxham & Co.'s," and insert the name of "Esdaile & Co." in lieu.[36] Where the drawer of a bill, after acceptance and without acceptor's consent, wrote after the acceptance "payable at Mr. B.'s, Chiswell street," it was held a material alteration and the acceptor discharged;[37] though in England it was formerly held otherwise.[38] So, striking out "in London," and thus mak-

32. Lewis v. Kramer, 3 Md. 265. See Benedict v. Miner, 58 Ill. 19.

33. Drexler v. Smith, 30 Fed. 756. And it has likewise been held that a provision written across the face of a note "Upon the written request of all the makers of this note made on or before June 15, 1896, the payee agrees that the time of payment shall be extended six months from the maturity thereof or note renewed for that time" is not such alteration as will release the sureties who also signed the note, where such words were intended to include such sureties. Sawyer v. Campbell, 107 Iowa, 397, 78 N. W. 56.

34. McCurbin v. Turnbull (Scotch case), Thompson on Bills, 112.

35. Chitty on Bills (13th Am. ed.) [*183, 184], 209–211; Nazro v. Fuller, 24 Wend. 374; Townsend v. Star Wagon Co., 10 Nebr. 615; Whitesides v. Northern Bank 10 Bush, 501. In this Kentucky case the indorsee of a bill accepted generally, caused to be written after the word "accepted" the additional words "payable at the First National Bank of Franklin," it was held, that all parties not consenting to the alteration were discharged. Adair v. England, 58 Iowa, 316; Carlton v. Reed, 61 Iowa, 166; Gwin v. Anderson, 91 Ga. 827, 18 S. E. 43; Pelton v. Lumber Co., 113 Cal. 21 45 Pac. 12; Sneed v. Sabinal Mining & Milling Co., 18 C. C. A. 213, 71 Fed. 493, quoting text.

36. Tidmarsh v. Grover, 1 Maule & S. 735 (1813); Bank of Ohio Valley v. Lockwood, 13 W. Va. 392.

37. Cowie v. Halsall, 4 B. & Ald. 197 (Eng. C. L.), 3 Stark. 36. See also Tidmarsh v. Grover, 1 Maule & S. 735; Rex v. Treble, 2 Taunt. 328.

38. Trapp v. Spearman, 3 Esp. 57, in which case the insertion in a bill "when due at the Crosskeys, Blackfriar's Road," was held immaterial. See also Marson v. Petit, 1 Campb. 82.

ing the bill payable generally.[39] So, adding to a note "payable at the Bank of Smyrna."[40] Even a *bona fide* holder cannot recover upon an acceptance so altered, nor upon a note so altered against parties prior to the one making the alteration.[41] Changing the place of date would change the rights of the parties, and hence is an alteration.[42]

§ 1379. Effect of statutory provisions as to general acceptances do not vary principles applicable to alteration.— In England, and in many of the United States, it is provided by statute that acceptances of bills drawn payable at a banking-house, or other particular place, shall be deemed general acceptances, unless the drawer adds special words limiting the payment to a particular place. The effect of these statutory provisions is that it is not necessary to aver or prove presentment at such place in an action against the acceptor, who, however, may show any loss resulting from nonpresentment there. But an indorser is absolutely discharged by failure to make due presentment there.[43]

These provisions do not affect the rules applying to alterations, because, though the acceptance be general, the insertion of a particular place induces the holder to present the bill there, instead of to the acceptor himself; and the bill might be treated as dishonored, and the acceptor put to inconvenience, when in fact no presentment had been made.[44] The acceptor has a right to deposit the amount at the particular place designated, and that done his obligation is discharged. Therefore, the insertion of a particular place by the holder would materially vary his rights. Besides, as said by Abbott, C. J.: "Suppose a bill so altered to be indorsed to a person ignorant of the alteration, his right to sue his indorser would, as the bill appears, be complete, upon default made where the bill is payable; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would

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39. Burchfield v. Moore, 25 Law & Eq. 123, 5 El. & Bl. 683.

40. Sudler v. Collins, 2 Houst. 538. See also Morehead v. Parkersburg Nat. Bank, 5 W. Va. 74; Ballard v. Insurance Co., 81 Ind. 239.

41. Nazro v. Fuller, 24 Wend. 374; Sudler v. Collins, 2 Houst. 538. See Holmes v. Bank of Ft. Gaines, 120 Ala. 493, 24 So. 959.

42. Mahaiwe Bank v. Douglass, 31 Conn. 170.

43. See 1 & 2 Geo. IV, chap. 78; chapter XX, on Presentment for Payment, § 641 *et seq.*, vol. I; Chitty on Bills [*82], 209; 2 Parsons on Notes and Bills, 548; also chapter XVIII, § 519, vol. I.

44. Ibid.

have committed no default by such nonpayment. I am of opinion, therefore, that the alteration is in a material part of the bill, and the acceptor is, in consequence, discharged." [45]

45. Mackintosh v. Haydon, Ryan & M. 362; to same effect, Desbrowe v. Weatherby, 1 Moody & R. 438; Cowie v. Halsall, 4 B. & Ald. 497; Taylor v. Moseley, 1 Moody & R. 439, note; Gardner v. Walsh, 5 El. & Bl. 83; Burchfield v. Moore, 5 El. & Bl. 683. In Burchfield v. Moore, 25 Eng. L. & Eq. 123, 5 El. & Bl. 683, the holder of a bill, without the acceptor's consent, altered it by inserting "payable at the Bull Inn, Aldgate." Lord Campbell, C. J., said: "By virtue of the 1 & 2 Geo. IV, chap. 78, these words, if in the handwriting of the defendant, would still leave the acceptance a general acceptance. Nevertheless, three very eminent judges have successfully held — Lord Tenterden, in Mackintosh v. Haydon; Lord Chief Justice Tindal, in Desbrowe v. Weatherby; and Lord Lyndhurst, in Taylor v. Moseley, 6 Car. & P. 273 — that such words, although they do not alter the direct liability of the acceptor, do vary the contract between others who are parties to the bill; therefore, that if interpolated without his consent, they may prejudice the acceptor; that they amount to a material alteration of the bill, and that they discharge the acceptor. These decisions were only at *nisi prius*, but they have been long acquiesced in, and we do not disapprove of them. The plaintiff here is a *bona fide* holder for value, without notice of the alteration; but the bill must be considered as vitiated in the hands of a prior holder. The defendant was discharged from his liability as acceptor from the moment when the alteration of the bill had been consummated, and the instrument having ceased in point of law to be an accepted bill, the indorsee afterward could be in no better situation than the indorser. As soon as it is established that there has been a material alteration in a bill of exchange, the particular nature of the alteration becomes immaterial, and Master v. Miller, 4 T. R. 320, 2 H. Bl. 140, becomes an authority. There a bill was drawn payable to A. B. While in his possession the date was altered, and the bill being subsequently indorsed to the plaintiffs, who were (like the present plaintiff) *bona fide* indorsees for value, the judgment was that they could not recover against the acceptor. Ashurst, J., says: 'If A. B. had brought the action, he could not have recovered, because he must suffer from any alteration of the bill whilst in his custody; and the same objection must hold against the plaintiffs who derive title from him.' We conceive, therefore, that in this case the plaintiff's remedy is confined to a right to recover the consideration for the bill, as between himself and the party from whom he received it. A similar remedy may be resorted to till the party is reached through whose fraud or laches the alteration was made. He ought to suffer; for 'a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state.' And Lord Denman, in delivering the judgment of the Exchequer Chamber, in Davidson v. Cooper, intimates a strong opinion that Pigot's Case, 11 Rep. 26, in which this principle is acted upon, has hitherto been, and still ought to be, upheld. The negotiability of bills of exchange is to be favored; but with this view, it is material that their purity should be preserved." It has been held, *contra*, in New York. Etz v. Place, 81 Hun, 203, 30 N. Y. Supp. 765.

And the principle has been applied in a number of American cases.[46]

46. Hill v. Cooley, 46 Pa. St. 259; Oakey v. Wilcox (Miss.), 3 How. 330; White v. Haas, 32 Ala. 430; Nazro v. Fuller, 24 Wend. 375. In this case there was added to the note the words "payable at Wayne County Bank." Nelson, C. J., delivering the opinion of the court, said: "I was at first inclined to think the addition, even if regarded as annexed to the body of the note, was not such a material alteration as invalidated it, for the reason that the designation of the place of payment did not affect the rights of the makers. * * * But upon further consideration, I am inclined to think, when the courts use the language that the note is payable generally and universally, though the place of payment be fixed, they only mean to say that it is so to be regarded for the purposes of the remedy, and that payment must still be made at the place; and a tender elsewhere is no bar. I have found no authority beyond this; and on speaking of the right of discharge by tender, the language used limits it to the place designated." But the contrary has been held in American National Bank v. Banks, 42 Mo. 454. The note sued on was as follows:

"$1,000. ST. LOUIS, October 10, 1866.

"Three months after date, we promise to pay to the order of Fritsch & Simonton, New York, one thousand dollars, for value received, negotiable and payable without defalcation or discount.

"*Due at Goodyear Bros. & Durand's, New York, Jan.* 10–13.

"BANGS & DEADY."

(Indorsed.) — "FRITSCH & SIMONTON."

The words italicised, "*Due at Goodyear Bros. & Durand's, New York, Jan.* 10–13," were inserted after the execution of the note, and without knowledge of the makers. It was held no alteration. And the court said: "The question then is, whether these words attached to the foot of the instrument are to be taken as a part of it, or only a private memorandum, which can in no way affect the liability of the maker. It will be found, upon an examination of the authorities upon this question, that where such words are not incorporated in the body of the contract itself, nor in any manner annexed to the instrument by the maker, for the purpose of fixing a place of payment, they are to be taken as a mere memorandum, and, therefore, immaterial. Story on Promissory Notes, § 49; Exon v. Russell, 3 Maule & S. 505; Williams v. Waring, 10 B. & C. 2. The same doctrine is fully recognized by the American courts in all the leading cases that have been examined. 19 Johns. 391, 24 Wend. 374. It should be kept in mind that this action is against the makers themselves. It was not declared upon as a note payable at the city of New York. There is no contest here as to a right to tender the amount at any designated place of payment, but simply as to the effect of the addition upon their general liability to pay. The principle is everywhere recognized that the maker is generally and universally liable, and a demand at the place is not a condition precedent of payment. Nazro v. Fuller, 24 Wend. 374. The memorandum in this case does not increase or vary, in any respect, the lia-

§ 1380. Right of drawee in particular city or town to designate place of payment therein.— Where a bill is addressed to a drawee at a particular town or city, but without any designation of a particular place of payment therein, it has been held that he may name in his acceptance a particular place in the city, without its having the effect of altering the bill so as to discharge the drawer or indorser, the place named becoming *pro hac vice* the place of business of the acceptor.[47] "Such acceptance is not a departure from the tenor of the bill. It merely fixes a place of payment for the mutual convenience of the acceptors and the holder, and can work no possible injury to the drawer or indorsers, as it will not affect the time for the presentment of the bill to, or for the service of notice of nonpayment on, the parties entitled to such notice." [48] And it has been said that even if the bill were payable at a particular store, counting-house, or office in the city, it would not be a material alteration to name in the acceptance another place in the same city.[49]

§ 1381. Drawee cannot designate place of payment in another city or town.— But if the drawee were to accept a bill so as to make it payable at another city or town, it would be a qualified acceptance, and the holder by taking it would discharge the drawer and indorsers.[50] It was so held in New York, where a bill addressed to "E. C. H., of New York," was accepted "Payable at American Exchange Bank, Clayville Mills," which was in an-

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bility of the defendants, and, therefore, presents no obstacle to the recovery of the plaintiff. It is admitted that in cases where there was a contest between the holder and indorser, such an addition or memorandum, without the knowledge and consent of the latter, has been held sufficient to discharge him. But as to the makers themselves, the question is altogether different. This opinion has proceeded upon the idea that the words in question were simply a memorandum made at the bottom of the note after its execution, and not intended to be a part of the contract itself. Such appears to be the fact, so far as the case is presented here by the record; but we will not assume it to be so for the purpose of entering up judgment in this court. The case proved at the trial did not authorize the declaration of law made by the court that the plaintiff was not entitled to recover."

47. Troy City Bank v. Lauman, 19 N. Y. 480 (1859); Niagara District Bank v. Fairman, 31 Barb. 405 (1860); Shuler v. Gilette, 12 Hun, 280 (1877).

48. Niagara District Bank v. Fairman, *supra*, E. D. Smith, J.

49. Troy City Bank v. Lauman, *supra*, Strong, J.

50. Rowe v. Young, 2 Brod. & B. 165 (6 Eng. C. L.); Redfield & Bigelow's Leading Cases, 329.

other county;[51] and so where a bill addressed to A. Y. & Co., at Coburg, Upper Canada, was accepted "Payable at the Bank of Upper Canada, Port Hope."[52]

§ 1382. Right to insert place of payment over drawee's signature of acceptance; query? — In Kentucky, it has been held, that where one indorses a bill for accommodation of the drawee, it bearing at the time the drawee's name written across its face, and leaves it in the drawee's hands to be used by him to raise money, he thereby confers authority on him to write the acceptance above his signature, and designate therein a place of payment. And the court — basing its decision also upon the ground that the acceptance being in blank, the parties to the bill had afforded an opportunity for it to be filled up in a manner different from their agreement, would be bound to a *bona fide* holder without notice — sustained action by the holder against all the parties thereto.[53] In a subsequent case this view was confirmed by the court, not, however, without indications of reluctant acquiescence in it.[54] And indeed it does not seem to us sustainable upon reason or authority. The mere name of the drawee written across the bill does not signify an inchoate, skeleton undertaking, like that of an indorser in blank; or if a bill is in blank in

51. Walker v. Bank of the State of New York, 13 Barb. 637 (1852).

52. Niagara District Bank v. Fairman, 31 Barb. 404 (1860). See Todd v. Bank of Kentucky, 3 Bush, 645, *infra*.

53. Rogers v. Posters, 1 Metc. (Ky.) 645 (1858).

54. Todd v. Bank of Kentucky, 3 Bush, 626 (1868). In this case the drawee of the bill wrote over his acceptance, "Accepted payable at the Northern Bank, Lexington." Held, that the indorser was not discharged, Williams, J., saying: "Although we might be inclined to deny this implied power in the drawee as the better opinion, if this question was now for the first time before this court, yet, in the face of an express decision of this tribunal, which has remained for ten years unaltered by legislative action or judicial construction, and when hundreds of thousands of dollars of this class of paper have been taken, and are perhaps now held on its faith, and regarding this rule, since the adoption of it by this court, as impliedly entering into all such contracts, we do not deem it of sufficient importance to overrule it, and thus unsettle a recognized rule of contracts, and perhaps jeopardize a large amount of such paper. Besides, there is much reason, when the paper is for the accommodation of the drawers and acceptor, as in this instance, to infer, from the transaction and nature of the paper, an implied authority in those for whose use it is made to appoint the place of payment, unless one has been already expressly designated in the bill, as this would more generally make the paper answer the purposes of the beneficiaries and objects of its creation."

respect to amount, time, or place of payment, it constitutes a full and complete acceptance in itself; and although it may be readily varied by additions, without imparting a suspicious appearance to the bill, that is a consequence of the nature of the engagement, and not of the carelessness or confidence of the acceptor. Therefore if it be varied, an alteration is made, and the prior parties are discharged.

§ 1383. Memorandum of place of payment.— Whether a memorandum of the place of payment is to be considered as a part of the contract, or merely as a direction where payment will be made, has been questioned; but it seems now settled that it enters into the contract and is a material alteration.

In Bank of America v. Woodworth, 18 Johns. 315, it appeared that an accommodation note had been made, dated, and indorsed in blank at Albany, where the parties resided, and that the maker, without the indorser's knowledge or consent, wrote in the margin, "Payable at the Bank of America," *i. e.*, in New York city. The Supreme Court held the alteration immaterial, on the ground that an indorser in blank leaves the place of payment, when none is designated, to the subsequent discretion of the maker, except only when he appoints one in bad faith, or at an unreasonable distance.

But this decision was overruled on appeal (Woodworth v. Bank of America, 19 Johns. 391), the court deciding that a written instrument might be varied by a memorandum in the margin, and that the terms of such memorandum had the same effect as if contained in the body of the instrument,[55] and that this was a material alteration, because "it subjected the indorser to new and unexpected liabilities. By the note, as originally drawn, he bound himself to pay in the event of nonpayment on a demand being made of the maker personally, or at his residence; by the addition of the memorandum, he is made liable upon a demand of payment at New York, which, but for that memorandum, would have been perfectly nugatory. It rendered valid a notice of nonpayment, which was received one or two days later than that which he contemplated at the time of his indorsement — a circumstance by which he does not indeed appear to have been

55. Starr v. Metcalf, 4 Campb. 217; Trecothick v. Edwin, 1 Stark. 469; Platt v. Smith, 14 Johns. 368; Jones v. Fales, 4 Mass. 244; Sanders v. Bagwell (S. C.), 10 S. E. 946, citing the text.

injured, but which certainly increased his risks, and lessened his prospects of indemnity." [56]

§ **1384. Alteration in amount of principal and interest.**— In the *fourth* place, as to the amount of principal for which the bill or note is executed, any change thereof is a material alteration, whether it be increased[57] or lessened;[58] as where, for instance, the amount is changed from $500 to $400,[59] for it is a palpable variance of the instrument's legal effect in its most vital part. Indeed, an alteration to a larger amount is a forgery; and so also of a smaller amount, if with fraudulent intent.

It has been held that where the principal altered a note so that its amount was lessened, and then delivered it to the payee, the surety was not discharged.[60] Certainly the identity of the contract was destroyed, and it is difficult to reconcile this case with the principles and authorities already stated. Doubtless, the idea that it was a release, and, therefore, a benefit to the surety, *pro tanto*, had a weighty influence with the court; but the law denominates any change in the legal effect of a contract an alteration, and its policy is to tolerate no tampering with written instruments.

§ **1385. Alteration in interest.**— In the *fifth* place, as to interest, any addition of words making the bill or note bear interest when it originally did not, or changing the time when interest should run, or varying the percentage of interest, is of the same character as if it changed the principal.[61] If the rate of interest be

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56. Pelton v. Lumber Co., 113 Cal. 21, 45 Pac. 12. See also Dewey v. Reed, 40 Barb. 17. And see *contra*, American Nat. Bank v. Bangs, 42 Mo. 454; *ante*, § 1379.

57. Bank of Commerce v. Union Bank, 3 N. Y. 230; Goodman v. Eastman, 4 N. H. 455; Batchelder v. White, 80 Va. 103; Searles v. Seipp, 6 S. Dak. 472, 61 N. W. 804; Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115.

58. Stevens v. Graham, 7 Serg. & R. 505; Leith v. Elphiston (Scotch case), Thompson on Bills (Wilson's ed.), 111; Hewins v. Cargill, 67 Me. 554; State Sav. Bank v. Shaffer, 9 Nebr. 7; Ætna Bank v. Winchester, 43 Conn. 391.

59. Hewins v. Cargill, 67 Me. 554.

60. Ogle v. Graham, 2 Pa. 132.

61. Schnewind v. Hacket, 54 Ind. 248; Harsh v. Klepper, 28 Ohio St. 200. See *ante*, § 1375; Reeves v. Pierson, 23 Hun, 187; Craighead v. McLoney, Sup. Ct. Pa., Cent. L. J., March 10, 1882, p. 192; Hoopes v. Collingwood, 10 Colo. 107; Heath v. Blake, 28 S. C. 406; Woodworth v. Anderson, 63 Iowa, 503; Davis v. Henry, 13 Nebr. 500, citing the text; Gwin v. Anderson, 91 Ga. 827, 18 S. E. 43; Hotel Lanier Co. v. Johnson, 103 Ga. 604, 30 S. E. 558;

left blank, authority is not implied to the holder to fill in an amount greater than the legal rate, and he would effect a material alteration in doing so.[62] But he may insert the legal rate.[63] Where the words "with lawful interest" were written on the corner of the note;[64] where "with interest from date" were incorporated in it;[65] and where "with interest" were written by the maker after it had been indorsed, but before delivery to the payee, it was alike held to be material, and to avoid the note as against nonconsenting parties;[66] where "with interest payable semi-annually" were inserted before delivery to payee;[67] and where they were inserted afterward,[68] the surety was discharged; and where "with interest" was added, but without fraudulent intent,[69] and "interest to be paid annually."[70] So adding, "eight per cent. interest;"[71] or "bearing ten per cent. interest

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Hurlbut v. Hall, 39 Nebr. 889, 58 N. W. 538; Courcamp v. Weber, 39 Nebr. 533, 58 N. W. 187; Handley v. Barrows, 68 Mo. 623.

62. Hoopes v. Collingwood, 10 Colo. 107; *ante*, § 143. But where no blank is left for insertion of interest, it is a material alteration to add "with interest at the rate of ten per cent. from maturity." Farmers & Merchants' Nat. Bank v. Novich, 89 Tex. 381, 34 S. W. 914; Little Rock Tr. Co. v. Martin, 57 Ark. 277, 21 S. W. 468; Brim v. Fleming, 135 Mo. 597, 37 S. W. 501.

63. First Nat. Bank v. Carson, 60 Mich. 437; Bank v. Wolff, 79 Cal. 71.

64. Warrington v. Early, 2 El. & Bl. 763. See also Sutton v. Toomer, 7 B. & C. 416; Sanders v. Bagwell (S. C.), 10 S. E. 946, citing the text. And it has been held, that where the maker of a note, several years after the execution, signs his name to the indorsement on the back of the note, providing for it to draw ten per cent. interest from a date anterior from the date on the indorsement, such indorsement becomes a part of the note and is based upon the original consideration of the note. See Harrell v. Parrott, 50 S. C. 16, 27 S. E. 521.

65. Brown v. Jones, 3 Port. 420.

66. Waterman v. Vose, 43 Me. 504. See also McGrath v. Clark, 56 N. Y. 36; Schwarz v. Oppold, 74 N. Y. 307, where the note was payable on demand; Jones v. Bangs, 40 Ohio St. 139, 48 Am. Rep. 664, surety held discharged, maker having added the words "with ten per cent. interest from date" before delivery to payee. So, where the holder struck out the words "interest paid on this note to maturity." Hert v. Oehler, 80 Ind. 135; Meise v. Doscher, 83 Hun, 580, 31 N. Y. Supp. 1072; Farmers' Nat. Bank v. Thomas, 79 Hun, 595, 29 N. Y. Supp. 837; Gwin v. Anderson, 91 Ga. 827, 18 S. E. 43.

67. Neff v. Horner, 63 Pa. St. 327; Jones v. Bangs, 40 Ohio St. 139.

68. Dewey v. Reed, 40 Barb. 16; Glover v. Robbins, 49 Ala. 219.

69. Fay v. Smith, 1 Allen, 477; Draper v. Wood, 112 Mass. 315; Hotel Lanier Co. v. Johnson, 103 Ga. 604, 30 S. E. 558.

70. Boalt v. Brown, 13 Ohio (N. S.), 364.

71. Hart v. Clouser, 30 Ind. 210; Palmer v. Poor, 121 Ind. 135.

from maturity;"[72] or "with half legal interest until maturity;"[73] and so where "after maturity" was added to interest clause;[74] and so where the like words in the interest clause were erased.[75] A change of percentage is of like effect. Thus, where "nine per cent." was added to the words of a note "on demand and interest;"[76] and where twelve per cent. was changed to ten.[77]

So interlining the word "paid" before "annually" in the expression: "the above to be at ten per cent. annually."[78] But where the word "annually" was inserted in the interest clause of a note, dated January 10, 1869, and payable on or before October 15, 1870, it was construed to relate to the rate of interest, and not to time of payment, and, therefore, that it was not a material alteration.[79]

§ **1386. Alteration in medium of payment.**—In the *sixth* place, as to the medium of payment, a change of the kind of currency, as by the addition of the words "in specie" to a bond after the sum;[80] or the word "gold" after the term "dollars" in a note;[81] or of the denomination, as "from pounds into dollars; from sterling pounds into current pounds,"[82] even though it could do no possible injury, would avoid the instrument, and there might be cases in which positive or possible injury would result. And so the erasure of such words would equally amount to alteration.[83] In a recent case before the United States Supreme Court, the words in an order which made it payable "in drafts to the order of H. G. A." were erased with a pen, and "in current funds" in-

72. Lee v. Starbird, 55 Me. 491. See also Kilkelly v. Martin, 34 Wis. 525; Franklin Life Ins. Co. v. Courtney, 60 Ind. 349.

73. Lamar v. Brown, 56 Ala. 157.

74. Coburn v. Webb, 56 Ind. 96.

75. Dietz v. Harder, 72 Ind. 208.

76. Ivory v. Michael, 33 Miss. 398. Even though afterward erased. Plyler v. Elliot, 19 S. C. 25.

77. Whitmer v. Frye, 10 Mo. 348 (a bond). In Moore v. Hutchinson, 69 Mo. 429, the note bore one per cent. per month. Payee erased "one." Held, that it was a material alteration vitiating note, however purely done. Hoopes v. Collingwood, 10 Colo. 107.

78. Patterson v. McNeely, 16 Ohio St. 348.

79. Leonard v. Phillips, 39 Mich. 182.

80. Darwin v. Rippey, 63 N. C. 318.

81. Bogarth v. Breedlove, 39 Tex. 561.

82. Stevens v. Graham, 7 Serg. & R. 505.

83. Church v. Howard, 16 Hun, 5, where the words "gold or its equivalent" were stricken out.

serted in their stead; and the paper was held avoided thereby.[84] So, if the instrument be payable in goods, on the same principle, if the style or character of the goods were changed, it would be vitiated. It was so held where a note was payable "in merchantable meat stock," and the word "young" was interpolated after merchantable;[85] so adding "good hard" before "wood;"[86] so writing "good" before "merchantable wool."[87]

SECTION III.

ALTERATIONS IN RESPECT TO THE PARTIES TO THE INSTRUMENT.

§ **1387.** In the *seventh* place, as to the PARTIES to a bill or note, any change in the personality, number, or relations of the parties is, as a general rule, a material alteration. Thus, where C., member of the firm of C. & Co., obtained an accommodation indorsement to his individual note, and then added "& Co." to his signature, thus making it his firm's note, it was held a material alteration.[88] When there are several makers or cosureties, the addition of another maker[89] or cosurety[90] constitutes a material alteration; for the addition of another maker destroys the integrity of the original contract; and the addition of another cosurety changes the right of the sureties in respect to the proportion of contribution for which each is liable to the others.[91] And the

84. Angle v. N. W., etc., Ins. Co., 92 U. S. (2 Otto) 330.

85. Martendale v. Follett, 1 N. H. 95.

86. Schwalm v. McIntyre, 17 Wis. 232.

87. State v. Cilley, quoted in 1 N. H. 97.

88. Haskell v. Champion, 30 Miss. 136; Hodge *et al.* v. The Farmers' Bank of Frankfort, Indiana, 7 Ind. App. 94, 34 N. E. 123, citing the text.

89. Hamilton v. Hooper, 46 Iowa, 516; Dickerman v. Miner, 43 Iowa, 508; Wallace v. Jewell, 21 Ohio (N. S.), 163; Hall v. McHenry, 19 Iowa, 521; Lunt v. Silver, 5 Mo. App. 186; Houck v. Graham, 106 Ind. 195; Gardner v. Welsh, 5 El. & Bl. 82, overruling Catton v. Simpson, 8 Ad. & El. 136. See Gould v. Combs, 1 C. B. 543; 2 Parsons on Notes and Bills, 556, 557. But the additional maker is himself bound. Hamilton v. Hooper, 46 Iowa, 516; Dickerman v. Miner, 43 Iowa, 508; Rhoades v. Leach, 93 Iowa, 337, 61 N. W. 988, 57 Am. St. Rep. 281.

90. McVean v. Scott, 46 Barb. 379, overruled in Card v. Miller, 1 Hun, 504; Sullivan v. Rudisill, 63 Iowa, 158; Berryman v. Manker, 56 Iowa, 150. (*Contra*, Ward v. Hackett, 30 Minn. 152; Graham v. Rush, 73 Iowa, 451, upon the ground that there had been no acceptance of the note at the time of the alteration.)

91. In Monson v. Drakeley, 40 Conn. 552 (1873), where after delivery a party signed a joint and several note of a maker and two sureties as surety,

erasure of the name of one of two drawers or makers,[92] or payees,[93] who have indorsed the paper, or of one of several cosureties,[94] or the name of the payee and inserting another,[95] is likewise a material alteration. So the substitution of one drawer or drawee, or maker or comaker for another, is of like effect.[96] But it has been held, that where A. signed as principal and B. as surety, the cutting off the memorandum of suretyship from B.'s name was no material alteration, because as such it did not vary the meaning, nature, or subject-matter of the contract, B. being liable any way.[97] This view does not seem tenable, and the contrary view has been taken in Texas.[98]

§ **1388. Adding a maker when there is but one.**— Whether or not when there is only one maker, the addition of another is an alteration which discharges him, is a question upon which the authorities are divided.[99] In New York, where a note was offered in

no question of alteration was raised. The court held that he would not, unless in pursuance of arrangement at time of execution or delivery, become a joint promisor or maker, and that the subsequent undertaking was independent of, and collateral to, the original; but the surety so signing was bound for contribution to the original sureties. See Favorite v. Stidham, 84 Ind. 425. For *contra* doctrine, see Barnes v. Van Keuren, 31 Nebr. 165, 47 N. W. 848.

92. Mason v. Bradley, 11 M. & W. 590; Gillett v. Sweat, 1 Gilm. 475; Callandar v. Kirkpatrick (Scotch case); Thompson on Bills (Wilson's ed.) 112.

93. Cumberland Bank v. Hall, 1 Halst. 215.

94. McCramer v. Thompson, 21 Iowa, 244; Hall v. McHenry, 19 Iowa, 521.

95. Robinson v. Berryman, 22 Mo. App. 510; Bell v. Mahin, 69 Iowa, 409; Horn v. Bank, 32 Kan. 521, citing the text.

96. Davis v. Coleman, 7 Ired. 424; Mahaiwe Bank v. Douglas, 31 Conn. 170; State v. Polk, 7 Blackf. 27; Richmond Mfg. Co. v. Davis, 7 Blackf. 412; Smith v. Weld, 2 Barr, 54; Fleming v. Leiper, Thompson on Bills, 112; Sneed v. Sabinal Mining & Milling Co., 20 C. C. A. 230, 73 Fed. 925.

97. Vance v. Collins, 6 Cal. 530; but *quære?*

98. Rogers v. Tapp, Sup. Ct. Tex., Dec. 5, 1881, Cent. L. J., Jan. 13, 1882, p. 38. Held, that where one of the signers of a promissory note adds to his signature the word "surety," and the others do not, the presumption is that the note was given for value by the other makers, and that they are the principal debtors; and that the erasure of the word "surety" would be a material alteration.

99. Favorite v. Stidham, 84 Ind. 424, citing the text. And if the maker of a note delivers the same to the payee, and the payee, through another person and in the absence of the maker, procures other signatures to the note, it is incumbent on the holder of the note to show that such material alteration was made with the knowledge and consent of the maker of the note. In such case an express promise by the maker after maturity of the note to the holder

part payment of a purchase, and the seller refused to take it unless the buyer added his name under the maker's, such a signature and transfer was held to make the signer jointly and severally liable with the maker to the holder of the note, and an action was allowed against both as joint makers.[1] So where holders, in order to get a note discounted as makers, signed their names as makers, and afterward paid the note, it was held they had lost no rights, and could sell or transfer it.[2] But in a subsequent case, where the payee wrote his name under the maker's, adding to it the word "security," it was held a material alteration.[3] There are other cases in the same State, in which it is held that the addition of another name as maker, where there was but one, is not a material alteration, the additional maker being regarded as a guarantor.[4] And in the latest case it was held that such party was bound as a several maker.[5] In Scotland, it has been decided, in apposition to the English authorities, that where a new acceptor had been added to the address of the bill, and had accepted without the drawer's knowledge, after delivery of the bill to the other acceptor, for whose accommodation it was drawn, it was not a material alteration. "But," says Parsons, commenting on this decision, "we think the wiser rule is that which looks first to the integrity of the instrument, and secures that, though there be no actual injury nor purpose of fraud."[6] If a blank were left for the name of the promisor so that the paper could be made joint and several, and new parties unite in and sign it, then, except as to those who knew that the authority to fill the blank was exceeded, the instrument would be valid.[7]

§ **1389.** The preservation of the integrity of the instrument is certainly a matter of prime importance, and where there are sev-

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thereof, and with knowledge of such alteration, constitutes a ratification of the alteration. See Emerson v. Opp, 9 Ind. App. 581, 34 N. E. 840, 37 N. E. 24.

1. Patridge v. Colby, 19 Barb. 248. See also McVean v. Scott, 46 Barb. 379; Denick v. Hubbard, 43 N. Y. S. C. 188; Dusenbury v. Albright, 31 Nebr. 345, 47 N. W. 1047.

2. Muir v. Demaree, 12 Wend. 468.

3. Chappell v. Spencer, 23 Barb. 584.

4. Brownell v. Winnie, 29 N. Y. 400; McCaughey v. Smith, 27 N. Y. 39, Balcom, J., dissenting.

5. Card v. Miller, 1 Hun, 504 (1874), overruling Chappell v. Spencer and McVean v. Scott.

6. 2 Parsons on Notes and Bills, 559.

7. Snyder v. Van Doren, 46 Wis. 602. See *ante*, §§ 143, 147.

eral makers, the addition of another would *prima facie* operate as a material alteration. Even if it were explained that the third was added as a surety, the difficulty would not seem to be entirely gotten over.[8] If one of the original makers signed for accommodation, his apparent rights of contribution would be changed, and two parties, instead of one, would have to be resorted to. And if the original makers owed the debt, the third, by adding his name, confuses the evidences of it, and changes the form of their obligation. Still, it may be urged with great force that the chance of damage is so remote, and the hardship of avoiding the instrument so great, that it should be regarded as an immaterial alteration. Where there is but one maker to a note, and another is added, these views apply with enhanced emphasis. The addition does not vary the original maker's liabilities in any respect. There could be no motive of fraud upon him or others to induce the addition. And while it would come within the letter of those declarations of courts that maintain anything which affects the integrity of the instrument, to be a material alteration, it does not seem to us to come within their spirit. And, on the whole, we think it may be regarded as an immaterial alteration.[9]

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8. There would be no objection, as to joint makers, if the name was added before delivery, as until then the instrument is incomplete. Hoffman v. Butler, 105 Ind. 372. Adding the signature of a married woman to a note will not constitute an alteration, unless it appear that she has a separate estate. Williams v. Jensen, 75 Mo. 681; Allen v. Dornan, 57 Mo. App. 288.

9. Miller v. Finley, 26 Mich. 249 (1872). In this case it appeared that a party added his signature as surety to a sole note. It was held an immaterial alteration. Campbell, J., said: "In the recent case of Aldous v. Cornwell, L. R., 3 Q. B. 573, Cotton v. Simpson is cited as authority on the point that an alteration will not vitiate, unless material; and the case of Gardner v. Walsh was referred to, merely to say that it only overruled the former case on the question whether such an alteration as that passed upon was material. Aldous v. Cornwell is somewhat pointed in condemning the early decisions, which paid no attention to the materiality of alterations. And the doctrine that immaterial alterations should not be regarded, is too well based on good sense to be overthrown. The addition of a surety was not, in either of those cases, held to discharge a principal. It has always been competent for a person to become surety by signing the note of the principal, so as to become a joint and several maker. There is no rule which requires that a contract of suretyship must be contemporaneous with the principal obligation. And unless the principal's liability is in some way affected by the addition, it cannot be material. It is very difficult to see how such a change can affect him in any but a mere technicality, which neither changes, increases, nor diminishes his liability." See also Gano v. Heath, 36 Mich. 441. In Mers-

§ 1390. Change of personality.— A change of the personality of the party is material. Thus adding or erasing "junior," in the signature,[10] or changing the christian name from "William" to "Thomas."[11]

Alterations in the name, number, or relation of the acceptors or indorsers, stand on same footing as of other parties. Changing an indorser's christian name,[12] or adding,[13] or erasing[14] that of an acceptor.

The interlining of the words "jointly and severally," or "severally," or "or either of us" in a note joint and not several, would be a material alteration, as they would engraft upon the joint note a several obligation.[15] But where a joint note has the effect to bind the parties jointly and severally, the insertion of those words would be immaterial, because merely expressing what was already implied.[16]

And the changing of a note from "I promise" to "We promise" is material, because it changes a joint and several note into

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man v. Werges, 112 U. S. 142 (1884), the view of the text was taken. But in Indiana the contrary view prevails. Nicholson v. Combs, 90 Ind. 515, 46 Am. Rep. 229; Ward v. Hackett, 30 Minn. 150, 44 Am. Rep. 187, sustains the text. *Contra*, Singleton v. McQuerry, 85 Ky. 42; Hochmark v. Richler, 16 Colo. 263, 26 Pac. 818. In this case, Helen, C. J., said: "Such operations at most operate to invalidate the instrument to nonconsenting, and no such party is here complaining. They do not release from liability the additional comaker, who has himself been in no way deceived or injured; *a fortiori* must this be true where, as in the present case, such comaker enjoys part of the consideration. Donkle v. Milem, 88 Wis. 33, 59 N. W. 586, holds a contrary view, where the payee was told by the maker that he would be joined by his wife on the note, provided an extension of time be granted, and that he, the maker, had seen the surety and knew that he would assent when the facts were the maker had not seen the surety, who, upon application being made to him that he agrees to the extension of time, refused his assent — this discharged the surety. Barnes v. Van Keuren, 31 Nebr. 165, 47 N. W. 848.

10. Broughton v. Fuller, 9 Vt. 373; Erickson v. First Nat. Bank, 44 Nebr. 622, 62 N. W. 1078, 48 Am. St. Rep. 753.

11. Macara v. Watson (Scotch case), Thompson on Bills, 112. See *post*, § 1398.

12. Macara v. Watson, *supra*.

13. Howe v. Purves (Scotch case), Thompson on Bills, 112.

14. M'Ewen v. Gordon, Thompson on Bills, 112.

15. Perring v. Hone, 2 Car. & P. 401, 4 Bing. 28. See Draper v. Wood, 112 Mass. 315.

16. Gordon v. Sutherland, Thompson on Bills (Wilson's ed.), 113; Miller v. Reed, 27 Pa. St. 244.

one joint only.[17] Adding the word "collector" by the payee to his name has been held in New Jersey a material alteration.[18]

Where the name of a surety was erased by agreement between himself and the payee, it was held that the principal was not affected, as the payee had a right to release the surety if he chose to; and, therefore, it was no alteration;[19] but if the payee erased the word "surety" from a party's name without his assent, such party would be discharged.[20]

The striking out of the name of an indorsee on a special or full indorsement;[21] or changing a blank indorsement so as to read, "Pay to the order of E. S. at the rate of 25 fr. 75 c. per £1, *'utretro,"* etc.; and writing the same on the face of the bill, materially alters the indorser's contract, and the latter also the acceptor's.[22]

Writing a waiver of demand, protest, or notice over an indorsement would convert a contingent into an absolute liability, and, therefore, discharge the indorser.[23]

SECTION IV.

ALTERATIONS IN THE OPERATION OF THE INSTRUMENT.

§ 1391. In the *eighth* place, a change in the character or effect of the instrument, whether in respect to its obligation or to its weight in evidence, is a material alteration. Thus, the addition of a seal to the signature of the maker of a note converts it into a bond, against which no plea of want of consideration can be made, and thus invests his contract with attributes which he declined to impart to it.[24] Consequently the note is avoided. So a bond is avoided by detaching the seal.[25]

So when a seal is added to the name of one of several comakers of a note, all are discharged, because the holder could not have

17. Humphreys v. Guillow, 13 N. H. 385; Hemmenway v. Stone, 7 Mass. 58; Clark v. Blackstock, Holt N. P. 474; Eckert v. Louis, 84 Ind. 99.

18. York v. Jones (Sup. Ct. N. J., June, 1881), 43 N. J. L. 332.

19. Broughton v. West, 8 Ga. 248; Huntington v. Finch, 3 Ohio St. 445.

20. Laub v. Paine, 46 Iowa, 551.

21. Grimes v. Piersol, 25 Ind. 246.

22. Hirschfield v. Smith, L. R., 1 C. P. 340.

23. Farmer v. Rand, 14 Me. 225; Davis v. Eppler, 38 Kan. 629, citing the text.

24. United States v. Linn, 1 How. 104; Marshall v. Gougler, 10 Serg. & R. 164; Vaughan v. Fowler, 14 S. C. 357; Bank v. Myers, 50 Mo. 157.

25. Piercy v. Piercy, 5 W. Va. 199.

the same recourse against the three which he held before; one would be estopped from denying a want of consideration which might inure to the benefit of all, and new relations and obligations would be created.[26]

§ 1392. Addition of witnesses' names.— Many questions have arisen as to the effect of adding to a note after its delivery the names of parties purporting to be witnesses to its execution. In States where a distinction is made between witnessed and unwitnessed notes, whether by the Statute of Limitations or otherwise, it would seem to us clear that the subscription of his name by the witness after the delivery would be a material alteration as to all parties not consenting, because it would change the legal effect of the instrument.[27] Thus, where an unattested note was barred by six years, and one attested stood on the footing of a bond, not being barred until twenty, and ten years after its execution, being four after the bar had accrued, the attestation was added, it was held a material alteration, as "it at once infused life into an instrument which had lost all legal efficacy." [28]

So, too, we should say, that if the payee should procure a person not present at the time of execution of the instrument to sign his name as a subscribing witness, it would be *prima facie* evidence of some fraudulent design, and would in itself constitute a material alteration.[29]

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26. Biery v. Haines, 5 Whart. 563.

27. Eddy v. Bond, 19 Me. 461; Fuller v. Green, 64 Wis. 164.

28. Brackett v. Mountfort, 11 Me. 115, 78 Me. 69. *Contra* in Wisconsin, the liability of the maker under the Statute of Limitations not being affected thereby. Fuller v. Green, 64 Wis. 159.

29. Homer v. Wallis, 11 Mass. 309. See 2 Parsons on Notes and Bills, 555. In Adams v. Frye, 3 Metc. (Mass.) 107, where the obligee of a bond procured a person not present nor authorized to attest it to sign it as a witness, it was held material, Dewey, J., said: "By adding to the bond the name of an attesting witness, the obligee became entitled to show the due execution of the same by proving the handwriting of the supposed attesting witness, if the witness was out of the jurisdiction of the court. It is quite obvious, therefore, that a fraudulent party might, by means of such an alteration of a contract, furnish the legal proof of the due execution thereof, by honest witnesses swearing truly as to the genuineness of the handwriting of the supposed attesting witness, and yet the attestation might be wholly unauthorized and fraudulent. It seems to us that we ought not to sanction a principle which would permit the holder of an obligation thus to tamper with it with entire impunity. But such would be the necessary consequence of an adjudication that the subsequent addition of the name of an attesting

§ **1393.** If, however, a party actually witnessed the execution of a bill or note, and afterward, by request of the holder, should, without the consent of others, subscribe his name as witness, it has been held that it does not work a material alteration, as it can work no harm.[30] And the suggestion that the appearance of such attestation might weigh with the jury in a question as to the genuineness of the signature has been thought of little force.[31]

But it is treading on dangerous, and at least doubtful, ground to countenance this doctrine. It is true that where proved to have been done honestly throughout, little, if any, harm could be wrought; but, if permitted at all, it is by no means clear that, by forging the names of promisors and of witnesses, the door might be opened for extensive frauds. Upon the minds of a jury, the more solemn the form of an instrument, the greater its weight. Indeed, every mark of authenticity must insensibly or otherwise have its effect upon all minds. Certainly a court should exact very rigid proof of perfect good faith; and we are sustained by high authority in the opinion which our mind has reached, that it would be better not to permit such liberties to be taken with the rights of others.[32] Where the name has been accidentally neglected, so that its addition was really in addition of an original understanding, it would be different.[33] And very slight circumstances might prove such understanding.

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witness, without the privity or consent of the obligee, is not a material alteration of the instrument, and would, under no circumstances, affect its validity. But we think that it would be too severe a rule, and one which might operate with great hardship upon an innocent party, to hold inflexibly that such alteration would, in all cases, discharge the obligor from the performance of his contract or obligation. If an alteration, like that which was made in the present case, can be shown to have been made honestly, if it can be reasonably accounted for, as done under some misapprehension or mistake, or with the supposed assent of the obligor, it should not operate to avoid the obligation. But, on the other hand, if fraudulently done, and with a view to gain any improper advantage, it is right and proper that the fraudulent party should lose wholly the right to enforce his original contract in a court of law."

30. Rollins v. Bartlett, 20 Me. 319; Milberg v. Stover, 78 Me. 71; Thornton v. Appleton, 29 Me. 298; Church v. Fowle, 143 Mass. 13; 2 Parsons on Notes and Bills, 555.

31. 2 Parsons on Notes and Bills, 554.

32. 2 Parsons on Notes and Bills, 556.

33. Smith v. Dunham, 8 Pick. 256.

It has been held that where the payee of a note cut off the name of an attesting witness he cannot recover at law, because it might be that it would impede the proof of consideration should a defense be made; and that equity would not relieve him, as it presumes everything against a spoliator.[34] The converse doctrine would seem to us applicable when the name had been added.

§ **1394. Alteration in terms of consideration.**— It has been held that if a bill be expressed generally "for value received," and words are added describing such consideration as "for the good-will and lease in trade" [35] of a certain person, or "for a certain tract of land," [36] it is materially altered and avoided. The reasons assigned are, *first*, that it makes the note a confession in evidence of a fact which might otherwise require extraneous proof; and, *second*, that it puts the holder upon inquiry whether that consideration passed.[37] The first reason seems to us in itself sufficient. But the second is, at least, according to several cases, and as it seems to us upon principle, incorrect in its statement of fact. The statement of the specific consideration is an assurance of some consideration, and does not charge the holder with inquiring about it.[38] Inserting words making the note a charge upon her estate, would be a material alteration as to a married woman.[39]

§ **1395. Alteration in words of negotiability.**— The addition of the negotiable words, "or order," or "bearer," is not an alteration when they were intended to have been inserted, and were accidentally left out.[40] But where the effect of such addition is to impart negotiability to an instrument not designed to be negotiable, it is a most material alteration in the nature of the contract, and the bill or note is thereby avoided.[41] So the inter-

34. Sharpe v. Bagwell, 1 Dev. Eq. 115.

35. Knill v. Williams, 10 East, 413.

36. Low v. Argrove, 30 Ga. 129.

37. 2 Parsons on Notes and Bills, 562.

38. Herieh v. Merchants' Nat. Bank, 34 Ind. 380; Bank of Commerce v. Barrett, 38 Ga. 126. See § 797, vol. I.

39. Reeves v. Pierson, 23 Hun, 185.

40. Kershaw v. Cox, 3 Esp. 246, 10 East, 437; Byrom v. Thompson, 11 Ad. & El. 31. See Cariss v. Tattersall, 2 M. & G. 890; Weaver v. Bromley (Mich.), 8 West. Rep. 190 (*sic*).

41. Bruce v. Westcott, 3 Barb. 274; Johnson v. Bank of United States, 2 B. Mon. 310; Pepoon v. Stagg, 1 Nott & McC. 102; Edwards on Bills, 95; The State v. Stratton, 27 Iowa, 424; Brown v. Straw, 6 Nebr. 536; McAuley v.

lineation of " or bearer " in a negotiable note, payable to a certain person or order, is an alteration of it, because it materially changes the manner of its negotiability. It would not without the payee's indorsement be evidence of the amount paid to him upon being returned after payment; and it might possibly deprive the defendant of a set-off otherwise available.[42] The substitution of " or order " for " bearer " would be different, because it would only affect the transfer of title between holder and transferee.[43]

So the addition of the words, " without defalcation or set-off," where they have the effect they import,[44] or making note negotiable by making it payable in bank,[45] would constitute an alteration. And writing over an indorser's signature the words, " without recourse," is a material alteration.[46]

§ 1396. Alteration of words on back of instrument.— In some cases, words on the back of a bill or note are not regarded as a part of it; and it has been held that the cancellation of an indorsement of part payment need not be explained unless called in question.[47] But still an indorsement on the back of the bill or note might be material as a part of it, as its construction is to

Gordon, 64 Ga. 221; First Nat. Bank v. Laughlin, 4 N. Dak. 391, 61 N. W. 473, citing text; Winter & Loeb v. Pool, 100 Ala. 503, 14 So. 411; Walton Plough Co. v. Campbell, 35 Nebr. 173, 52 N. W. 883.

42. Booth v. Powers, 56 N. H. 30; Scott v. Walker, Dud. (Ga.) 243; The State v. Stratton, 27 Iowa, 424; Union Nat. Bank v. Roberts, 45 Wis. 373; Needles v. Shaffer, 60 Iowa, 65. So, the alteration of the indorsement of a note by striking out the word " order " and inserting the word " bearer," is not only material, but the plaintiff to whom it appears the note was not indorsed cannot maintain an action to recover the amount due thereon, even though it does not appear that he made the alteration or that it was done with his knowledge, or whether the alteration was made before or after he acquired possession of it. See Burch v. Daniel, 101 Ga. 228, 28 S. E. 622.

43. Flint v. Craig, 59 Barb. 330.

44. Davis v. Carlisle, 6 Ala. 707.

45. McCoy v. Lockwood, 71 Ind. 319; Toomer v. Rutland, 57 Ala. 379.

46. Luth v. Stewart, 6 Vict. 383.

47. Commonwealth v. Ward, 2 Mass. 397. See Warner v. Spencer, 7 J. J. Marsh. 340; Kittridge v. Stegmier, 11 Wash. 3, 39 Pac. 242. Held, in this case, that an indorsement on the back of a promissory note in the following words: " With privilege of three months' extension, if security remains satisfactory," although made by the payee after delivery and without the knowledge of the surety, will not have the effect of discharging the surety, as it is an immaterial alteration, in no way changing the rights or obligations of the parties.

be gathered from every source of information which an inspection of it supplies.[48] And it may be shown by evidence that an indorsement annexing a condition to the payment was on the instrument when delivered, in which case it would be deemed a material part of it.[49]

§ 1397. Alteration by making or obliterating memoranda on bills and notes.—An alteration of the legal import and operation of a bill or note may be effected as readily by making or obliterating material memorandum upon it, as by inserting or erasing provisions in the body of it. Thus, where the words "with lawful interest" were written on the corner of a note after its execution, it was said in England, by the Court of Queen's Bench: "This forms part of the contract. It would clearly have been so if it had been written in the body of the note, and we think a memorandum of this kind written in the corner of this note is equally part of the contract, because the contract must be collected from the four corners of the document, and no part of what appears there is to be excluded."[50] So, where the maker of a note payable generally wrote on the margin, "Payable at Bank of North America," it was held vitiated as to the indorser.[51]

Cutting off or obliterating a material memorandum which had the effect to make a note written on demand payable on time;[52] or which annexed a condition to the payment of the note;[53] or provided for a delay of collection until a certain person should

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48. See Muldrow v. Baldwell, 7 Mo. 587; 2 Parsons on Notes and Bills, 545; *ante*, § 149 *et seq.*; Heaton v. Ainley, 108 Iowa, 112, 78 N. W. 798.

49. Blake v. Coleman, 22 Wis. 415.

50. Warrington v. Early, 2 El. & Bl. 763. See also Benedict v. Cowden, 49 N. Y. 396 (1872); *ante*, § 149 *et seq.*, vol. I; State Solicitors' Co. v. Savage, 39 Fla. 703, 23 So. 413, citing the text. After citing with approval the general proposition stated in above paragraph, the court said: "Yet if the memoranda or indorsements do not have the legal effect to alter the legal import and operation of the note, but express a new, distinct, and collateral agreement between the payee and principal named therein, it will only be evidence of the new agreement intended, and it cannot be said, that the note, the evidence of the prior agreement, was thereby altered."

51. Woodworth v. Bank of America, 19 Johns. 381 (overruling 18 Johns. 319, 391). See *ante*, § 1367.

52. Wheelock v. Freeman, 13 Pick. 165; Payne, Exr. v. Long, 121 Ala. 385, 25 So. 780.

53. Wait v. Pomeroy, 20 Mich. 425. But query, if there was no disfigurement. See *post*, §§ 1405, 1407 *et seq.*

take it up, the maker having paid it;[54] or which made the note payable out of the profits of a certain business.[55]

The indorsement of a memorandum upon the note granting an extension of time to the principal, while it releases the surety if made upon sufficient consideration and be otherwise valid, is not an alteration of the instrument rendering it void in the hands of the party against whom the change is alleged.[56]

SECTION V.

IMMATERIAL AND AUTHORIZED CHANGES OF THE INSTRUMENT.

§ 1398. Not every change in a bill or note amounts to an alteration. If the legal effect be not changed, the instrument is not altered, although some change may have been made in its appearance, either by the addition of words which the law would imply, or by striking out words of no legal significance.[57] Thus, writing out the name of the bank after the name of the signature "cashier," which was intended to bind the bank, is merely expressing more clearly the legal effect of the signature, and is not an alteration.[58] So adding name of a surety without maker's knowledge is not material.[59] So the insertion of a dollar mark before the numerals expressing the amount in dollars;[60] or insertion of the word "annually" after the interest clause in a note payable on or before a certain time;[61] or changing the marginal figures so as to conform them to the written amount;[62] or the addition

54. Johnson v. Heagan, 23 Me. 329.

55. Benedict v. Cowden, 49 N. Y. 396.

56. Moore v. Macon Sav. Bank, 22 Mo. App. 684; Bucklen v. Hubb, 53 Ind. 474. And the surety will not be released by such indorsement if it appears that the request for the extension was made at the instance of the sureties as well as that of the principal. Sawyer v. Campbell, 107 Iowa, 397, 78 N. W. 56.

57. Tutt v. Thornton, 57 Tex. 35; Fuller v. Green, 64 Wis. 164; Marx v. Luling Co-operative Assn., 17 Tex. Civ. App. 408, 43 S. W. 596; Ryan v. First Nat. Bank, 148 Ill. 349, 35 N. E. 1120, quoting text.

58. Bank of Genesee v. Patchin Bank, 13 N. Y. 309; Folger v. Chase, 18 Pick. 63.

59. Royse v. State Nat. Bank, 50 Nebr. 16, 69 N. W. 301.

60. Houghton v. Francis, 29 Ill. 244.

61. Leonard v. Phillips, 39 Mich. 182, Cooley, J., saying that in such a note "the rate of interest to be paid annually must be understood as naming only the rate to be paid for the yearly period."

62. Smith v. Smith, 1 R. I. 398. See *ante*, chapter III, § 86, vol. I.

in full of the christian names of the drawers whose surnames had been affixed before the acceptance;[63] the interlineation of the surname of the payee, after delivery;[64] the running of a pen through the words "Providence Steam-Pipe Co.," which was one name under which a firm did business, and writing over it their style in the copartners' names,[65] were likewise adjudged immaterial. So also where a bill was addressed to a firm by the style of "A. B. & Co.," and on being accepted by them in the name of "A. & B.," and the address was changed to conform to the acceptance, there being no question as to the identical firm intended, and the acceptors being liable either way.[66]

So erasing "R.," where the payee's name was written "B. R. C.," instead of "B. C.," as intended,[67] and correcting "Franklin E.," so as to read "Francis."[68] So adding "agent" to a maker's name as mere *descriptio personæ*.[69] So, striking out the name of a principal and inserting that of an agent as agent, the legal effect of the instrument in either case being the same.[70] So, inserting the legal rate of interest in a blank in a note which provides for interest without specifying the rate.[71]

And in no case is a change in the phraseology of the instrument material when it does not essentially change its legal effect.[72]

§ **1399. Immaterial memoranda** on the margin or other portions of the bill or note stand on the same footing as immaterial insertions incorporated in it. If they be merely explanatory of some circumstance connected with the transaction, they are immaterial. Thus, where a drawer, who held a bill indorsed in blank by the payees, wrote under his signature, "Left with Mr.

63. Blair v. Bank of Tennessee, 11 Humphr. 84.

64. Manchet v. Cason, 1 Brev. 307.

65. Arnold v. Jones, 2 R. I. 345.

66. Farquhar v. Southey, Moody & M. 14; First Nat. Bank of Butte v. Weidenbeck, 38 C. C. A. 131, 97 Fed. 896, citing text.

67. Cole v. Hills, 44 N. H. 227.

68. Desby v. Thrall, 44 Vt. 414.

69. Manufacturers, etc., Bank v. Follett, 11 R. I. 92; Casto *et al.* v. Evinger *et al.*, 17 Ind. App. 298, 46 N. E. 648.

70. Lowry v. McLain, 75 Ga. 373.

71. Bank v. Wolff, 79 Cal. 71; James v. Dalvey, 107 Iowa, 463, 78 N. W. 51.

72. Holland v. Hatch, 15 Ohio St. 464. In Cushing v. Field, 70 Me. 50, a note was indorsed on its face "subject *to* a contract made," which was changed to "subject *of* a contract made." Held immaterial. But in Missouri any change vitiates paper. Kingston Sav. Bank v. Bosserman, 52 Mo. App. 269.

B. (the plaintiff) as collateral," it was held immaterial.[73] So where a party's residence was noted on the instrument after his name.[74] So an indication, for the convenience of the holder, where he would find his money when due.[75] So, where several makers of a note had appended to their signatures the words, "As trustees of the First Universalist Society," which appendix was torn off, it was held immaterial, as the note was the personal undertaking of the signers, and so remained unchanged in its effect.[76] The figures denoting the number in a particular series to which the instrument belongs, are no part of it, and their alteration or erasure is immaterial.[77] So, where the maker of a note payable on certain conditions, indorsed the performance of the conditions thereon, it was held not such an alteration as would discharge a surety.[78]

§ 1400. **Other illustrations of immaterial alterations.**— So there are some changes of a purely immaterial character, which do not change the effect or impair the identity of the instrument, and, therefore, are not alterations.[79] Thus, retracing a faded name in clear ink;[80] or writing over in ink a word written in pencil;[81] or correcting a misspelling.[82] Where the number of a negotiable bond was changed, but it did not appear that the numbering was required by statute, nor in any way affected the holder's rights, it was held immaterial;[83] and so in England the alteration of the number of certain Bank of England notes was considered immaterial, Coleridge, J., saying that though in a popular sense

73. Bachellor v. Priest, 12 Pick. 399; Thompson on Bills, 113; Bank v. Wolff, 79 Cal. 71.

74. Struthers v. Kendall, 5 Wright, 214.

75. Walter v. Cubley, 2 Cromp. & M. 151.

76. Burlingame v. Brewster, 79 Ill. 515. To same effect, see Hays v. Mathews, 63 Ind. 412; Marx & Bliem v. Luling Co-operative Assn., 17 Tex. Civ. App. 408, 43 S. W. 596.

77. City of Elizabeth v. Force, 29 N. J. Eq. 591, overruling 28 N. J. Eq. 587; Commonwealth v. Industrial Sav. Bank, 98 Mass. 12; Berdsell v. Russell, 29 N. Y. 220. See § 1499*a*.

78. Jackson v. Boyles, 64 Iowa, 430.

79. Harris v. Bank, 22 Fla. 501.

80. Dunn v. Clements, 7 Jones Law, 58; United States Nat. Bank v. National Park Bank, 59 Hun, 495, 13 N. Y. Supp. 411.

81. Reed v. Roark, 14 Tex. 329.

82. Leonard v. Wilson, 2 Cromp. & M. 589.

83. Commonwealth v. Emigrants' Bank, 98 Mass. 12; State *ex rel.* Plock v. Cobb, 64 Ala. 158.

it was a material alteration because it interposed some difficulty in the way of detecting fraud, it did not vary, or attempt to vary, the contract.[84] Where the consideration of a note was gold, and the payee inserted "paid in gold, gold having been the consideration," it was held immaterial to the maker, and also as to the surety, if he knew that the consideration was gold when he signed.[85]

§ 1401. Changes by express or implied consent.— It is quite obvious that where all the parties to a bill or note expressly agree to a change in any of its terms that they cannot complain of such change as an alteration.[86] They have as much right to change as to make a contract. And where all do not consent, those consenting are bound, while the rest are discharged.[87]

Consent may be given before the change is made, or it may be given afterward by ratification.[88] It may be express, or it may be implied from custom,[89] or from the acts of the parties.[90] Where one indorses for accommodation of the maker, a note in which the place of payment is left blank, authority to the maker to fill the blank will be presumed, that being indispensable to the negotiability of the instrument, and the use of it for the purpose intended.[91]

In all cases where a change has been made, it will be a question for the court to determine whether or not it amounts to an

84. Suffell v. Bank of England, Q. B. D., Cent. L. J., Dec. 9, 1881, p. 455.

85. Hanson v. Crawley, 41 Ga. 303.

86. Wardlow v. List, 41 Ohio St. 414; Connable v. Smith, 61 Hun, 185, 15 N. Y. Supp. 924; Phillips v. Cripps, 108 Iowa, 605, 79 N. W. 373; Schmelz v. Rix, 95 Va. 509, 28 S. E. 890, citing text.

87. Grimstead v. Briggs, 4 Iowa, 559; Wilson v. Jamieson, 7 Barr, 126; Bank of Ohio Valley v. Lockwood, 13 W. Va. 392; Peru Plow & Wheel Co. v. Ward, 1 Kan. App. 6, 41 Pac. 64; Glover v. Gentry Admrs., 104 Ala. 222, 16 So. 38.

88. National State Bank v. Rising, 4 Hun, 793; Carriss v. Tattersall, 2 M. & G. 890; Morrison v. Smith, 13 Mo. 234; Cannon v. Grigsby, 116 Ill. 151; Lammers v. Sewing Mach. Co., 23 Mo. App. 471.

89. Woodworth v. Bank of America, 19 Johns. 391.

90. Clute v. Small, 17 Wend. 238; Bowers v. Jewell, 2 N. H. 543. And accordingly it has been held that where a surety stands by, and by his silence and conduct induces a borrower to part with his money on the faith of the surety's approval of an alteration by the principal of the rate of interest stipulated in the note, he cannot afterward rely upon such alteration as a discharge of his liability. See Sanders v. Bagwell, 37 S. C. 145. 15 S. E. 714, 16 S. E. 770.

91. Wessell v. Glenn, 108 Pa. St. 105; *ante*, § 144.

alteration;[92] but the question whether or not the parties affected consented to it, is solely with the jury.[93]

If a note be altered by one signer without the consent of the other, and be sued upon as their joint note, the plaintiff may recover against the signer who made the alteration, but the other will be entitled to his costs.[94] Where two of three joint makers of a note consented to its alteration, it has been held that the holder can recover against them, provided he had no knowledge that the third maker had not consented.[95]

Under the English Stamp Acts there are a number of decisions to the effect that no change can be made after issue, even by consent of all parties.[96] As soon as the instrument is issued the stamp has filled its function. Any change afterward is virtually a new contract, requiring a new stamp.

§ **1402. Evidence of consent to alteration.**— Consent to the insertion of negotiable words might be inferred where the party indorsed the note as if it were negotiable;[97] so also from a subsequent acknowledgment of validity by payment of interest, consent would be implied.[98] So a promise to pay after full knowledge of alteration, and an offer to give security for payment, would be competent evidence of consent;[99] but a renewal note signed by an accommodation indorser, without knowledge of the fact that the original note indorsed by him had been materially altered, would be without consideration; and would not bind him, save to a *bona fide* holder without notice.[1]

So the supplying of an omission, such as stating on whose account the bill was drawn, there being no dispute as to the fact.[2]

Where the last indorser of an accommodation bill made a memorandum at the foot directing its proceeds to be credited

92. Stevens v. Graham, 7 Serg. & R. 505; Bowers v. Jewell, 2 N. H. 543; Jones v. Ireland, 4 Iowa, 63.

93. Stout v. Cloud, 5 Litt. 205; Stahl v. Berger, 10 Serg. & R. 170; Overton v. Mathews, 35 Ark. 147; Jacobs v. Gilreath, 45 S. C. 46, 22 S. E. 757.

94. Broughton v. Fuller, 9 Vt. 373; Wills v. Wilson, 3 Oreg. 308.

95. Myers v. Nell, 84 Pa. St. 369.

96. Bowman v. Nichol, 5 T. R. 547; Bathe v. Taylor, 15 East, 412; Downes v. Richardson, 5 B. & Ald. 674.

97. Kershaw v. Cox, 3 Esp. 246.

98. Carriss v. Tattersall, 2 M. & G. 890. *Contra*, Jacobs v. Gilreath, 45 S. C. 46, 22 S. E. 757.

99. Humphreys v. Guillow, 13 N. H. 385.

1. Fraker v. Cullum, 21 Kan. 555.

2. Commercial Bank v. Paton, Thompson on Bills, 113.

to the drawer, it was held no part of the bill, and its obliteration of no consequence.[3]

§ **1403. Changes to correct mistakes, supply omissions, and effectuate parties' intentions.**— In like manner, where the change is made by implied consent, as, for instance, where it is done in order to correct a mistake in which all the parties concurred, or to supply an accidental omission, and thus to effectuate the intentions of all, it does not constitute a legal alteration. For although it may sometimes vary the apparent legal effect of the instrument, it does not change the effect which they intended to give it; but really effectuates their design by giving expression to it, and prevents it from being thwarted.[4] Thus, where 1822 was inserted by mistake for 1823, and the agent of the drawer, and acceptor to whom the bill had been given for delivery to the indorsee, rectified the mistake, it was held not an alteration.[5] And so where 1868 was changed to 1869, the latter having been intended.[6]

§ **1404.** So, where the drawer intended to make the bill negotiable, and indorsed it over, but omitted the words, "or order," their subsequent insertion merely supplied his omission, and it was held not an alteration.[7] So, where the holder of a bill payable "twenty-four after date," inserted "months;"[8] and where in a bill payable "in the of our Lord," the word "year" was inserted,[9] it was held likewise. And where a note was intended to read "eight hundred dollars," and "hundred dollars" were omitted, they were properly supplied.[10] So, where "hundred" was inserted before "pounds" in a bond, having been intended.[11]

3. Hubbard v. Williamson, 5 Ired. 397.

4. McCraven v. Crisler, 53 Miss. 542; Johnson v. Johnson, 66 Mich. 526; McClure v. Little, 15 Utah, 379, 49 Pac. 298, 62 Am. St. Rep. 938, citing text.

5. Brutt v. Piccard, Ryan & M. 273; Van Brunt v. Eoff, 35 Barb. 501.

6. Duker v. Franz, 7 Bush, 273. But see Bowers v. Jewell, 2 N. H. 543. In this case it appeared that a note was actually executed in 1819, but dated 1809, and subsequently altered to 1819. There was no express evidence of the consent of the maker, and judgment for the plaintiff was reversed by the Superior Court, for evidence to be taken as to whether or not the alteration, which is deemed material, was fraudulent also.

7. Kershaw v. Cox, 3 Esp. 246, 10 East, 437; Jacobs v. Hart, 2 Stark. 45; Clute v. Small, 17 Wend. 242; Lynch v. Hicks, 80 Ga. 201; McClure v. Little, 15 Utah, 379, 49 Pac. 298, 62 Am. St. Rep. 938, citing text.

8. Connor v. Routh, 7 How. (Miss.) 176. 9. Hunt v. Adams, 6 Mass. 519.

10. Boyd v. Brotherson, 10 Wend. 93.

11. Waugh v. Bussell, 5 Taunt. 707.

For like considerations, where the name of one of several payees was inserted by mistake, the indorsee of the other payees might prove the fact in a suit to recover against his indorsers, in order to show that such payee's indorsement was unnecessary to pass title to him.[12] And we should say that, as such payee's name was not intended to be there, its erasure would be authorized to correct the mistake.[13]

The blanks left for the insertion of the singular or plural pronoun may be filled up by the payee so as to conform the instrument to its other parts.[14] So, also, a blank left for the insertion of the date of a renewal accommodation note may be filled by the payee.[15]

SECTION VI.

BONA FIDE HOLDER OF ALTERED BILL OR NOTE — WHERE PARTY AFFORDS OPPORTUNITY FOR ALTERATION HE IS BOUND.

§ 1405. There is a general principle which pervades the universal law merchant respecting alterations (which, when they are material, will, as we have seen, vitiate the bill or note even in the hands of a *bona fide* holder without notice); a principle necessary to the protection of the innocent and prudent from the negligence and fraud of others. That is, that when the drawer of the bill or the maker of the note has himself, by careless execution of the instrument, left room for any alteration to be made, either by insertion or erasure, without defacing it, or exciting the suspicions of a careful man, he will be liable upon it to any *bona fide* holder without notice when the opportunity which he has afforded has been embraced, and the instrument filled up with a larger amount or different terms than those which it bore at the time he signed it.[16] The true principle applicable to such

12. Pease v. Dwight, 6 How. 190.

13. Thompson on Bills (Wilson's ed.), 114.

14. Brown v. First Nat. Bank, 115 Ind. 572.

15. Bechtel's Appeal (Pa.), 19 Atl. 412.

16. Young v. Grote, 4 Bing. 253. (The authority of Young v. Grote seems to be shaken in England. See Bank of Ireland v. Evans' Trustees, H. of L. Cas. 389; Baxendale v. Bennett, cited § 842.) Isnard v. Towes, 10 La. Ann. 103; Garrard v. Haddan, 67 Pa. St. 82; Young v. Lehman, 63 Ala. 519; Toomer v. Rutland, 57 Ala. 379; Garrard v. Lewis, 37 Eng. Rep. 375; Johnston Harvester Co. v. McLean, 57 Wis. 258, 46 Am. Rep. 39; Scotland County Nat. Bank v. O'Connell, 23 Mo. App. 166; Lowden v. National Bank, 38 Kan. 533, citing the text; Kulb v. United States, 18 Ct. of Claims, 565, citing the text;

cases is that the party who puts his paper in circulation, invites the public to receive it of any one having it in possession with apparent title, and he is estopped to urge an actual defect in that which, through his act, ostensibly has none.[17] "It is the duty of the maker of the note to guard not only himself, but the public, against frauds and alterations by refusing to sign negotiable paper made on such a form as to admit of fraudulent practices upon them with ease, and without ready detection."[18] The inspection of the paper itself furnishes the only criterion by which a stranger to whom it is offered can test its character, and when the inspection reveals nothing to arouse the suspicions of a prudent man, he will not be permitted to suffer when there has been an actual alteration.[19]

§ 1406. Illustrations.— Thus, where the maker of a note left a blank between the amount "one hundred," and the word "dollars" following, and "fifty" was inserted between them in the same handwriting, it was held that the holder without notice could recover the whole amount.[20] So, where the note was expressed, "with interest monthly at the rate of — per cent. per annum, per month, until final payment," and the word "five" was inserted so as to put the blank rate of interest at five per cent;[21] and the like decision has been rendered in Iowa.[22] But, in a similar case, where a blank was left after the words, "value received with interest at —," and "ten per cent." was inserted, this doctrine was denied.[23] And in a recent Iowa case, where

Thompson on Bills (Wilson's ed.), 109, also 42, 43. See *post*, chapter XLIX, on Checks, section XIV; Cason v. Grant County Deposit Bank, 97 Ky. 487, 31 S. W. 40, 53 Am. St. Rep. 418, quoting with approval the text; Winter v. Pool, 104 Ala. 580, 16 So. 543, citing text. But see Simmons v. Atkinson & Lampton Co., 69 Miss. 862, 12 So. 263; Bank v. Wade, 73 Mo. App. 558; Scholfield v. The Earl of Londesborough, 1 Q. B. 536 (1895).

17. Van Duzer v. Howe, 21 N. Y. 538 (1860). See chapter XXVI, section III, § 843 *et seq.*, and chapter XLIII, section VI, § 1405 *et seq.*

18. Zimmerman v. Rote, 75 Pa. St. 188; Brown v. Reed, 79 Pa. St. 370.

19. Approved in Blakey v. Johnson, 13 Bush, 204 (1877); Texarkana Nat. Bank v. Stillwell & Co., 121 Mich. 154, quoting text; Weidman v. Symes, 120 Mich. 658, 79 N. W. 894, 77 Am. St. Rep. 603, quoting text.

20. Garrard v. Haddan, 67 Pa. St. 82. To like effect, Yocum v. Smith, 63 Ill. 321; *ante*, § 844.

21. Vischer v. Webster, 8 Cal. 109. See also 6 Cal. 577.

22. Rainbolt v. Eddy, 34 Iowa, 440 (1872).

23. Holmes v. Trumper, 22 Mich. 427. See also Greenfield Savings Bank v. Stowell, 123 Mass. 196; Washington Sav. Bank v. Ekey, 51 Mo. 273.

"one hundred" was inserted before the words "ten dollars," and there was nothing suspicious in the appearance of the paper, a very strong opinion was rendered holding that a *bona fide* holder could not recover.[24] Where after the word "at" a blank was left, and it was filled, so that the note was made payable at an unauthorized place, it was held that the word "at" implied that the blank space which succeeded it might be filled before the note should be delivered, with a designated place of payment, and that if the holder filled in a place of payment, it would not discharge the maker,[25] nor an indorser.[26] And to the like effect are cases elsewhere cited.[27]

And in like manner, where the note was written partly in pencil and partly in ink, and the provision in pencil annexing the condition, "This note is not to be paid until fourteen mills are sold," the rubbing out of the condition would not debar a *bona fide* holder without notice from recovering, the maker having been guilty of gross negligence in so making the note as to be easily altered without mutilation.[28] So where the words "without interest" were interlined in pencil, and afterward erased, the party was held guilty of negligence, and the *bona fide* holder without notice protested.[29] Where the figure 8 in the margin of a note was changed to 80, and the word eight in the body to "eighty," and then passed to a *bona fide* purchaser without notice, it was held that whether the maker was negligent or not was a question for the jury.[30]

§ **1407. The addition or subtraction of a memorandum on** the bill or note is, as we have already seen, as much an alteration as if the same act had been committed in respect to its incorporated terms.[31] But if the memorandum were so written upon the margin

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24. Knoxville Nat. Bank v. Clarke, 51 Iowa, 264, Seevers, J., delivered a very instructive opinion; Fordyce v. Kosminski, 49 Ark. 40; Congre v. Crabtree, 88 Iowa, 536, 55 N. W. 335, 45 Am. St. Rep. 249; Derr v. Keaough, 96 Iowa, 397, 65 N. W. 339; First Nat. Bank v. Hall, 83 Iowa, 645, 50 N. W. 944.

25. Redlich v. Doll, 54 N. Y. 237.

26. Kitchen v. Place, 41 Barb. 465. See McGrath v. Clark, 56 N. Y. 36.

27. Vol. I, §§ 149, 152.

28. Harvey v. Smith, 55 Ill. 224. See also Elliott v. Levings, 55 Ill. 214; Bank v. Wade, 73 Mo. App. 558.

29. Seibel v. Vaughan, 69 Ill. 257; Bank v. Wade, 73 Mo. App. 558.

30. Leas v. Walls, 101 Pa. St. 57, 47 Am. Rep. 609; Derr v. Keaough, 96 Iowa, 397, 65 N. W. 339.

31. *Ante*, § 1397.

or any other part of the instrument that it could be readily separated from it without giving it a mutilated appearance, a *bona fide* holder taking it without notice, we should consider unaffected by its being so severed and destroyed.[32] This view was well illustrated in a late Indiana case.[33] If the memorandum were originally made upon a separate paper, there can be no doubt that, although a contract binding between the parties, it would be of no effect against a third party without notice;[34] and if the party who executes a negotiable instrument chooses to restrict its effect by a separable memorandum, instead of writing the entire contract in the body of the instrument, he should not be protected against a fraud of which he has laid the foundation. The holder should be protected, upon the principle that where one of two innocent persons must suffer, the loss should fall on the one who has furnished the opportunity. The case is analogous to those in which blanks have been filled with excessive amounts. The promisor should be held bound when he has left his contract in a form to be mutilated by the cutting away of a part, as well as where he has left room for an alteration to be engrafted upon it. But it has been held differently in Michigan,[35]

32. *Ante*, § 1406; Phelan v. Moss, 17 P. F. Smith, 59; Garrard v. Haddan, 17 P. F. Smith, 82; Cornell v. Nebeker, 58 Ind. 428; Zimmerman v. Rote, 75 Pa. St. 188; Noll v. Smith, 64 Ind. 511; Mater v. The Am. Nat. Bank of Denver, 8 Colo. App. 325, 46 Pac. 221, citing, and fully sustaining, the text.

33. Nall v. Smith, 64 Ind. 511. In this case a condition was annexed to the notes, perfect in form, that they were not to be paid unless defendant (the maker) sold within a certain time certain machines equal to the amount of the notes. The condition was severed, and the notes negotiated, and a *bona fide* holder was held entitled to recover.

34. 2 Parsons on Notes and Bills, 539.

35. In Wait v. Pomeroy, 20 Mich. 425, it appeared that there was written under a promissory note for $200 this memorandum, "If the machine should not be delivered, this note not to be paid," which was cut off and destroyed, and the note, without it, passsd to a *bona fide* holder without notice; the court held that he could not recover, and Campbell, C. J., concluded his opinion, saying: "There seems at first a plausibility in the argument that a party by signing a note with a separate memorandum beneath, puts it in the power of the holder to gain easier credit for the note than it would be likely to gain if altered in the body. But as it was well suggested on the argument, no one is bound to guard against every possibility of felony. And practically it is a matter of every-day occurrence to feloniously alter negotiable paper as successfully by changes on the face as in any other way. The public are not very much more likely to be defrauded in one way than in another. There can never be absolute safety except by looking to the character and responsibility of the persons from whom such paper is received,

and also in New York,[36] and some other States;[37] but it is observable that in the New York case the court says, in its opinion, that the question, whether or not there was negligence on the part of the maker, and the effect thereof, was not raised in the court below, and could not then be considered. If there were a mere memorandum to the effect, "This note is given on condition," and there is nothing to show what the condition is, the severance has been held to be immaterial.[38]

§ 1407a. Conflicting authorities; inserting words between spaces of completed instruments.— The authorities on this subject, as applicable to particular circumstances, are conflicting, as the text has already disclosed. Where blanks are left in the paper, they concur that their existence implies authority in the holder to fill them, and that, therefore, the *bona fide* holder may recover on the paper, although the blank be filled in excess of any real authority conferred. But when the paper is perfect in itself, and the parties are sought to be charged because of the fact that the words or figures have been so written that interlineations are practicable, without presenting a strange or suspicious appearance, and have been made so as to alter the purport of the instrument, a very nice and difficult question is presented. A recent Massachusetts case very forcibly presents the doctrine that the *bona fide* holder of perfected negotiable instruments, which have been altered by the insertion of words in the spaces left between the words and figures, cannot recover; and denies that the parties to such instrument are guilty of any such negligence as should render them liable when their undertakings have been altered by strangers.[39]

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and who are always bound to respond for the consideration if it is forged. Little v. Derby, 7 Mich. 325. If a party makes a contract in such a manner as is authorized by law, he has a right to object to being bound to any other. A *bona fide* holder, before maturity, is allowed to receive the genuine contract, discharged from any equities attached to the contract itself, as between the original parties, but he cannot get a contract where none was made."

36. Benedict v. Cowden, 49 N. Y. 396 (1872).

37. Gerrish v. Glines, 56 N. H. 9. See Palmer v. Largent, 5 Nebr. 223.

38. Palmer v. Largent, 5 Nebr. 223. See *ante*, §§ 41, 45, 797.

39. Greenfield Sav. Bank v. Stowell, 123 Mass. 203. In this case the cases on this subject were reviewed in an elaborate and able opinion, and the doctrine stated in the text was disapproved. In that case it appeared that George W. Bardwell obtained from the plaintiff a printed form of a note, wrote the figures "67" at the top of it, leaving a space of three-tenths of an inch between the "$" mark and these figures, and also wrote the words

§ **1408.** If the alteration were made without any fault on the part of the maker, drawer, or acceptor, neither will then be bound, although the alteration were so skillfully made as to escape notice upon careful observation. Thus, where a banker's check had been dexterously altered by a chemical process, the original sum being expunged, and a larger inserted, the banker was not allowed to recover of the drawer more than the sum for which the draft actually called when he drew it.[40] So where the payee of a note altered it from $500 so as to read $1,500, no blank space having been negligently left.[41] And clearly when the alteration is made in so clumsy or ineffectual a manner that it ought to excite suspicion and inquiry, the holder will not be protected, having only himself to blame if he takes it.[42] Actual notice is not in such cases required, constructive notice suffices,

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"sixty-seven" before the word "dollars," in the body of the note, leaving three inches of the blank space before the words "sixty-seven" unfilled. Having signed the note in this form, he presented the note to, and obtained the signatures of, two others, as joint and several makers with himself, they having no knowledge or expectation that the note was to be altered or negotiated for a larger sum than $67, and giving him no authority to alter or increase the amount of the note. Bardwell, without the knowledge of the comakers who signed for his accommodation, fraudulently inserted the figure "4" before the figures "67," and the words "four hundred and" before the words "sixty-seven," and negotiated the note to the plaintiff as a note for $467. It was held that the plaintiff could not recover against the accommodation makers. But compare Foley-Wadsworth Implement Co. v. Solomon *et al.*, 9 S. Dak. 511, 70 N. W. 639; Scholfield v. The Earl of Londesborough, 1 Q. B. 536 (1895); McDaniel v. Whitsett, 96 Tenn. 10, 33 S. W. 567. In this case a note was given in the first instance payable to the order of James C. Whitsett, and specified on its face that it was for the third and last payment on a tract of land. The alteration consisted in adding after the name of the payee the words "of holder," and in adding to the note the following: "A lien is retained on said land until all the purchase money is paid." The court held the above a material and fraudulent alteration, though defendant, upon seeing the note afterward and recognizing the alteration, as in his judgment making the note void, yet proposed that if plaintiff would grant him further indulgence, and renew the note and charge only 6 per cent. interest for the delay, he would pay it in a certain time, which proposition was declined by the plaintiff, who thereafter erased the alteration he had made, and brought suit. Derr v. Keaough, 96 Iowa, 397, 65 N. W. 339.

40. Hall v. Fuller, 5 B. & C. 750; Scholfield v. Earl of Londesborough, L. R., App. Cas. 514 (1896).

41. Trigg v. Taylor, 27 Mo. 245.

42. Hall v. Fuller, 5 B. & C. 750; Garrard v. Haddan, 67 Pa. St. 82; Worrall v. Gheen, 3 Wright, 388; Thompson on Bills (Wilson's ed.), 43.

and if the holder chooses to receive the paper with erasures or other marks of infirmity upon it, he takes it at his own risk.[43] It has been held that the question whether the alteration bears marks of suspicion is for the court, on inspection of the instrument.[44] Any addition to any instrument already complete is an undoubted forgery.[45]

§ **1409.** In Scotland the doctrine of the text obtains, and there the acceptor and indorser were held bound upon a bill in which the sum had been altered from "eight" to "eighty-four" pounds; there being so much room for the alteration that it was made without giving the bill a suspicious appearance. In another case in which two bills came under consideration — one in which the words "four hundred and" had been added before "fifty-eight" without appearing suspicious; and the other in which an alteration had likewise been made in the sum, but so as to have a crowded appearance; it was held that the acceptors were bound upon the first bill to the full amount to a *bona fide* holder without notice; but upon the second, that the parties were discharged altogether.[46] A Pennsylvania case well illustrates the principles enunciated. The defendant signed an agreement constituting him agent for the sale of a patented article, which agreement was so framed that a part of it could be cut off, leaving a perfect negotiable note. It was so cut without defendant's knowledge, and transferred for value to the plaintiff. It was held that the defendant was not bound, as he had not signed a negotiable note, and was not guilty of negligence in the premises.[47]

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43. Angle v. M. W., etc., Ins. Co., 92 U. S. (2 Otto) 342. See *ante*, §§ 788, 789.

44. Paramore v. Lindsey, 63 Mo. 63.

45. Ivory v. Michael, 33 Mo. 398; McGrath v. Clark, 56 N. Y. 36. See vol. I, § 142; Meise v. Doscher, 83 Hun, 580, 31 N. Y. Supp. 1072; Farmers' Nat. Bank v. Thomas, 79 Hun, 595, 29 N. Y. Supp. 837.

46. Pagan v. Wylie, Graham v. Gillespie. See Thompson on Bills (Wilson's ed.), 42; Ross on Bills, 104, 195.

47. Brown v. Reed, 79 Pa. St. 370 (1875), Sharswood, J., distinguishes and explains Phelan v. Moss, Garrard v. Haddan, and Zimmerman v. Rote. The paper which was perverted into a note was as follows:

NORTH EAST, April 3, 1872.

Six months after date I promise to pay J. B. Smith or order Two Hundred and Fifty Dollars for value received, with legal interest, without defalcation or stay of execution. * bearer, fifty dollars when I sell by worth of hay and harvest grinders appeal and also without

T. H. BROWN. * Agent for Hay & Harvest Grinders.

The paper was divided by cutting through where the asterisks are placed, but when the paper was written the context was close and natural, with

SECTION VII.

THE EFFECT OF ALTERATION.

§ **1410.** The effect of material alteration of a bill or note will be considered, (1) in respect to fraudulent alterations, and (2) in respect to alterations innocently made. The effect of immaterial changes, not amounting to alterations, will be separately considered.

§ **1410a. Fraudulent alteration destroys instrument and extinguishes debt.**— In the *first* place, as to fraudulent alteration, when a party to a bill or note fraudulently alters its legal effect, he not only destroys the instrument by thus destroying its legal identity, but he also extinguishes the debt for which it was given. And it cannot afterward be made the basis of, or evidence for, a recovery in any form of action whatever;[48] though, of course, it might be admissible to defeat a claim on the ground of fraud, or convict a party of a crime.[49] It is necessary that the law should impose this forfeiture of the debt itself upon one who fraudulently tampers with the instrument which evidences or secures it; and it is done upon the principle that "no man should be permitted to take the chance of gain by the commission of a fraud, without running the risk of loss in the case of detection." [50]

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nothing to indicate that any portion was to be detached. The left-hand half was negotiated as a note, but was not recoverable upon as such by even a *bona fide* holder. Upon like principles the defendant-maker of a note in the hands of an innocent indorsee, was relieved in Tennessee, where it appeared that a "stub" attached to the note, and containing a limitation of the maker's liability, had been fraudulently detached. Stephens v. Davis, 85 Tenn. 272; Scofield v. Ford, 56 Iowa, 372, citing the text.

48. Wheelock v. Freeman, 13 Pick. 165; Meyer v. Huneke, 55 N. Y. 412; Booth v. Powers, 56 N. Y. 31; Newell v. Mayberry, 3 Leigh, 254; Smith v. Mace, 44 N. H. 553; Clute v. Small, 17 Wend. 238; Merrick v. Boury, 4 Ohio St. 70; Wallace v. Harmstad, 44 Pa. St. 492 (a deed); 2 Parsons on Notes and Bills, 572; Wallace v. Tice, 32 Oreg. 283, 51 Pac. 733; First Nat. Bank v. Laughlin, 4 N. Dak. 391, 61 N. W. 473, citing text; Glover v. Green, 96 Ga. 126, 22 S. E. 664; Magguire v. Eickmeier, 109 Iowa, 301; Hurlbut v. Hall, 39 Nebr. 889, 58 N. W. 538; Walton Plough Co. v. Campbell, 35 Nebr. 173, 52 N. W. 883, citing text.

49. Chitty on Bills (13th Am. ed.) [*191], 219.

50. Newell v. Mayberry, 8 Leigh, 254; Vogle v. Ripper, 34 Ill. 107; Whitmer v. Frye, 10 Mo. 350.

Thus in Massachusetts, where a memorandum was written upon two notes, providing that they should be payable in a certain contingency in two years, and was cut off by the plaintiff, it was held presumptively fraudulent, and that he could not recover.[51]

§ 1411. In the next place, as to alterations innocently made.— It is considered by a number of authorities that when the alteration is material, the instrument is *ipso facto* avoided, and the original consideration forfeited; no regard being paid to the inquiry whether or not the alteration was fraudulent as well as material; it being said in a case of this character in Vermont, by Pierpoint, J.: "The forfeiture of the debt is one of the penalties which the law imposes upon the party who alters or tampers with the written evidence which he holds of his claim."[52] On the other hand, in a number of English and American cases, it has been considered that a material alteration only avoided the instrument, and if it were given for a debt,[53] or in renewal of a bill or note,[54] the holder might still sue upon the original cause

51. Wheelock v. Freeman, 13 Pick. 168, Shaw, C. J.: "If the plaintiff claims upon the notes, he is not entitled to recover, because he has made a material alteration in the notes since they were signed. Master v. Miller, 4 T. R. 320. That it was fraudulent is a conclusion of law from the fact that it was done wilfully, for his own benefit and to the injury of the defendant, by accelerating the payment. It has been made a question whether the alteration was material. This is easily tested by inquiring whether the notes would have the same legal effect and operation after the alteration as before. After the alteration they were payable on demand; before it, on time. The difference is apparent. And so the parties understood it. When written 'on demand,' the defendant refused to sign them, and only consented to do so after the qualifying memorandum was made. But there is no magic in the word 'memorandum.' And it has often been decided that any words written on an instrument which qualify and restrain its operation, constitute a part of the contract. Jones v. Fales, 4 Mass. 245, where the words 'foreign bills,' written in the margin of the note, were held to be part of the contract; Springfield Bank v. Merrick, 14 Mass. 322; Homer v. Wallis, 11 Mass. 309; Heywood v. Perrin, 10 Pick. 228." Meade v. Sandidge, 9 Tex. Civ. App. 360, 30 S. W. 245.

52. Bigelow v. Stephens, 35 Vt. 525; Martendale v. Follett, 1 N. H. 99; Gillette v. Smith, 18 Hun, 10; Savings Bank v. Shaffer, 9 Nebr. 1. See Toomer v. Rutland, 57 Ala. 379.

53. Atkinson v. Hawden, 2 Ad. & El. 169 (29 Eng. C. L.); Owen v. Hall, 70 Md. 100; Sullivan v. Rudisill, 63 Iowa, 158. Bill altered in date from 30th to 28th of December. Held, drawer could recover original consideration of acceptor. Warren v. Layton, 3 Harr. 404; Clute v. Small, 17 Wend. 242; Clough v. Seay, 49 Iowa, 111; 2 Parsons on Notes and Bills, 572. See § 1413; Baskin v. Wayne, 62 Mo. App. 515.

54. Sloman v. Cox, 1 Cromp., M. & R. 471. Bill given in renewal altered in

of action — no question of fraudulent intent being raised in the pleadings or appearing in the case. But the holder could not sue any party whose remedy, after making payment, would be impaired by the alteration.[55] If the alteration is material, all authorities agree that the instrument is avoided.[56] The alteration vitiates it regardless of intention.[57] In New York the effect of material alteration innocently made has been stated by Folger, J., as follows: "If the alteration was made without fraudulent intention, the payee may resort to the original indebtedness, if that was independent of the note, and has not been discharged by the execution of it, and pursues the maker upon that. But to have such resort, he must be able to produce and surrender the note." [58]

And in Rhode Island, Matteson, C. J., said in a case where the rate of interest had been without fraudulent intent altered from 10 to 5 per cent.: "The presumption of fraudulent intent being rebutted, the plaintiff can recover under the common counts in the declaration, the debt for which the note was given against the parties who received the consideration." [59]

§ 1412. Presumption from material alteration.— It is maintained by a number of authorities, that if a bill or note appear on its face,[60] or be shown by extraneous evidence to have been materially altered, there will be no presumption that such alteration was fraudulent, and that, therefore, although the instrument be

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date from 20th to 24th of June, and it was held that there could be suit on original bill.

55. Alderson v. Langdale, 3 B. & Ad. 660.

56. Angle v. N. W., etc., Ins. Co., 92 U. S. (2 Otto) 342; Harsh v. Klepper, 20 Ohio St. 200; Booth v. Powers, 56 N. Y. 31; Stephens v. Elver, 101 Wis. 392, 77 N. W. 737; Hurlbut v. Hall, 39 Nebr. 889, 58 N. W. 538.

57. Evans v. Foreman, 60 Mo. 449; Moore v. Hutchinson, 69 Mo. 429; Morrison v. Garth, 78 Mo. 437; Eckert v. Pickel, 59 Iowa, 545. In a recent case (decided in 1898) the Supreme Court of Oregon held that where the alteration of an instrument is prompted by honest motives, with a purpose of correcting it to correspond with what the party in good faith believed to be the true engagement of the parties at the time of its execution, the act does not destroy the legal efficiency of such instrument and recovery may be had on it when restored. See Wallace v. Tice, 32 Oreg. 283, 51 Pac. 733; Keene v. Weeks, 19 R. I. 309, 33 Atl. 446.

58. Booth v. Powers, 56 N. Y. 31. See also Clute v. Small, 17 Wend. 238; Meyer v. Huneke, 55 N. Y. 412; Keene v. Weeks, 19 R. I. 309, 33 Atl. 446.

59. Keene v. Weeks, 19 R. I. 309, 33 Atl. 446.

60. Gist v. Evans, 30 Ark. 286.

destroyed as the foundation of an action, the party who held it may recover upon the original consideration, or enforce any other security for the debt.[61] On the other hand, others maintain that if the alteration be material, it will be presumed to have been fraudulent also, and that until this presumption be rebutted by explanation there can be no recovery in any form of action whatever.[62] The latter doctrine seems correct. The party in default should bear the burden of explaining it, and of extricating himself. He must know the circumstances which induced the alteration, and to require the party wronged to go into his enemy's camp for testimony would be to facilitate the inventions of fraud. Still, the question is one that must be resolved by the peculiar circumstances of each case, and the presumptions which arise are frequently so slight and so shifting that no fixed and invariable rule can well be established.[63]

§ **1413. Suit not maintainable on altered instrument.**— When an instrument has been materially altered it cannot be sued upon in its altered form, nor read in evidence to support an action, even when brought by a *bona fide* holder without notice,[64] and even though the alteration has been so skillfully made as to escape detection upon the closest scrutiny.[65] But when the party making the alteration discharges the burden of proof upon him by showing that the material alteration was made by mistake and without fraudulent intent, the right of action upon the consideration for which it was given remains.[66] And there is au-

61. Vogle v. Ripper, 34 Ill. 100. A note secured by mortgage was materially altered. Held, that a mortgage securing it might be enforced, the mortgagor not alleging fraud. But see Eckert v. Pickel, 59 Iowa, 545.

62. Whitmer v. Frye, 10 Mo. 349, Scott, J.: "There is no question but that the alteration was a material one, and it is *prima facie* fraudulent." Wheelock v. Freeman, 13 Pick. 165; Robinson v. Reed, 46 Iowa, 221; Shroeder v. Webster, 88 Iowa, 627, 55 N. W. 569.

63. In Kountz v. Kennedy, 63 Pa. St. 190, Thompson, C. J., said: "Each case must stand much more on its own facts than upon the rules announced in any given case." Craighead v. McLoney, S. C. Pa., Cent. L. J., March 10, 1882, p. 193.

64. State Sav. Bank v. Shaffer, 9 Nebr. 1; Horn v. Bank, 32 Kan. 523, citing the text; Otto v. Halff, 89 Tex. 384, 34 S. W. 910, 59 Am. St. Rep. 56, text quoted.

65. Kulb v. United States, 18 Ct. of Claims, 560, citing the text.

66. Hunt v. Gray, 35 N. J. L. 227; Matteson v. Ellsworth, 33 Wis. 488; State Sav. Bank v. Shaffer, 9 Nebr. 7; *ante*, § 1411; Otto v. Halff, 89 Tex. 384, 34 S. W. 910, 59 Am. St. Rep. 56, text quoted.

thority to the effect that although the alteration be material and fraudulent — that since a bill or note suspends, and is not absolute payment of, the debt for which it is given — such alteration only extinguishes the security, and the original consideration remains.[67] But this is not, we think, sound doctrine. In Massachusetts, where P., the maker of a note for $500, got R. to indorse it for P.'s accommodation, and then by aid of chemicals raised it to $2,000, and got it discounted at bank; but before it fell due the fraud was discovered, the writing restored, and the note as for $500 protested, it was held that R. was not liable; the only note accepted by the bank, the plaintiff, being for $2,000, which note R. did not indorse.[68]

§ 1414. Right of restoration of instrument innocently altered.— There may be many cases of innocent material alterations in which it would work injury, loss, or inconvenience to confine the holder to a suit upon the original consideration. If the indorser were sued, and were held liable, he could not have the maker's note restored to him as a foundation for his action if it were utterly annihilated by the alteration. And the indorsee might have rendered such a consideration as could not be recovered back; for instance, professional services, labor, or another note. For these reasons it would seem just to allow a more specific remedy; and while we have seen no precedent which so decides, it has been suggested that a court of equity would, under its jurisdiction over mistakes, correct an alteration innocently and mistakenly made, and restore the instrument to its original form.[69] And there is no sufficient reason why the party should not himself be permitted to undo what he has mistakenly done, provided no other person has become so situated toward the instrument that it would operate prejudicially upon him.[70] The burden of proving innocence would be a sufficient safeguard to prior parties; and when innocence is clearly proven, and the *prima facie* presumption of guilt overthrown, it would seem too rigorous to inflict upon the innocent a penalty only deserved by the guilty.[71]

67. Matteson v. Ellsworth, 33 Wis. 488, *obiter*.

68. Citizens' Nat. Bank v. Richmond, 121 Mass. 110. See also Walpole v. Ellison, 4 Houst. 322.

69. See Chadwick v. Eastman, 53 Me. 16. This seems to be hinted. In Shepard v. Whetstone, 51 Iowa, 457, it is doubted.

70. 2 Parsons on Notes and Bills, 570; Light v. Killinger, 16 Ind. App. 102, 44 N. E. 760, 59 Am. St. Rep. 313, quoting with approval the text.

71. See Shepard v. Whetstone, 51 Iowa, 457, and § 1415.

§ 1415. Illustrations of restoration of altered notes.— This latter view was forcibly presented in Pennsylvania in a case where within an hour or two after the note was signed, the payee returned to the maker's office, where his clerk, at the payee's request, but without knowledge or consent of the indorser, inserted "with interest." The maker ratified the clerk's action. But subsequently the payee had the inserted words expunged, apparently with chemicals, and sued the indorser upon it in its original form. The latter claimed that the note had been avoided as to him by the alteration; but it was held, that no fraud having been intended, the plaintiff had a right to restore it to, and sue upon it in, its original form.[72] And in Massachusetts, where a special indorsement was erased by mistake, and no one could suffer from its restoration, the canceled words were allowed to be replaced, the court saying: "Justice requires and the law allows it to be done."[73] In a late Iowa case, where the payee of a note, being desirous of transferring it, but ignorant of the appropriate method, erased his own name and inserted that of the transferee, and subsequently, before delivery, restored it to its original form, and then indorsed it, the alteration was deemed immaterial, and an action by the indorsee against the maker sustained.[74] And in another case where a blank after the word "at" was filled without fraudulent design with the words, "with ten per cent. interest from date," and the note was subsequently restored to its original form, and negotiated to an innocent holder without notice, it was held he could recover upon the note.[75]

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72. In Kountz v. Kennedy, 63 Pa. St. 187 (1870), Thompson, C. J., said: "Now it seems to me, that, as the identity of the note remained, and there was nothing in it to enlarge the obligation of the indorser, and as what had been done was innocently but mistakenly done, and expunged, for aught we know, within the hour after it had been done, there is no rule of law unreasonable enough to hold it avoided by this. I admit that if there had been evidence of a fraudulent tampering with the note, a different rule would apply. But regarding it as mistakenly done, in an attempt to make the note comply with the contract, and assented to by the original parties, one of them the principal in it, and without fraud, ought the consequences of such an act, done under such circumstances, be made to rank with fraud and perjury? It ought to be regarded, as it manifestly was, to the indorser immaterial." Sharswood, J., dissented. See also Collins v. Makepiece, 13 Ind. 448.

73. Nevins v. De Grand, 15 Mass. 436.

74. Horst v. Wagner, 43 Iowa, 373 (1876). See Ames v. Brown, 22 Minn. 257.

75. Shepard v. Whetstone, 51 Iowa, 457.

In California the principles presented in the text were applied in the case of an innocently altered and restored bond.[76] Where the alteration is fraudulent, there cannot be any restoration.[77]

§ 1416. Effect of immaterial change with fraudulent intent.— It is said by some of the authorities, and by Greenleaf in his Treatise on Evidence, that if the alteration be fraudulently made by the party claiming under the instrument, it does not seem important whether it be in a material or an immaterial part; for in either case, he has brought himself under the operation of the rule established for the prevention of fraud; and having fraudulently destroyed the identity of the instrument, he must take the peril of all the consequences.[78] There are other cases in which this doctrine is laid down;[79] but in none of those quoted by the learned author, or which we have seen, did it appear that the alteration was immaterial, and was held to have vitiated the instrument by reason of the fraudulent intent. If the change destroys the identity of the instrument, it is material; but it has been well said, "an immaterial alteration may be treated as no alteration;"[80] and accordingly held that if the act itself is immaterial and can work no injury, it is irrelevant to inquire into the motives with which it was committed. Intent not manifested in a material respect is nugatory, and this we conceive to be the true doctrine.

SECTION VIII.

BURDEN OF PROOF OF ALTERATION.

§ 1417. Whether or not a negotiable instrument has been altered may appear upon its face, or may be shown by the defendant to have been made so skilfully, or in such a manner, as not to be apparent to the observer. When an alteration is apparent on the face of the instrument, the question arises whether the burden of proof is upon the holder to show that it was made before, or contemporaneously with, its issue; or is upon the defendant to show that it was made after it was issued. It may

76. Rogers v. Shaw, S. C. Cal., Nov., 1881, Cent. L. J., Jan. 13, 1882, p. 36.

77. Citizens' Nat. Bank v. Richmond, 121 Mass. 110; Woodworth v. Anderson, 63 Iowa, 503.

78. Greenleaf on Evidence, vol. I, 568.

79. Lubbering v. Kohlbrecher, 22 Mo. 598; Turner v. Billagram, 2 Cal. 523.

80. Moge v. Herndon, 30 Miss. 120; Maness v. Henry, 96 Ala. 454, 11 So. 410; Fisherdick v. Hutton, 44 Nebr. 122, 62 N. W. 488.

seem harsh to the holder, and may frequently devolve loss upon an innocent party, to require him to explain an alteration which may have been made before he came into possession of the instrument and with which he had no privity. But it would frequently be equally harsh to hold the defendant to the responsibility of showing not only that his contract has been altered, but in addition that the alteration was made after it left his hands.

The principle which prevails according to the current of English and American authorities has been well stated by Chief Justice Gibson, in a case where the words "payable at the Bank of Pittsburgh," written at the end of a note, were in a handwriting different from that of the defendant. He said: "Without a presumption to sustain him, the maker would in every case be defenseless. It may be said that the holder, with such a presumption against him, would also be defenseless. But it was his fault to take such a note. As notes and bills are intended for negotiation, and as payees do not receive them when clogged with impediments to their circulation, there is a presumption that such an instrument starts fair and untarnished, which stands till it is repelled; and a holder ought, therefore, to explain why he took it branded with marks of suspicion, which would probably render it unfit for his purposes. The very fact that he received it is presumptive evidence that it was unaltered at the time; and, to say the least, his folly or his knavery raised a suspicion which he ought to remove. The maker of a note cannot be expected to account for what may have happened after it left his hands; but a payee or indorsee who takes it, condemned and discredited on the face of it, ought to be prepared to show what it was when he received it.[81]

§ **1418.** The same rule has been applied where it appeared that "May 4th, 1837," had been altered to "April 4th";[82] where

81. Simpson v. Stackhouse, 9 Barr, 186 (1848); Harris v. Bank of Jacksonville, 22 Fla. 501; Adair v. Egland, 58 Iowa, 316, citing the text; Hood's Appeal, 5 Cent. (Pa.) 851; Lesser v. Scholze, 93 Ala. 338, 9 So. 273; Gowdey v. Robbins, 3 App. Div. 353, 38 N. Y. Supp. 280; Byers v. Tritch, 12 Colo. App. 373, 55. Pac. 622, supporting the text; Franklin v. Baker, Exr., 48 Ohio St. 296, 27 N. E. 550, 29 Am. St. Rep. 547. See *In re* Brown's Estate, 92 Iowa, 379, 60 N. W. 659; Magguire v. Eichmeir, 109 Iowa, 301; J. I. Case Threshing Machine Co. v. Peterson, 51 Kan. 713, 33 Pac. 470, citing text; Glover v. Gentry *et al.*, Admrs., 104 Ala. 222, 16 So. 38; Winter v. Pool, 100 Ala. 503, 14 So. 411; Hurlbut v. Hall, 39 Nebr. 889, 58 N. W. 538. See Sweitzer v. Banking Co., 76 Mo. App. 1.

82. Hill v. Barnes, 11 N. H. 395 (1840).

"£40 17*s.* 6*d.*" appeared to have been changed to "£49 17*s.* 6*d.*";[83] where the words "second of exchange" were changed to "only of exchange";[84] where the words "at his office in New York" were erased;[85] where "March 25th" was changed apparently to "March 30th,"[86] and "August 12th" to "August 13th";[87] where the name of one of several promisors had been erased;[88] where the words "forty-five dollars and twenty-nine cents" had been erased, and "forty-seven dollars and seventy-nine cents" interlined;[89] where "one hundred" was substituted for "three hundred";[90] where the words "if the same be a lien on the land bought" were interlined in an acceptance conditioned upon the satisfaction of a judgment, and were in ink of a different color from the rest of the bill, the same view was taken;[91] where the words "after due" in the printed form of a note, following the rate of interest, were erased;[92] so where the words "& Co." were inserted in a guaranty of payment by "George Winchester," in a different handwriting and a different-colored ink from the body of the instrument.[93]

And the principle has been recognized or enforced in numerous other cases,[94] though not without a number to the contrary.[95]

83. Henman v. Dickinson, 5 Bing. 183 (15 Eng. C. L.), Best, C. J.

84. White v. Haas, 32 Ala. 430. **85.** Fontaine v. Gunter, 31 Ala. 258.

86. Heffner v. Wenrich, 32 Pa. St. 423.

87. Kennedy v. Lancaster County Bank, 18 Pa. St. 347.

88. Daniel v. Daniel, Dudley (Ga.), 239.

89. Wheat v. Arnold, 36 Ga. 480; Magguire v. Eickmeier, 109 Iowa, 301.

90. Chism v. Toomer, 27 Ark. 109.

91. McMicken v. Beauchamp, 2 La. (O. S.) 290 (1830).

92. Willett v. Shepard, 34 Mich. 106.

93. Wilde v. Armsby, 6 Cush. 314. In Massachusetts it was held in Simpson v. Davis, 119 Mass. 269, that in an action on a note in which the declaration alleges that the defendant made the note, and the answer denied this and alleged alteration, proof of defendant's signature was *prima facie* evidence that the whole body of the note was the act of the defendant, but the burden of proof was on the plaintiff to show that the note declared on was the note of the defendant.

94. Runnion v. Crane, 4 Blackf. 466; Warren v. Layton, 3 Harr. 404; Walters v. Short, 5 Gilm. 252; Wheat v. Arnold, 36 Ga. 482; Piercy v. Piercy, 5 W. Va. 199; Elbert v. McClelland, 8 Bush, 577. In Greenleaf on Evidence, vol. I, § 564, it is said: "Generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument." But in note 1, p. 605, to the same section, it is said: "An exception to this rule seems to be admitted in the case of negotiable paper." 2 Parsons on Notes and Bills, 575–577.

95. Stoner v. Ellis, 6 Ind. 161 (*semble*); Gooch v. Bryant, 13 Me. 386, in which case a figure of the date had been altered. Held, no explanation de-

A different principle applies to deeds[96] and other written contracts; and the exception is made in respect to negotiable paper because, being intended for circulation, the greater strictness and watchfulness is necessary.

§ 1419. In California it has been held that it is not necessary for the plaintiff to explain the alteration where it has been made in printed words, it being then presumed that the parties had changed the printed form to suit their intentions. And accordingly, where the plaintiff sued on a note on which the printed words "payable at the banking-house of Dale and Simpson" had been erased by a line drawn through them, he was allowed to recover without showing how or when the erasure was made.[97] And, in Iowa, it is considered that the fact that a portion of an indorsement signed by the defendant is written in a different ink and handwriting from the balance, does not afford *prima facie* evidence of a fraudulent alteration so as to require the plaintiff to explain the same,[98] and that an erasure does not necessarily vitiate the paper or put the holder on inquiry.[99]

volved on plaintiff. Farnsworth v. Sharp, 4 Sneed, 55. In Sayre v. Reynolds, 2 South. 737, it appeared the word "first," in the date "first September," had been erased, and "second" written over it. The court said that, as alteration could produce no effect but make the note bear interest one day later, to presume a forgery "would be a violation of all probabilities." In Sedgwick v. Sedgwick, 5 Cal. 213, "1871" the date appeared to have been changed to "1870." Held not to have been presumably done after execution of note. Cumberland Bank v. Hall, 1 Halst. 215; Bailey v. Taylor, 11 Conn. 531; Davis v. Jenney, 1 Metc. (Mass.) 221; Smith v. Terry, 69 Mo. 142; Patterson v. Fagan, 38 Mo. 70; Cochran v. Nebeker, 48 Ind. 459; Dodge v. Haskell, 69 Me. 429; Wilson v. Hayes, 40 Minn. 531; Odell v. Gallup, 62 Iowa, 254.

96. In Doe v. Catamore, 16 Q. B. 745, 5 Eng. L. & Eq. 349, Lord Campbell, C. J., said: "A deed cannot be altered after it is executed without fraud or wrong; and the presumption is against fraud or wrong." Hoey v. Jarman, 39 N. J. L. 524. As to interlineation, see Herrick v. Malin, 22 Wend. 394. That alteration of deed must be explained. See Piercy v. Piercy, 5 W. Va. 199.

97. Corcoran v. Dale, 32 Cal. 89.

98. Wilson v. Harris, 35 Iowa, 507. In Paramore v. Lindsey, 63 Mo. 67, it is said: "If nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument. But if any ground of suspicion is apparent on the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as the person by whom, and the intent with which, the alteration was made, as matters of fact to be ultimately found by the jury upon proof to be adduced by the party offering the instrument in evidence." Stillwell v. Patton, 108 Mo. 352, 18 So. 1075.

99. Shepard v. Whetstone, 51 Iowa, 457.

§ **1420.** By some authorities it is considered that where the alteration is against the interest of the party claiming under it, then, at all events, the law will not throw upon him the burden of accounting for it, since it would be unreasonable to presume that a party acted against his interest.[1] But it is answered that the plaintiff may have intended and expected the alteration to be beneficial to him; and while the presumption may be very slight against him, and easily removed, that it is better to adhere to the general principle, which seems best calculated to prevent frauds.[2] The exception, however, seems to be a reasonable one, as self-interest is a prevailing motive to human action; and it is against all probability that one should do an act calculated to injure himself.

§ **1421.** Where an alleged alteration is not apparent on the face of the instrument, the burden of proving it is upon the party alleging it.[3] And it has been held in some cases that an indorsement on the back of the instrument will be deemed to have been contemporaneous with its execution;[4] in others the contrary.[5]

§ **1421a. Observations on conflicting authorities.**— The question as to the burden of proof in respect to alterations is generally affected by all the surrounding circumstances; and one fact or another shifts it to and fro, the jury being left to weigh the testimony and determine the issue with all the lights that can be thrown upon it.[6] Very slight circumstances may operate to

1. 1 Greenleaf on Evidence, § 564; Bailey v. Taylor, 11 Conn. 531; Huntington v. Finch, 3 Ohio St. 449 (1854); Pullen v. Shaw, 3 Dever. 238. See also Tillon v. Clinton, etc., Ins. Co., 7 Barb. 568; Heffelfinger v. Shutz, 16 Serg. & R. 46.

2. 2 Parsons on Notes and Bills. 579; Chism v. Toomer, 27 Ark. 108. Note altered from $310 to $110. Held, that plaintiff must show it was made before delivery, or by maker's consent.

3. Meckel v. State Sav. Inst., 36 Ind. 357; Harris v. Bank, 22 Fla. 501; Williamsburgh Sav. Bank v. Town of Solon, 136 N. Y. 465, 32 N. E. 1058; Shroeder v. Webster, 88 Iowa, 627, 55 N. W. 569; Glover v. Gentry *et al.*, Admrs., 104 Ala. 222, 16 So. 38; Moddie v. Breiland, 9 S. Dak. 506, 70 N. W. 637, citing text; Cosgrove v. Fanebust, 10 S. Dak. 213, 72 N. W. 469; McClintock v. State Bank, 52 Nebr. 130, 71 N. W. 978.

4. Brooke v. Smith, Moor, 679.

5. Emerson v. Murray, 4 N. H. 171.

6. See on this subject Admrs. of Beaman v. Russell, 20 Vt. 210; and the instructive opinion of Hall, J., Bailey v. Taylor, 11 Conn. 531; Davis v. Jenney, 1 Metc. (Mass.) 221; Kountz v. Kennedy, 63 Pa. St. 190; *ante*, § 1412; Neil v. Case, 25 Kan. 510, and 37 Am. Rep. 260, and notes; Bank v. Morrison, 17

shift the burden of proof, and it has been well said by Horton, C. J., in Kansas, that "it is impossible to fix a cast-iron rule to control in all cases." [7] When all the facts are undisputed some presumption must arise; and that presumption must be conformable to the experience of mankind, and according to what that experience shows to be most probably the truth of the matter. The authorities are every way; and generally each case must rest largely on its own peculiar surroundings.

Nebr. 341; Goodin v. Plugge, 47 Nebr. 284, 66 N. W. 407; Courcamp v. Weber, 39 Nebr. 533, 58 N. W. 187; Stough v. Ogden, 49 Nebr. 291, 68 N. W. 516.

7. Neil v. Case, 25 Kan. 510, 37 Am. Rep. 259. This was an action on a note. It appeared from its face that the rate of interest had been changed either from 7 to 10 per cent., or *vice versa*. Horton, C. J., said on the question of burden of proof: "This is a vexed question, and the books are full of diverse decisions. Four different rules are generally stated. *First:* That an alteration on the face of the writing raises no presumption either way, but the question is for the jury. *Second:* That it raises a presumption against the writing and requires, therefore, some explanation to render it admissible. *Third:* That it raises such a presumption when it is suspicious, otherwise not. *Fourth:* That it is presumed in the absence of explanation to have been made before delivery, and, therefore, requires no explanation in the first instance. * * * Generally the instrument should be given in evidence, and in a jury case should go to the jury upon ordinary proof of its execution, leaving the parties to such explanatory evidence of the alteration as they may choose to offer. If there is neither intrinsic nor extrinsic evidence as to when the alteration was made, it is to be presumed, if any presumption is said to exist, that the alteration was made before, or at the time of, the execution of the instrument. Perhaps there might be cases when the alteration is attended with manifest circumstances of suspicion that the court might refuse to allow the instrument to go before the jury until some explanation; but this case is not of that character." In Landauer v. Sioux Falls Improvement Co., 10 S. Dak. 205, 72 N. W. 467, it is held that a change in a guaranty on a note, changing the word "we" to "I" (thereby changing a joint contract to a joint and several obligation) was sufficient to put a subsequent purchaser upon notice.

CHAPTER XLIV.

THE LAW OF SET-OFF IN ITS APPLICATION TO NEGOTIABLE INSTRUMENTS.

SECTION I.

THE GENERAL DOCTRINES OF SET-OFF.

§ **1422.** A brief statement of the general principles of set-off — of those especially which have application to negotiable instruments — is all that would be appropriate to this treatise. By set-off is meant the discharge of one claim by another, which is "set off" against it. It was formerly sometimes called "stoppage," because the amount sought to be set off was "stopped" or deducted from the cross-demand.[1]

The United States Supreme Court defines it as "the discharge or reduction of one demand by an opposite one." [2]

Set-off was unknown to the common law, it being considered inconvenient to try two opposing claims in one suit. But still greater inconvenience arose from disallowing it; and courts of equity first introduced it, the want of it at law being productive of great mischief. "The natural sense of mankind was first shocked at this doctrine in the case of bankrupts; they thought it hard that a person should be bound to pay the whole that he owed to a bankrupt and receive only a dividend of what the bankrupt owed him." [3] In Virginia, the setting off of cross-demands was allowed by statute as early as 1644.[4] In England, various statutes have perfected the law concerning it; and in all of the United States it is regulated likewise by statutory enactments.

§ **1423. In what actions set-off is available.**— In England, and generally in the United States, actions *ex contractu* are the only

1. Byles on Bills (Sharswood's ed.) [*350], 523.

2. Auten v. United States Nat. Bank, 174 U. S. 125, 19 Sup. Ct. Rep. 628.

3. Byles on Bills (Sharswood's ed.) [*350], 524; Patterson v. Wright, 64 Wis. 292, citing the text.

4. See 5 Rob. Pr. 958, and see the existing Virginia statute expounded in Allen v. Hart, 18 Gratt. 727, and Wartman v. Yost, 22 Gratt. 603.

suits to which matters of set-off may be pleaded, and they must be actions for definite ascertainable amounts. Actions sounding in damages, such as trespass, trover, etc., are not subject to the defense of set-off, because the sums recoverable are unliquidated;[5] and actions *ex contractu* for unliquidated damages follow the same rule.[6]

A set-off is not available as a defense against a lien, as for instance, that of a workman on a chattel for his wages.[7] In Virginia, it is available in an action upon a forthcoming bond taken on a warrant of distress.[8]

§ **1424. Nature of demand available as a set-off.**— In an action at law, none but a legal debt can be set off in England and in some of the States.[9] But in other States a plea of equitable set-off is admitted.[10] Equity will not relieve a party who has neglected to plead a set-off at law.[11] But there are cases in which set-off is not available at law, and which present peculiar circumstances for equitable relief.

§ **1425.** The counter demand, in order to be available as a set-off, must be an actual subsisting debt which has matured,[12] and

5. Byles on Bills (Sharswood's ed.) [*351], 525; 2 Parsons on Notes and Bills, 616; Vancleave v. Beach, 110 Ind. 269; Clause v. Printing Press Co., 118 Ill. 612. In trover, however, it has been held that mutual demands arising out of the same subject-matter might be adjusted. Stow v. Yarwood, 14 Ill. 424; Gantt v. Duffy, 71 Mo. App. 91.

6. Gordon v. Brown, 2 Johns. 150; Byles on Bills [*259], 373.

7. 2 Parsons on Notes and Bills, 617.

8. Allen v. Hart, 22 Gratt. 722.

9. Wake v. Tinkler, 16 East, 36; McDade v. Mead, 18 Ala. 214; Milburn v. Guyther, 8 Gill, 92. A set-off cannot be pleaded to a set-off. See Chaplin v. Sullivan, 128 Ind. 50, 27 N. E. 425.

10. Watkins v. Hopkins' Exrs., 13 Gratt. 743.

11. *Ex parte* Ross, Buck, 127; United States Bung Mfg. Co. v. Armstrong, 34 Fed. 94.

12. Evans v. Prosser, 3 T. R. 186. The holder of a debt not due cannot enforce set-off against one that is due. Kinsey v. Ring, 83 Wis. 536, 53 N. W. 842; Kling v. Irving Nat. Bank, 21 App. Div. 372, 47 N. Y. Supp. 528. But where the indorser of a note, having no security for its payment except the promise of the maker who is insolvent, procures the same to be discounted by a bank, and the avails to be credited to a deposit account, which he has with such bank, he may, in the event of the bank becoming insolvent before the maturity of the note, elect that it become due at once, and have the amount of his deposit applied in liquidation of his liability as indorser upon it. See O'Connor v. Brandt, 12 App. Div. 596, 42 N. Y. Supp. 1079; Peymen v. Bowery Bank, 14 App. Div. 432, 43 N. Y. Supp. 826; Clute v. Warner,

has not been extinguished, nor barred by the Statute of Limitations.[13] In other words, it must be such a debt as would support an independent suit.[14] As a general rule, also, it must be capable of certain and exact ascertainment, and not a mere claim for unliquidated damages.[15] Thus, where it appeared that a debtor had drawn and delivered to his creditor an order on a third person, payable at sight, and directed the amount, when received, to be placed to the credit of his account, and the creditor, without the knowledge of the drawer, took the drawee's acceptance at sixty days, and before the expiration of that time the acceptor died insolvent; the creditor then sued the drawer upon the original debt, and the latter pleaded as set-off the amount of the draft he had given; but it was held that the drawer's claim on account of the draft was for unliquidated and uncertain damages for the creditor's failure to collect it, and, therefore, could not be allowed as a set-off.[16]

§ **1426.** A judgment cannot be set off against an action brought by a judgment debtor in some States;[17] in others it may be.[18] And in Virginia the assignee of a judgment may plead it as offset to an action against him.[19]

§ **1427. Set-off being entirely a subject of statutory jurisprudence,** save in those cases which present circumstances for equitable interference, any question arising would be referable for its solution to the particular statute of the State whose laws controlled

8 App. Div. 40, 40 N. Y. Supp. 392; Fera v. Wickham, 135 N. Y. 223, 31 N. E. 1028; Hughitt v. Hayes, 136 N. Y. 163, 32 N. E. 706; Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. Rep. 148; Heidelbach v. National Park Bank, 87 Hun, 117, 63 N. Y. Supp. 794; People v. St. Nicholas Bank, 76 Hun, 522, 28 N. Y. Supp. 114; Central Bank v. Thein, 76 Hun, 571, 28 N. Y. Supp. 232; Weader v. First Nat. Bank, 126 Ind. 111, 25 N. E. 887.

13. Williams v. Gilchrist, 3 Bibb, 49; Turnbull v. Strohecker, 4 McCord, 210; Jacks v. Moore, 1 Yeates, 391; 2 Parsons on Notes and Bills, 617.

14. Pate v. Gray, 1 Hempst. 155; Goldthwaite v. National Bank, 67 Ala. 549; Lewis v. Pickering, 58 Nebr. 63, 78 N. W. 368; Hanselman v. Doyle, 90 Mich. 142, 51 N. W. 195. See Lobdell v. Slawson, 90 Mich. 201, 51 N. W. 349.

15. Harrison v. Wortham, 8 Leigh, 304.

16. Harrison v. Wortham, 8 Leigh, 304.

17. Sketoe v. Ellis, 14 Ill. 75; Rae v. Halbert, 14 Ill. 572; Barber v. Baker, 70 Mo. App. 680.

18. Wartman v. Yost, 22 Gratt. 595; Allen v. Hart, 18 Gratt. 728; Barbour v. Bank, 50 Ohio St. 90, 33 N. E. 542.

19. Wartman v. Yost, 22 Gratt. 603.

it. There are, however, some doctrines which will be found to have extensive, and, indeed, general application; but, as the adjudicated cases for the most part have been decided in the interpretation of statutes, their pertinence to any given question can only be ascertained by comparison of the enactment under discussion with that which has been interpreted.

There must, as a rule, be mutuality between the parties; and the party owing the debt on one side must be the identical party to whom it is due on the other, whether the set-off be claimed at equity or in law.[20]

§ 1428. **(1) As to partnership debts.**— A debt due by an individual partner in his own right cannot be set off against a debt sued upon by the firm of which he is a member;[21] nor can a debt due by a firm be set off against a debt claimed by an individual member.[22] And an individual defendant cannot set off against an individual plaintiff a debt by plaintiff to a firm in which he and defendant are partners.[23]

So if a firm be sued, they cannot set off a debt due to one or more of the partners, but not to all.[24] But one partner may settle a debt due to the firm by setting off against it a debt due from himself.[25] And where a surviving partner, to whom has passed the effects and credit of the firm by the death of his copartner, sues or is sued, his individual debts may be set off, because he sues personally, though bound to account with the deceased partner's personal representative.[26] But a debt of one firm to another firm cannot be set off in a suit brought by the representative of a member of one firm, who has died since contracting the debt, against one member of the other firm.[27]

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20. Ford v. Thornton, 3 Leigh, 495; Byles on Bills [*352], 528.

21. Ritchie v. Moore, 5 Munf. 388; Scott v. Trents, 1 Wash. (Va.) 79; Wood v. Brush, 72 Cal. 224; Armistead v. Butler, 1 H. & M. 176; Werner v. Hatton, 54 Kan. 250, 38 Pac. 279; Jones v. Steamboat Co., 90 Me. 120, 37 Atl. 879; Stevens v. Lunt, 19 Me. 70; Williams v. Brimhall, 13 Gray, 462.

22. Duramus v. Harrison, 26 Ala. 326; Mitchell v. Sellman, 5 Md. 376; Pinckney v. Keyler, 4 E. D. Smith, 469; 2 Parsons on Notes and Bills, 608; Coates v. Preston, 105 Ill. 472; Jones v. Steamboat Co., 90 Me. 120, 37 Atl. 879.

23. Land v. Cowan, 19 Ala. 297. 24. Byles on Bills [*352], 528.

25. Wallace v. Kelsall, 7 M. & W. 264.

26. Slipper v. Stidstone, 5 T. R. 493; French v. Andratte, 6 T. R. 582; Meader v. Scott, 4 Vt. 26; Cowden v. Elliott, 2 Mo. 60; Holbroook v. Lackey, 13 Metc. (Mass.) 132; Byles on Bills [*353], 528; 2 Parsons on Notes and Bills, 608.

27. Reed v. Whitney, 7 Gray, 533; Walker v. Eyth, 25 Pa. St. 216.

§ 1429. **(2) As to joint and several debts.**— In a suit brought by an individual there cannot be set off against him a debt due by him jointly with another;[28] and in a suit by several plaintiffs there cannot be set off a debt due by one of them.[29] But in some of the States of the United States a note made by joint and several makers may be set off against either in an action brought by either of them on a debt due to him individually.[30] And where plaintiff sues several defendants jointly and severally liable, either may file as set-off against the claim as to himself a debt due him by the plaintiff.[31] The rule is otherwise in England, where the debts between the defendant and plaintiff must be strictly "mutual," in order to admit the one as offset against the other.[32] In Virginia it is expressly provided by statute that, "although the claim of the plaintiff be jointly against several persons, and the set-off is of a debt not to all, but only to a part of them, this section shall extend to such set-off, if it appear that the persons against whom such claim is, stand in the relation of principal and surety, and the person entitled to the set-off is the principal." And this relation may be shown by parol proof.[33]

§ 1430. **(3) As to debts of husband and wife.**— It has been held in England that if the husband sues alone on a note given his wife, a set-off of a debt due from her *dum sola*, cannot be pleaded against him, though a debt due by himself might be; though he may join her in the suit, in which case a debt due by her *dum*

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28. Middleton v. Pollock, L. R., 20 Eq. Cas. 204; Davis v. Notioare, 13 Nev. 421; Porter v. Nekervis, 4 Rand. 359; Glazebrooke's Admr. v. Ragland, 8 Gratt. 332; Christian v. Miller, 3 Leigh, 78; Ritchie v. Moore, 5 Munf. 388; Robertson v. Parks, 3 Md. Ch. 65; Blankenship v. Rogers, 10 Ind. 333; Wilson v. Keedey, 8 Gill, 195; Perkins v. Hawkins, 9 Gratt. 650. Held, that a bond of the plaintiff's intestate was not a legal set-off against a bond given to the plaintiff, but might become a set-off by agreement between the parties. In Virginia it has been held that a debt due by A. & B. jointly to C., and a debt due by C. to B. alone could not be set off either in equity or at law. Gilliatt v. Lynch, 2 Leigh, 493.

29. Johnson v. Kent, 9 Ind. 252; Mitchel v. Friedley, 126 Ind. 545, 26 N. E. 391.

30. Powell v. Hogue, 8 B. Mon. 443; Pate v. Gray, 1 Hemp. C. C. 155; 2 Parsons on Notes and Bills, 609.

31. Briggs v. Briggs, 20 Barb. 447; Wartman v. Yost, 22 Gratt. 595.

32. Isbery v. Bowden, 8 Wels., H. & G. 852; Wartman v. Yost, 22 Gratt. 604.

33. Wartman v. Yost, 22 Gratt. 603. And see Code of Virginia, 1873.

sola would be a good set-off.[34] Professor Parsons criticises this decision, and considers that as the husband is generally liable for the wife's debts, the set-off should be available against him, whether he joins his wife in the action or not.[35]

§ **1431. (4) As to agents and trustees.**— A debt of an agent cannot be set off in a suit against his principal.[36] But if the agent does not disclose himself as such in the transaction and acts as if he were the principal, the other party may set off a debt against him.[37] Nor can a debt due the defendant as trustee or guardian be set off against the plaintiff, who sues him individually;[38] though it seems that if a trustee sues for another's benefit, a debt against that other may be set off.[39] Set-off may be available by or against receiver.[40]

But when an action is brought for another's use, the defendant may set off a debt due by the beneficiary.[41] And it may be shown that the plaintiff is really suing as agent and for the benefit of an undisclosed principal, against whom the set-off would be available.[42]

In an action against principal and surety, a debt due by the principal alone to the plaintiff may be set off;[43] and so might a debt due by the plaintiff to the surety be set off by the surety against him, leaving him to settle with the principal.[44]

§ **1432. (5) As to personal representatives.**— A debtor to the estate of a decedent may plead as set-off against his personal representative, any debt due him which was contracted in the

34. Burrough v. Moss, 10 B. & C. 558 (21 Eng. C. L.).

35. 2 Parsons on Notes and Bills, 615.

36. Carman v. Garrison, 13 Pa. St. 158; Wilson v. Codman, 3 Cranch, 193; Foster v. Hoyt, 2 Johns. Cas. 327.

37. Monroe v. Whitehouse, 90 Me. 139, 37 Atl. 866; Dean v. Plunkett, 136 Mass. 195.

38. Glazebrooke's Admr. v. Ragland, 8 Gratt. 342, Baldwin, J.

39. White v. Ford, 22 Ala. 442.

40. Auten v. United States Nat. Bank, 174 U. S. 125, 19 Sup. Ct. Rep. 628.

41. Sheldon v. Kendall, 7 Cush. 217; Pates v. St. Clair, 11 Gratt. 24; Winchester v. Hackley, 2 Cranch, 342; Sykes v. Lewis, 17 Ala. 261; Forkner v. Dinwiddie, 3 Ired. 34; Bottomley v. Brooke, cited 1 T. R. 621; Barbour v. Bank, 50 Ohio St. 90, 33 N. E. 542.

42. Pettee v. Prout, 3 Gray, 502; Pates v. St. Clair, 11 Gratt. 24.

43. Concord v. Pillsbury, 33 N. H. 310; Mahurin v. Pearson, 8 N. H. 539; Kent v. Rogers, 24 Miss. 306; Slayback v. Jones, 9 Ind. 470; Newell v. Salmons, 22 Barb. 647.

44. Lynch v. Bragg, 13 Ala. 773.

decedent's lifetime,[45] provided the debt due the representative did not accrue after the decedent's death.[46] In an action by the representative on debts due the decedent in his lifetime, the decedent cannot set off an amount paid by him as the decedent's surety after his death,[47] nor can he set off against the representative debts of the decedent purchased after his death.[48]

§ **1433. Where an action is brought by executors** upon a contract made with them, the defendant cannot set off a debt due from the testator, though a judgment may have been obtained for the same against the executors; for if a set-off of this nature were allowed, the defendant might gain an improper advantage over other creditors. He might obtain payment of his debt out of the assets, when, according to law, the whole assets ought to be applied to creditors of higher dignity.[49] Nor in a suit by a personal representative, on a bond to him as such, can the defendant set off money subsequently received by him as such.[50] But it might be different if they have sufficient assets.[51]

§ **1434.** There is generally made a distinction between a solvent and an insolvent estate. In the former case the debt may be set off, although not mature and due at the death of the deceased. But if the estate of the deceased be insolvent, the debt seems to fix the rights of the parties, and a debt cannot be set off which was not due at the time of the decease, although it matured before the action was brought.[52]

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45. Richardson v. Parker, 2 Swan, 529; Boardman v. Smith, 4 Pick. 212; Light v. Lieninger, 8 Barr, 403; Walker v. Fearhake, 22 Tex. Civ. App. 61, 52 S. W. 629.

46. Fry v. Evans, 8 Wend. 530; Wolfersberger v. Bucher, 10 Serg. & R. 10; Bizzell v. Stone, 7 Eng. (Ark.) 378; Armstrong v. Pratt, 2 Wis. 299; Lambarde v. Older, 17 Beav. 542, 23 Eng. L. & Eq. 45.

47. Minor v. Minor, 8 Gratt. 1.

48. Root v. Taylor, 20 Johns. 137.

49. White v. Bannister's Exrs., 1 Wash. (Va.) 166; Brown's Admx. v. Garland, 1 Wash. (Va.) 221; Steel v. Steel, 12 Pa. St. 64.

50. James v. Johnson, 22 Gratt. 461.

51. White v. Bannister's Exrs., 1 Wash. (Va.) 166.

52. 2 Parsons on Notes and Bills, 611.

SECTION II.

HOW FAR THE LAW OF SET-OFF IS APPLICABLE TO NEGOTIABLE INSTRUMENTS.

§ **1435.** The doctrine of set-off has but a limited application to negotiable paper, it being a distinguished characteristic of negotiable securities that when they have passed into the hands of third parties for value, no set-off admissible in pleadings between original parties is available. Between the original parties, however, or parties between whom there is a privity — that is, between maker and payee, drawer and acceptor, indorser and immediate indorsee — a set-off may be pleaded to negotiable securities as well as to any other kind.

§ **1435a. Set-off is not an equity; purchaser of overdue negotiable instrument not subject to set-off that would apply to his transferrer.** — The rule that a party taking an overdue bill or note takes it subject to the equities to which the transferrer is subject, does not extend so far as to admit set-offs which might be available against the transferrer. A set-off is not an equity; and the general rule stated is qualified and restricted to those equities arising out of the bill or note transaction itself,[53] and the transferee is not subject to a set-off which would be good against the transferrer, arising out of collateral matters.[54]

§ **1436. English doctrine.**— This is the English rule on the subject. In a leading case, where the set-off existed at the time of the transfer, Bayley, J., said: "This was an action on a promissory note made by the defendant, payable to one Fearn, and by him indorsed to the plaintiff after it became due; for the defendant it was insisted that he had a right to set off against the plain-

53. Galliher v. Galliher, 10 Lea, 24; Barnes v. McMullins, 78 Mo. 260; Cutler v. Cook, 77 Mo. 388; Drexler v. Smith, 30 Fed. 958, citing the text. Armstrong, Recr. v. Warner, 49 Ohio St. 376, 31 N. E. 877; Davis v. Noll, 38 W. Va. 66, 17 S. E. 791, 45 Am. St. Rep. 871, note, citing text.

54. Chitty on Bills (13th Am. ed.) [*220], 251; Story on Bills, § 220; Story on Notes, § 178; Byles on Bills (Sharswood's ed.) [*353], 529. See also Edwards on Bills, 260; 2 Parsons on Notes and Bills, 603, 604. See chapter XXI, on Transfer by Indorsement, § 725 *et seq.*, vol. I; Wilbur v. Jeep, 37 Nebr. 604, 56 N. W. 198; Gemmell v. Hueben, 71 Mo. App. 291; Harrisburg Tr. Co. v. Shufeldt, 31 C. C. A. 190, 87 Fed. 669, citing text. *Contra*, Merchants' Exch. Bank v. Fuldner, 92 Wis. 415, 66 N. W. 691; Jones v. Piening, 85 Wis. 264, 55 N. W. 413.

tiff's claim a debt due to him from Fearn, who held the note at the time when it became due. On the other hand, it was contended that this right of set-off, which rested on the Statute of Set-off, did not apply. The impression on my mind was, that the defendant was entitled to the set-off; but on discussion of the matter with my Lord Tenterden and my learned brothers, I agree with them in thinking that the indorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters."[55] In a subsequent case, where it was averred that the indorsee received the bill with notice of the set-off, it was held that it could not be pleaded against him.[56] And in a more recent case it was held that the right of an indorsee of an overdue bill to sue the acceptor was not defeated by the existence of a debt due from the drawer to the acceptor, and notice by the latter to the drawer before indorsement, of his election to set off the amount against the bill; and that the indorsee was not affected by the right of set-off between the acceptor and the drawer, although the bill was indorsed without value, and for the purpose of defeating the set-off.[57]

§ **1437. American doctrine.**—In the United States there is a conflict of decisions. In some of the States the English rule, excluding set-offs which existed at the time of the transfer of the overdue paper, is followed.[58] In others such set-offs are admitted.[59] But it seems to be the uniform ruling everywhere, that, although the paper be transferred after maturity, no set-offs between antecedent parties, which arose after the transfer, will be available

55. Burrough v. Moss, 10 B. & C. 558, 5 Moody & R. 296; Chitty, Jr., on Bills, 1481.

56. Whitehead v. Walker, 10 M. & W. 696; Davis v. Noll, 38 W. Va. 66, 17 S. E. 791, 45 Am. St. Rep. 841, note.

57. Oulds v. Harrison, 28 Eng. L. & Eq. 524.

58. Davis v. Miller, 14 Gratt. 8 (the court seems to favor the English rule); Annon v. Houck, 4 Gill, 332; Hughes v. Large, 2 Barr, 103; Epler v. Funk, 8 Barr, 468; Clay v. Cottrell, 6 Harr. 413; 2 Rob. Pr. (new ed.) 252, 253. See *ante*, vol. I, § 725; Weader v. First Nat. Bank, 126 Ind. 111, 25 N. E. 887.

59. Peabody v. Peters, 5 Pick. 1; Braynard v. Fisher, 6 Pick. 355; Grew v. Burditt, 9 Pick. 265; Pettee v. Prout, 3 Gray, 502; Shirley v. Todd, 9 Greenl. 82; McDuffie v. Dame, 11 N. H. 244; Martin v. Trowbridge, 1 Vt. 477; McKenzie v. Hunt, 32 Ala. 494; Bond v. Fitzpatrick, 4 Gray, 89; Nixon v. English, 3 McC. 549; Perry v. Mays, 2 Bailey, 254; McDonald v. MacKenzie, 24 Oreg. 573, 14 Pac. 866, citing the text. In this connection, see citation of authorities on this question in note to case reported in 23 L. R. A. 327.

against the indorsee.[60] In some of the States this question is settled by express statute on the subject. In New York, for instance, the statute admits set-offs existing at the time of transfer of the overdue note or bill.[61]

The right to plead an equitable set-off is a personal privilege of the principal, and does not extend to the surety, unless the defense amounts to total want or failure of consideration.[62]

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60. Davis v. Miller, 14 Gratt. 8. Moncure, J., said on this subject: "Whatever conflict of authority there may be upon the question whether the equities subject to which an indorsee takes an overdue note, embrace set-offs in favor of the maker against the payee, existing at the time of the indorsement, I have been able to find no case in which it was held, or even said, that set-offs between those parties, arising or acquired after the indorsement, even though without notice thereof, are good against the indorsee. On the contrary it was expressly decided in Baxter v. Little, 6 Metc. (Mass.) 7, that they are not." Shaw, C. J., in his able opinion, said: "A note does not cease to be negotiable because it is overdue. The promisee by his indorsement may still give a good title to the indorsee. Notes or other matters of set-off acquired by the defendant against the promisee after such transfer cannot be given in evidence in defense to such note, although the maker had no notice of such transfer at the time of acquiring his demand against the promisee. The indorsee of a note overdue takes a legal title; but he takes it with notice on its face that it is discredited, and, therefore, subject to all payments, and offsets in the nature of payment. The ground is, that by this fact he is put upon inquiry, and, therefore, he shall be bound by all existing facts of which inquiry and true information could apprise him; but these could only apprise him of demands then acquired by the maker against the payee." Wyman v. Robbins, 51 Ohio St. 98, 37 N. E. 264; Henderson v. Johnson, 22 Tex. Civ. App. 381, 55 S. W. 35.

61. Edwards on Bills, 260. The point was considered doubtful (outside of the statute) in Miner v. Hoyt, 4 Hill, 193, 197; Patterson v. Wright, 64 Wis. 292, citing the text.

62. Osborn v. Bryce, 23 Fed. 177. But see Armstrong, Recr. v. Warner, 49 Ohio St. 376, 31 N. E. 877. In this case held, the plaintiff, as surety, is entitled, in equity, to have set-off against his liability as acceptor of the draft, the amount due his principal on the deposit account with the bank. Following the general principle announced in the text, in Kentucky it has been decided that where one is the surety of a solvent principal on a note to a bank which has assigned for the benefit of creditors, and the assets of which are insufficient to pay its creditors in full, he has no right to have the amount of his deposit which he had with the bank at the time of its assignment, set off against the note on which he is surety. The effect of that would be to permit him to collect his claim against the bank in full, while the other creditors would only get their *pro rata*. See New Farmers' Bank's Trust v. Young, 100 Ky. 683, 39 S. W. 46. See Storts v. George, 150 Mo. 1, 51 S. W. 489.

CHAPTER XLV.

EXCHANGE AND RE-EXCHANGE; AND DAMAGES, UPON DISHONORED NEGOTIABLE PAPER.

SECTION I.

NATURE OF DAMAGES, AND OF EXCHANGE.

§ **1438. Statutory enactments.**— In the United States the whole subject of re-exchange and damages has been very much simplified by the enactment of statutes establishing fixed amounts of damages in lieu of re-exchange; and even previous to statutory provisions on the subject, mercantile custom had, in some of the States, prescribed fixed rates of damages equally as effectually. Immemorial usage, at an early day, allowed ten per cent. as damages in lieu of re-exchange on bills drawn in Massachusetts on England, and returned protested,[1] and twenty per cent. on the like bills drawn in New York.[2] In England it seems that a similar rule was adopted in the commerce between England and the East Indies, to allow a certain per cent. in particular cases in lieu of re-exchange, but it was merely conventional as between parties agreeing to it.[3] Such custom, however, would not apply in the absence of an agreement, express or implied, to allow re-exchange.[4]

In 1700 a statute was passed in the Colony of Pennsylvania allowing twenty per cent. on bills drawn upon England or any part of Europe;[5] and, in 1743, Rhode Island adopted one of similar purport.[6]

Now every State has recognized the convenience and utility of regulating the matter by statute, and their codes contain ample provisions on the subject. But they lack uniformity, and, consequently, in transactions between the States there is great diversity in the rights and liabilities of parties. It has been thought that

1. Grimshaw v. Bender, 6 Mass. 157.
2. Hendricks v. Franklin, 4 Johns. 119.
3. Auriol v. Thomas, 2 T. R. 52.
4. Williams v. Ayres, 3 App. Cas. 82 (1877). See *post*, § 1446.
5. Francis v. Rucker, Amb. 672.
6. Brown v. Van Braum, 3 Dall. 344.

Congress has a right to prescribe fixed rates of damage, under the clause of the Constitution authorizing it to regulate commerce between the States.[7] But no action has been taken by that body.

§ 1439. **These statutory damages** are not given as a penalty for drawing without authority, but as commutation for interest, damages, and re-exchange.[8] "It is, in truth," says Gibson, C. J., "a liquidation of the damages, not by the parties, but by the law fixing the compensation for the loss beforehand, to save time and litigation; and if damages need not be specially laid where there is no statute on the subject, as they certainly need not be in England, no rule of pleading requires them to be laid in their liquidated form."[9] The damages given by statute constitute as much a part of the contract as the interest.[10] But, while they are now universally fixed in amount by statute, the whole theory from which they are derived springs from the right of the holder to indemnity for dishonor of the bill, which was formerly worked out through the doctrine of re-exchange. And it is still necessary to a thorough understanding of the subject of damages that the rules of the law merchant respecting exchange and re-exchange should be held in view.

§ 1440. **Function of bills of exchange, and the nature of exchange.** — The very name of the instrument, "Bill of Exchange," indicates the office which it so frequently performs, that of exchanging a debt in one place or country for a debt in another place or country. When a person in one place or country owes money to a party in another place or country, he does not in general discharge the debt by transmitting the money, which would involve risk and expense, but purchases from some banker, or other person who has money due him at the place where he has the amount to pay, a bill drawn for that amount upon the banker or such other person's debtor. This bill is drawn payable to the purchaser's creditor, or to himself, and indorsed by him to his creditor, as he sees fit, and when presented to and paid by the drawee it extinguishes the original debt. The facility with which such

7. Mr. Verplanck's report to House of Representatives, March 22, 1826; Edwards on Bills, 750; Sedgwick on Damages, 274; 1 Parsons on Notes and Bills, 654.

8. Bangor Bank v. Hook, 5 Greenl. 174; Allen v. Union Bank, 5 Whart. 420; Lenning v. Ralston, 23 Pa. St. 137.

9. Lloyd v. McGarr, 3 Barr, 474.

10. Bank of the United States v. United States, 2 How. 711.

a bill may be procured depends upon the commercial relations between the two places or countries betwixt which it is required.

Thus: If there are more debts due from New York to London than from London to New York, the demand in New York for bills on London will be greater than the demand in London for bills on New York; and, consequently, in London, where there are many creditors of debtors in New York, it will be easier and cheaper to procure a bill of exchange on New York than it will be in New York, where there are a less number of creditors of London debtors, to procure a bill on London.

It would follow from this state of affairs that in London bills on New York would be at a discount, creditors preferring to take lesser amounts of cash in hand than to undergo the trouble and delay of collecting their debts in New York. This discount, which is in fact a sum paid by the London drawer of an order of payment on his New York debtor, is called exchange, and the course of exchange is said to be against New York. It is also in favor of London, for in New York a draft on London, being in greater demand, would bear a premium; that is, a purchaser would pay for it more than the amount of its face. This premium is also called exchange.[11]

§ **1440a. The rate of exchange.**—It follows that the rate of exchange between two countries is that amount of premium which it will cost to replace a sum of money in the one country in the other; or which a right to a sum of money in one country will produce in another country. In other words, it is the difference in the value of the same amount of money in different countries.

§ **1441. Natural and artificial exchange.**—The rate of exchange between two countries is sometimes natural and sometimes artificial. "Thus," observes Parsons, "an exchange is never nominally at par, because our statute makes the pound sterling equal to only four dollars and forty-four cents, which is nearly ten per cent. less than it is really worth when paid in gold Accordingly, while £100 is legally worth only $444, to pay that sum in London one must pay in New York, if the exchange is actually at par, about $484. A recent United States statute has provided that, for the purpose of estimating duties on imported goods, the pound sterling shall be calculated at $4.84, which is about its true value. (Statute July 27, 1842, chap. 66, 5 U. S. Statutes at Large, 496.)

11. See Thompson on Bills, 439.

But the matter of exchange is left to itself. Merchants regulate that by adding from nine to ten per cent. to the actual rate of the day (or that which would be the rate if it were determined by business alone), and thus the buying and selling rate is made. This is seldom less than eight per cent., for if it falls so low, or nearly so low, gold comes over from England, and seldom more than eleven, for if it rises so high, or near this rate, gold instead of bills is sent to England." [12]

§ **1442. Par of exchange.**— By the par of exchange is meant the precise equality of any given sum of money in the coin or currency of one country, and the like sum in the coin or currency of another country into which it is to be exchanged, regard being had to the fineness and weight of the coins so fixed by the mint standard of the respective countries.[13] Marius says: "*Pair,*" as the French call it, "is to equalize, match, or make even, the money of exchange from one place with that of another place; when I take up so much money for exchange in one place to pay the just value thereof in other kind of money in another place, without having respect to the current of exchange for the same, but only to what the moneys are worth." [14] It is necessary to this purpose to ascertain the intrinsic values of the different coins; and then it is a mere matter of arithmetical computation to arrive at the amount of the one which will be the exact equivalent of a certain amount of the other, into which it is to be exchanged. When this has been accomplished, and the exact equivalent of a certain amount in one currency has been ascertained in another, should it be desired to transmit such amount from one country to another, the rate of exchange between the countries will be added to or subtracted from such amount, accordingly as the course of exchange is in favor of the one country or the other. So the par of exchange is the equivalency of amounts in different currencies, while the rate of exchange is the difference between these amounts at different places.

§ **1443.** Gilbert remarks on this subject, in his Treatise on Banking: "The real par of exchange between two countries is that

12. 1 Parsons on Notes and Bills, 663. By more recent enactment of Congress, the value of the sovereign or pound sterling is placed at $4.8665. See R. S. U. S. 707; Act March, 1873, chap. 268, vol. XVII, p. 603.

13. Cunningham on Bills, 417; Story on Bills, § 30.

14. Marius on Bills, 4.

by which an ounce of gold in one country can be replaced by an ounce of gold of equal fineness in the other country. In England gold is the legal tender, and its price is fixed at £3 17*s.* 10½*d.* per ounce. In France silver is the currency, and gold, like other commodities, fluctuates in price according to supply and demand. Usually, it bears a premium or *agio.* In the above quotation, this premium is stated to be 7 per *mille;* that is, it would require 1,007 francs in silver to purchase 1,000 francs in gold. At this price the natural exchange, or that at which an ounce of gold in England would purchase an ounce of gold in France, is 25.32½. But the commercial exchange — that is, the price at which bills on London would sell on the Paris Exchange — is 25 francs, 25 cents, showing that gold is 0.30 per cent. dearer in Paris than in London. Tables have been constructed to show the results of each fluctuation in the premium of gold in Paris and Amsterdam." [15] And in Cunningham on Bills it is said: "By the par of exchange is meant the precise equality between any sum or quantity of English money, and the money of a foreign country into which it is to be exchanged, regard being had to the fineness as well as to the weight of each. When Sir Isaac Newton had the inspection of the English mint, he made, by order of council, assays of a great number of foreign coins to know their intrinsic values, and to calculate thereby the par of exchange between England and other countries; of which a table is given by Dr. Arbuthnot. And he says you may thereby judge the balance of trade, as well as the distemper of a patient by the pulse. And this, it seems, induced Mons. Dutot, in a late book, entitled 'Reflexions Politique sur les Finances,' to follow the same path in calculating the par of exchange, and to say that the balance of trade may be thereby as well judged of as the weather by a barometer." [16]

SECTION II.

NATURE OF RE-EXCHANGE AND DRAWER'S LIABILITY.

§ **1444.** From the use which bills of exchange subserve in transmitting money, arises the liability upon the part of the drawer for the payment of what is termed "re-exchange," in the event of the dishonor of the bill in the place or country upon which it is drawn.

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15. Gilbert on Banking, 424, 425.

16. Gilbert on Banking, 417.

Thus, suppose A. in San Francisco, California, desires a thousand dollars in New York city, New York. He purchases a bill of exchange from a San Francisco banker, drawn by him on a house in New York, and pays therefor a premium of (say) three or five per cent. In other words, he purchases New York exchange in San Francisco, and is entitled to demand in New York of the drawee the thousand dollars for which he has paid the premium. Now, should it happen that the bill were dishonored in New York, it is obvious that if the holder could only recover of the drawer in California the thousand dollars which he should have received in New York, he would lose the premium which he paid for the exchange, and suffer without remedy the loss and inconvenience of returning the bill to California for recourse against the drawer.

And even if no premium had been paid, the holder entitled under the drawer's contract to receive the thousand dollars in New York, would not be indemnified if he could only sue for and obtain that amount in California. From these circumstances grew the customary right of the holder of the bill, by the law merchant, to draw a bill upon the drawer — literally a bill of re-exchange — for the principal amount which he should have received, increased by the costs of protest, and the sum which it will cost to replace that principal amount at the place where it should have been paid. Thus, if the exchange between New York and California were ten per cent., the holder of a bill for a thousand dollars drawn in California on New York, would, upon its protest in New York, be entitled to redraw upon the California drawer for eleven hundred dollars, with his necessary expenses and interest added.[17]

§ **1445. Re-exchange,** then, may be defined to be the amount for which a bill may be purchased in the country where the original bill is payable, drawn upon the drawer in the country where he resides, which will give the holder a sum exactly equal to the amount of the original bill at the time when it ought to be paid, or when he is able to draw the re-exchange bill, together with expenses and interest; for that is precisely the sum which the holder is entitled to receive, and which will indemnify him for its nonpayment.

The cross-bill is called in French the *retraite.* The amount for which it is drawn is called in law Latin, *ricambium,* in Italian, *recambio,* and in English, re-exchange. In point of fact, the

17. See D'Tastet v. Baring, 11 East, 265.

re-exchange bill is seldom, if ever, drawn in England or in the United States, but the right of the holder to draw it is recognized by the law merchant of all nations, and it is by reference to this supposed redraft upon the drawer that the re-exchange is computed.[18]

§ **1446.** The United States Supreme Court remarks on this subject: "The doctrine of re-exchange is founded upon equitable principles. A bill is drawn in this country, payable at Paris, France. The payee gives a premium for it, under the expectation of receiving the amount at the time and place where the bill is made payable. It is protested for nonpayment. Now the payee and holder is entitled to the amount of the bill in Paris. The same sum paid in this country, including costs of protest and other charges, is not an indemnity. The holder can only be remunerated by paying to him, at Paris, the principal, with costs and charges; or by paying to him in this country those sums, together with the difference in value between the whole sum at Paris and the same amount in this country. And this difference in value is ascertained by the premium on a bill drawn in Paris, and payable in this country, which should sell at Paris for the sum claimed." [19] By Sir J. Colville, in the Privy Council, it was recently said: "If an ordinary bill of exchange is drawn in one country upon persons in another and distant country, the holder who has contracted for the transfer of funds from the one country to the other almost necessarily sustains damages by the dishonor of the bill. He must take other means to put himself in funds in the country where the bill was payable. Hence the right to 're-exchange' which is the measure of those damages." And accordingly it was held that where the holder of a bill drawn in London on a party in Australia, had no occasion to transfer funds to Australia, but sent the bill there to have it negotiated and the proceeds remitted to London, he could not, upon dishonor of the bill, recover re-exchange.[20]

§ **1447. Drawer may limit re-exchange.**— The drawer may, if he pleases, limit the amount of re-exchange and expenses, in the event of the bill being dishonored, by subscribing: "In case of nonacceptance or nonpayment, re-exchange and expenses not to

18. Byles on Bills (Sharswood's ed.) [*402], 588.
19. Bank of the United States v. United States, 2 How. 737.
20. Wellans v. Ayres, 3 App. Cas. 133 (1877), 24 Moak's Eng. Rep. 82.

exceed $——," or some such words. And then the holder cannot recover a larger amount.[21] It might be better to say, "re-exchange and expenses shall be so much," for then the amount is definitely determined.[22]

SECTION III.

INDORSER'S AND ACCEPTOR'S LIABILITY FOR RE-EXCHANGE AND DAMAGES.— ACCUMULATIONS OF RE-EXCHANGE AGAINST DRAWER AND INDORSER.

§ **1448.** Every indorser of a bill is a new drawer, and the holder may, therefore, redraw upon any indorser (as well as upon the drawer) for the re-exchange between the country upon which the bill is drawn and that where the indorsement was made. And as soon as the indorser pays the re-exchange, he may thereupon redraw upon any antecedent indorser, or upon the drawer, for the whole amount, including the re-exchange between the place of dishonor and of indorsement, which he has been required to pay; and, in addition, the re-exchange between the place of such payment and the place upon which the redraft is drawn.[23] This principle rests upon the obvious equity and justice of indemnifying each several and successive party for the loss which he suffers by the breach of contract of his antecedents; and although when the bill has passed through numerous hands, the drawer may be burdened with successive re-exchanges between different places, it is only the consequence of his own engagement, and what is necessary to reimburse and save harmless those who trusted to its performance.[24]

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21. Chitty on Bills (13th Am. ed.) [*166], 190.

22. 1 Parsons on Notes and Bills, 653.

23. Chitty on Bills (13th Am. ed.) [*686], 767; Edwards on Bills, 732; 1 Parsons on Notes and Bills, 652; Wharton on Conflict of Laws, § 458; Westlake on International Law, § 234.

24. D'Tastet v. Baring, 11 East, 265; Crawford v. Branch Bank, 6 Ala. (N. S.) 15; Mellish v. Simeon, 2 H. Bl. 379 (1794). In this case the bill was drawn in England by Simeon on Boyd & Co., in Paris. It was negotiated through Amsterdam, in Holland, and refused payment, and was sent back to the indorser at Amsterdam, and by him to the English drawer, with the accumulation of £300 damages. Lord Chief Justice Eyre said: "I see no distinction between this case and the common one of a bill being refused payment. The drawer must pay for all the consequences of the nonpayment, and the loss on the re-exchange seems to me to be part of the damages arising from the contract not being performed. I thought, indeed, at the trial, that

Story says, upon the authority of Jousse, that if there be a direct commercial intercourse between the country where the acceptance and payment are to be made, and the country where the drawer lives, the rate of that re-exchange is the proper amount to be allowed to the holder, and intimates that it is only when such intercourse is disturbed that the drawer is bound for the re-exchange accumulating by the circuitous mode of transmitting and negotiating the bill in the various countries through which it must pass.[25] But none of the English cases cited recognize this distinction, nor does it appear to be a principle of the law merchant resting either upon reason or authority. As the indorsers are drawers, there is no reason why the holder should not draw upon the one as well as another, and that the party who has put his bill in circulation, should not indemnify those who received it. Even the fact that the drawec is prohibited by the laws of his country from accepting or paying the bill does not release the drawer's liability, for he "who undertakes for the act of another, undertakes that it shall be done at all events."[26] But an indorsee can avail himself of but one satisfaction of re-exchange, nor will any drawer or indorser be liable for re-exchange except when it is allowed by the laws of the country where the bill is drawn, or the indorsement made.[27]

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it might be a question whether the drawer was liable for the re-exchange occasioned by the circuitous mode of returning the bill through Amsterdam, but the jury decided." Buller and Heath, JJ., concurred.

25. Story on Bills, § 402, quoting Jousse Comm. sur L'Ord, 1673 tit. 6, art. 4, pp. 139, 140. In Scotland, Story's view has been taken by Forbes and Glen. See Forbes, 151; Glen, 274. But Thompson exposes its fallacy with his usual clearness and discrimination. See Thompson on Bills, 445, where it is said: "It has been said that the drawer ought not to be liable for any but the direct re-exchange between the place of drawing and the place of payment, unless he has given permission to negotiate the bill in other places. But such a permission is implied by the drawer issuing a negotiable document, since the holder for the time is entitled to indorse it to any person he pleases; and, on the other hand, the last holder, being entitled, in case of its dishonor, to redraw on any previous indorser, in order to make good his recourse against such indorser, who again has a right to do the same with any prior indorser, the drawer, as he is liable for all the consequences of dishonor, must be liable for the accumulated re-exchange arising on the successive redrafts, because that results from the negotiability of the document which he has issued."

26. Mellish v. Simeon, 2 H. Bl. 376, Heath, J.

27. Story on Bills, § 403.

§ 1449. Whether or not acceptor liable for re-exchange.— Many of the commentators on bills of exchange state emphatically that the liability for re-exchange is peculiar to the drawer and indorser of a bill, and does not extend to the acceptor.[28] Others consider the acceptor equally liable.[29] And others still take an intermediate view, that he is liable only when he has agreed with the drawer or indorser, for a valuable consideration, to pay the bill, and has failed to do so; and the drawer or indorser has consequently been compelled to pay re-exchange. Then they say he is bound to reimburse them.[30] In England, where an English mercantile firm had directed an American merchant of Pennsylvania to purchase corn for them, and draw on them for reimbursement — and the bills drawn in pursuance of this direction were not paid, some of them not even accepted — the Pennsylvania merchant was permitted to prove against the English firm not only the principal amount, but also for twenty per cent. allowed by the laws of Pennsylvania against "the drawer and all others concerned," when bills upon England were returned protested.[31]

This case would seem clearly to maintain the acceptor's liability for re-exchange to the drawer. But it was afterward held in England, that the holder could not recover re-exchange from the acceptor, who, it was said, by his acceptance only charges himself with the liability to pay according to the law of this country; and if he do not pay, the holder has his remedy over against the drawer.[32] And Lord Ellenborough said, in one of

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28. Chitty on Bills (13th Am. ed.) [*686], 767; Chitty, Jr., on Bills, 41; Byles on Bills (Sharswood's ed.) [*402], 588; 3 Kent Comm., lect. 44; Edwards on Bills, 733.

29. Thompson on Bills (Wilson's ed.), 446; 1 Parsons on Notes and Bills, 650. Bayley says, p. 306, chap. X, note 41: "It seems reasonable that he should be liable to all parties when he has effects, and to all excepting the drawer when he has not." In Kyd on Bills, 141, it is said: "The acceptor must pay re-exchange and all charges." Pothier, 117; 1 Bell Comm. B. 3, chap. II, § 4, p. 407 (5th ed.).

30. Story on Bills, § 398; Sedgwick on Damages [*242], 271.

31. In Francis v. Rucker, Ambler, 672 (1768), Lord Campbell said: "The 20 per cent. is a liquidated thing, and, therefore, differs from the case of re-exchange. The reason of not admitting proofs of the difference upon re-exchange is because it is uncertain damage which cannot be proved * * * The nature of the engagement is to pay the bills or the 20 per cent., the consequential damages according to the law of Pennsylvania, the same as if it had been by express stipulation."

32. Napier v. Schneider, 12 East, 420 (1810).

the cases where it was sought to charge the acceptor for re-exchange because the holder had suffered to that extent by the dishonor: "You may as well state that, by reason of the bill not being paid, the plaintiff was obliged to raise money by mortgage." [33] But in a recent case before the Chancery Division of the High Court of Justice, it was held that the drawer of a bill of exchange in a foreign country, upon its dishonor and protest, is entitled to recover from the acceptor not only the amount of the bill with interest, but also all such reasonable expenses as may have been caused by the dishonor, including the expenses of re-exchange. And Vice-Chancellor Malins, referring to Lord Ellenborough's decision, said: "But as to that *nisi prius* case, if it had been expressly in point, it could not outweigh the solemn decision of Francis v. Rucker. Now, I cannot accede to the argument that a drawer is under greater liability than an acceptor. I am of opinion that the primary liability is on the acceptor. The liability of the drawer is secondary, and if the drawer is liable, so must the acceptor be." [34]

§ **1450.** In the United States Supreme Court, the drawee, who had instructed the drawer to purchase salt for him, and to draw for reimbursement, was held liable for re-exchange upon ground broad enough to include every case in which there is an authority to draw, or an acceptance.[35] But in this country the decisions

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33. Woolsey v. Crawford, 2 Campb. 445 (1810). In Dawson v. Morgan, 9 B. & C. 618 (1829), Lord Tenterden, C. J., said: "The custom does not give a right to an indorser (against the acceptor) to recover re-exchange."

34. *In re* General South American Co., L. R., 7 Ch. Div. 645 (1878). See also Walker v. Hamilton, 1 De Gex, F. & J. 502; Prehn v. Royal Bank of Liverpool, L. R., 6 Exch. 92.

35. In Riggs v. Lindsay, 7 Cranch, 500, Livingston, J., said: "As Lindsay was expressly authorized to draw, he certainly had a right to do so; and whether the defendants accepted his bill or not, so as to render themselves liable to the holders of them, there can be no doubt, that, as between Lindsay and them, it was their duty, and that they were bound in law to pay them. Not having done so, and Lindsay, in consequence of their neglect, having taken them up, he must be considered as paying their debt, and as this was not a voluntary act on his part, but resulted from his being their surety (as he may well be considered from the moment he drew the bills), it may well be said that in paying the amount of these bills, which ought to have been paid, and was agreed to be paid by the drawees, he paid so much money for their use. Nor can any good reason be assigned for distinguishing the damages from the principal sum, for if it were the duty of the defendants to pay such principal sum, it is as much so to reimburse Lindsay for the damages, which,

generally deny the acceptor's liability.[36] Our view is this: If the drawee authorizes the bill to be drawn (which is a virtual acceptance as to the drawer who draws the bill, or the holder who takes it, on the faith of the authority), or if there is an acceptance when the bill is presented for acceptance, the acceptor is bound for all damages, including re-exchange, which may result to the drawer immediately from the dishonor of the bill. If the holder sues the drawer and recovers re-exchange, the acceptor should reimburse him, as his own default occasioned the liability. If the holder sues drawer and acceptor together, the acceptor would likewise be liable, because the drawer, on paying the amount, would immediately have a claim over against him. And even if the acceptor was sued alone, he should be held bound for the re-exchange. We can see no philosophy in the cases which hold him liable only when he has specially instructed the drawer to draw for a separate valuable consideration. His liability arises out of his contract to pay the bill. A precedent debt is a valuable consideration; and if he accepts to pay the debt in a particular way, he should bear the consequential damages which his default occasions, and as Thompson has well said: "If the drawer or indorser is liable for such damage to the holder, there seems to be no reason why the acceptor, who is more immediately bound to him, should not also be liable for this direct consequence of his breach of contract." [37]

§ 1451. What laws determine liability of drawer and drawee.— The drawer of a bill undertakes that the drawee shall accept, and

by the law of South Carolina, he was compelled to pay, and which may, therefore, also be considered a part of the debt due by the defendants in consequence of the violation of their promise."

36. Newman v. Gozo, 2 La. Ann. 642. In Alabama damages in lieu of re-exchange and other charges are recoverable only of the drawer or indorsers. Tramwell v. Hudmon, 56 Ala. 237; Hanrick v. Farmers' Bank, 8 Port. 539. In Watt v. Riddle, 8 Watts, 545, the statute of Pennsylvania was held not to include the acceptor as liable for re-exchange. Bowen v. Stoddard, 10 Metc. (Mass.) 377 (1845), Hubbard, J., said: "In cases where the drawers have been obliged to take up bills, and pay damages, because the acceptors suffered them to be protested when they had funds of the owners in their hands, and were as between themselves and the drawers bound to accept, they may recover such damages of the acceptors, because the loss is occasioned by their default and neglect. This rests, however, on the relations existing between them, and not on the ground that the acceptor as such is liable to pay damages by reason of his acceptance."

37. Thompson on Bills, 447.

afterward pay the bill according to its tenor, at the place and domicile of the drawee, if it be drawn and accepted generally; at the place appointed for payment, if it be drawn and accepted payable at a different place from the place of domicile of the drawee. If this contract of the drawer be broken by the drawee, either by nonacceptance or nonpayment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with his interest, damages, and costs, as the law of the country where he contracted may allow.[38] And so the indorser, who is a new drawer, is liable for damages according to the law of the country where he indorses.[39]

§ **1452. Indorser's liability for damages.**— It results from the doctrine that the indorser is bound only according to the law of the place of indorsement, that several and successive indorsers may be bound to the holder in different amounts of damages. For the holder can only recover damages against the indorser according to the measure allowed by the law of the place of indorsement. And as the indorser can only recover damages against prior parties when allowed, and to the extent allowed by the law of the place of their contracts, it follows that an indorser may be required to pay more to his indorsee than he can recover against such prior parties.[40] Thus, in Maryland, the damages on bills on Europe are fixed at fifteen per cent.; in Pennsylvania, at twenty per cent.; and in New York, at ten per cent. And, for the sake of illustration, let us suppose that at Rio de Janeiro, Brazil, no damages whatever are allowed against the indorser of a bill or note. Now, suppose a bill be drawn by A. in Maryland, in favor of B. in New York, on C. in Liverpool, England, and then indorsed by B. to D. in Rio, and by D. to E. in Pennsylvania, and by E. in Pennsylvania to F. of Liverpool, England. In such case, in the event of dishonor, F., the holder, could recover against A., the Maryland drawer, the fifteen per cent. damages; against B., in New York, ten per cent. damages; against D. in Rio he could recover no damages; and against E. in Pennsylvania he could recover twenty per cent. damages. But suppose, now, the

38. Allen v. Kemble, 6 Moore P. C. 314; Gibbs v. Fremont, 9 Exch. 25, 20 Eng. L. & Eq. 555. See §§ 998–999, vol. I.

39. Story on Bills, § 153.

40. 2 Parsons on Notes and Bills, 342, 346; Story on Bills, § 153; 2 Kent Comm. [*460], 596. See also Wharton on Conflict of Laws, § 458.

amount, with twenty per cent. damages, be paid by E. in Pennsylvania, he can recover no damages against the indorser in Rio. But he may recover against the Maryland drawer and the New York indorser the amount in full paid by him, with twenty per cent. damages added; and, superadded, the exchange between Pennsylvania and Maryland or New York, as the case may be. And the Rio indorser, while not bound to the holder for any damages, may recover against the drawer and indorser the principal amount paid, with the damages allowed between Brazil and Maryland or New York, as the case may be. But, by the law merchant, in the absence of any statutory enactment, each indorser is bound to indemnify his successors fully for all damages they have been compelled to pay, as we have already seen.

SECTION IV.

RE-EXCHANGE AND DAMAGES UPON PROMISSORY NOTES.— OTHER CHARGES.

§ **1453.** Promissory notes are not, by the law merchant, within the rule entitling the holder to re-exchange, or damages in lieu thereof; but they may be drawn with the express provision that they are to be paid, with exchange on a certain place.[41] And it has been held that, when indorsed, they come within the reason and spirit of the rule; for the indorser of a promissory note is, in effect and in legal contemplation, the drawer of a bill upon a maker, who is regarded as its acceptor, and there is great force in this view.[42] But it does not seem to be in accordance with the doctrines of the law merchant, whose peculiar rules in respect to the subject are confined strictly to bills of exchange.

§ **1454.** While, ordinarily, promissory notes do not carry re-exchange, it is the doctrine of the English courts, and of some of the United States authorities, that when an amount is contracted to be paid in a certain State or country (say, for instance, the case of a note made in Virginia for one hundred pounds sterling, payable in London), the creditor ought to recover, wherever his suit may be brought, a sum equal to the debt due, with interest;

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41. Pollard v. Herries, 3 Bos. & P. 335; Grutacap v. Woulluise, 2 McLean, 584.

42. Howard v. Central Bank, 3 Kelly, 375 (1847). The note was made in Georgia, payable in New York. Thompson on Bills, 442–443.

and also as much as might be necessary to replace the money in the country where it ought to have been paid.[43] This doctrine has been forcibly expressed by Mr. Justice Story, in a case presenting the question,[44] and seems to be, as he has well observed, "founded on the true principles of reciprocal justice," but it has been denied by authorities of great weight.[45]

In a case where the payment was to be in Turkish piastres, but it did not appear where the contract was made or payable, it was held to be the settled rule, "where money is the object of the suit, to fix the value according to the rate of exchange at the time of the trial."[46] But Story says it is impossible to say that a rule laid down in such general terms ought to be deemed of universal application; and cases may easily be imagined which may justly form exceptions.[47]

The measure of damages for conversion of a bill or note is *prima facie* the amount of the note.[48]

§ 1455. It has been held in England that where the acceptor pays a part of the bill, and it is protested as to the residue, damages in lieu thereof are to be reduced proportionately, and allowed only on the amount unpaid.[49] And this view has been taken in several cases in the United States, it being considered that damages are not given as a liquidated arbitrary mulct, but as compensation for remission of an amount of money which should bear relation to that amount.[50] But it would seem that the drawer contracts that the bill shall be honored, and if not, that he will pay the re-exchange, or damages in lieu thereof, provided by statute, they being as fixed and determinate an obligation as the

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43. Grant v. Healey, 3 Sumn. 523; Smith v. Shaw, 2 Wash. C. C. 167; Lee v. Wilcocks, 5 Serg. & R. 45; Bank of Missouri v. Wright, 10 Mo. 719; Scott v. Bevan, 2 B. & Ad. 78; Cash v. Kennion, 11 Ves. 314; Edwards on Bills, 726–729; 1 Parsons on Notes and Bills, 664.

44. In Grant v. Healey, 3 Sumn. 523, Story, J., said: "But the rate of exchange is not recoverable on a note when the venue is laid in the State where suit is brought, and there is no count or allegation to cover the difference of exchange." Grutacap v. Woulluise, 2 McLean, 581.

45. Martin v. Franklin, 4 Johns. 124; Day v. Scofield, 20 Johns. 102; Adams v. Cordis, 8 Pick. 260; Lodge v. Spooner, 8 Gray, 166.

46. Lee v. Wilcocks, 5 Serg. & R. 48.

47. Story on Bills, § 150. **48.** McPeters v. Phillips, 46 Ala. 496.

49. Laing v. Barclay, 3 Stark. 38; Story on Bills, § 399; Chitty on Bills (13th Am. ed.) [*687], 768.

50. Bangor Bank v. Hook, 5 Greenl. 174; Warren v. Combs, 20 Me. 139.

debt itself.[51] The question may turn in some cases on the construction of the particular statute.

§ **1456.** It is not necessary for the plaintiff to show that he has paid the re-exchange; it suffices if he be liable to pay it; but if the jury find that there was not at the time any course of re-exchange between the two foreign places, then no re-exchange is recoverable.[52]

§ **1457. Provision.**— Besides the re-exchange, the drawer and indorser of a foreign bill which is dishonored, are liable also to the holder, in like manner, for the charges of protest, postage, and provision.[53] "With respect to provision," observes Mr. Chitty, "it is said by Pothier that it is usual for the holder of a bill to allow his agent, to whom he indorses it for the purpose of receiving payment for him, a certain sum of money, called 'provision,' at the rate of so much per cent., to recompense him not only for his trouble, but also, if such agent be a banker, for the risk he runs of losing the money which he is obliged to deposit with his correspondents in different places for the purpose of repaying his principal the amount of the money received on the bills. And it is said that one-half per cent. is not an unreasonable allowance.[54] When it is necessary for the holder to send notice by a special messenger, his reasonable expenses are also chargeable upon the parties liable for payment." [55]

§ **1458.** Interest is recoverable against all the parties to a bill according to the law of the place where their several contracts were entered into or to be performed. And neither interest, or re-exchange, or damages in lieu thereof, need be specially claimed in the declaration, as they flow out of the contract.[56] But charges of protest, postage, and other necessary expenses, can only be recovered upon a special count which covers them.[57] And protest

51. In Hargous v. Lahens, 3 Sandf. 21, Sandford, J., said: "The liability for damages becomes perfect on the return of the protested bill. A subsequent part payment by the acceptor can have no greater influence than a similar part payment by the drawer or any other party. It is as fixed and determinate an obligation as the debt represented by the sum expressed in the bill itself."

52. Chitty on Bills [*684], 765.

53. Chitty on Bills [*684], 765.

54. Chitty on Bills [*688], 770.

55. Pearson v. Crallan, 2 Smith's Rep. 404; Chitty, Jr., on Bills, 715.

56. Bank of the United States v. United States, 2 How. 711.

57. Kendrick v. Lomax, 2 Cromp. & J. 405.

must be alleged in order to the recovery of damages, as they accrue only on the protest.[58] Interest on a note payable on demand runs only from the time of demand, or suit brought;[59] and it makes no difference that the note was given for money received at the time it was made.[60] Upon a promise to pay "with interest" at a specified rate, interest runs from the date of the instrument, and not the date of maturity.[61]

And if the note run with a certain rate of interest until paid that rate, if legal, runs after maturity as before.[62]

The indorser of a note bearing annual interest is liable for the interest as it falls due before the maturity of the note; but he must be charged with liability by demand and notice.[63]

§ 1458a. Statutory and contract rates of interest.— Where a certain rate of interest is fixed by law, but a higher rate is permissive by contract, the question often arises as to what rate should be adjudged against the parties bound for payment after maturity of the debt. The better opinion is that the conventional or contract rate should prevail,[64] although there are a number of cases

58. Jordan v. Bell, 8 Port. 53.

59. Hunter v. Wood, 54 Ala. 71; Maxey v. Knight, 18 Ala. 300; Dodge v. Perkins, 9 Pick. 369; Brefogle v. Beckley, 16 Serg. & R. 264; Dillon v. Dudley, 1 Marsh. 66. And a demand may be inferred from entries in the books of a corporation, open to the drawee, its treasurer, which show a payment of interest to the payee. Linthicum v. Caswell, 19 App. Div. 541, 46 N. Y. Supp. 610; *In re* Estate of King, 94 Mich. 411, 54 N. W. 178.

60. Hunter v. Wood, 54 Ala. 71; Schmidt v. Limehouse, 2 Bailey, 276; Pullen v. Chase, 4 Pike, 210.

61. Campbell Press Co. v. Jones, 79 Ala. 475; Miller v. Cavanaugh, 99 Ky. 377, 35 S. W. 920, 59 Am. St. Rep. 463; Jonrolmon v. Ewing, 26 C. C. A. 23, 80 Fed. 604.

62. Augusta Nat. Bank v. Hewins, 90 Me. 255, 38 Atl. 156.

63. Mt. Mansfield Hotel Co. v. Bailey, 64 Vt. 151, 24 Atl. 136. And see Codman v. Vermont, etc., R. Co., 16 Blatchf. 165.

64. Cecil v. Hicks, 29 Gratt. 1 (1877). In this case the promise ran: "Six months after date to pay to H. or order the sum of $700, with interest at the rate of twelve per centum per annum after date." Held, the contract was legal at the time it was made, and was not affected by subsequent abolition of constitutional provision, authorizing contracts for 12 per cent., and that that rate of interest continued after maturity. See to like effect, Seymour v. Continental Life Ins. Co., 44 Conn. 300; Overton v. Bolton, 9 Heisk. 762; Pridgen v. Andrews, 7 Tex. 461; Thompson v. Pickel, 20 Iowa, 490; Hand v. Armstrong, 18 Iowa, 324; Phinney v. Baldwin, 16 Ill. 108; Briscoe v. Kenealy, 8 Mo. App. 77; Hopkins v. Crittenden, 10 Tex. 189; Kohler v. Smith, 2 Cal. 597; Cox v. Smith, 1 Nev. 171; Foulay v. Hall, 12 Ohio, 615; Pruyne v.

which take the opposite view.[65] It is clearly the case that the contract rate should run after maturity when the contract to pay the higher rate after maturity is express.[66] Where the rate of interest contracted to be paid is legal, the promisor may bind himself for a higher rate than that which runs by operation of law, to take effect at and continue after maturity as liquidated damages, and the increased rate is not a penalty against which equity will grant relief.[67] The rule applied by the United States Supreme Court is to give the contract rate up to maturity of the contract, and thereafter the rate fixed by law for cases in which parties have fixed none.[68] But it regards the question as one of local law, and follows State decisions in particular cases.[69]

In a Virginia case where a two-year bond bore no interest until after maturity, and then at the rate of eight per cent., it was held that the contract was not usurious in the inception and that the interest in excess of the legal rate, which was six per cent., should be rejected as a penalty.[70]

Milwaukee, 18 Wis. 568; Morgan v. Jones, 20 Eng. L. & Eq. 454. See Cromwell v. County of Sac, 96 U. S. (6 Otto) 61; Payne v. Caswell, 68 Me. 80; Andrews v. Keeler, 19 Hun, 87; Hume v. Mazelin, 84 Ind. 574; Macon County v. Rodgers, 84 Mo. 66; Borders v. Barber, 81 Mo. 636; Kimmell v. Burns, 84 Ind. 370; Shaw v. Rigby, 84 Ind. 375; Home Fire Ins. Co. v. Fitch, 52 Nebr. 88, 71 N. W. 940; Canadian, etc., Mortgage & Tr. Co. v. Keyser, 7 Tex. Civ. App. 475, 27 S. W. 280; Kendall v. Porter, 120 Cal. 106, 45 Pac. 333, 52 Pac. 143.

65. Duran v. Ayer, 67 Me. 145; Eaton v. Boissonault, 67 Me. 540; Perry v. Taylor, 1 Utah, 63; McComber v. Dunham, 8 Wend. 550; Ludwick v. Hutsinger, 5 Watts & S. 51; Henry v. Thompson, Minor, 209; Newton v. Kennerly, 31 Ark. 626; White v. Curd, 86 Ky. 192; Sherwood v. Moore, 35 Fed. 109.

66. Eaton v. Boissonault, 67 Me. 540. See Cecil v. Hicks, 29 Gratt. 1; Richardson v. Campbell *et al.*, 34 Nebr. 181, 51 N. W. 753, 33 Am. St. Rep. 633; Rose v. Munford, 36 Nebr. 148, 54 N. W. 129; Connecticut Mut. Life Ins. Co. v. Westerhoff, 58 Nebr. 379, 78 N. W. 724, 79 N. W. 731, 76 Am. St. Rep. 101.

67. Bane v. Gridley, 67 Ill. 388; Finger v. McCaughey, 114 Cal. 64, 45 Pac. 1004; Omaha Loan & Tr. Co. v. Hanson, 46 Nebr. 870, 65 N. W. 1058; Linton v. National Life Ins. Co., 44 C. C. A. 54, 104 Fed. 584 See Yndart v. Den, 116 Cal. 533, 48 Pac. 618, 58 Am. St. Rep. 200. A contract embodied in notes and mortgages securing the same, that deferred instalments of interest shall bear interest at a higher rate than that borne by the principal, is wholly illegal and void; and in such case no lawful contract for compound interest can be implied, and no compound interest can be allowed upon the foreclosure of the mortgage.

68. Holden v. Trust Co., 100 U. S. (10 Otto) 72.

69. Ohio v. Frank, 103 U. S. (13 Otto) 698; Cromwell v. County of Sac, 96 U. S. (6 Otto) 61, explaining and distinguishing Brewster v. Wakefield, 22 How. 118.

70. Ward v. Cornett, 91 Va. 676, 22 S. E. 494.

§ **1459. Costs.**— The owner or indorser who is compelled to pay the bill cannot charge the costs of suit to prior parties, for they arise as well from his breach of contract to pay the bill as from that of the principal party, and not from his indorsement.[71] But it has been said, that if he is an accommodation party, he may charge to the person accommodated, not only the face of the paper, but the costs of an action against him.[72]

§ **1460.** It has been held in California that damages on bills do not accrue from any stipulation in the contract, but are recoverable by mere operation of law; and that they are, therefore, a mere incident to the principal sued for, and where the latter cannot be recovered there can be no claim for the former. If the drawee should pay only the principal sum after dishonor of the bill, the right to demand damages against the drawer having already accrued, the liability of the drawer to pay them would remain. But if the holder surrender up the bill to the drawer, on payment of the principal by him it would operate as a waiver of all claim for damages, the evidence of the debt being surrendered up and canceled. And where there are two or more of a set of bills, the acceptance of payment of the principal of one would waive damages as to another of the set which had been presented, and refused payment, as all of the set constitutes in fact but one bill.[73] The result arrived at in the case cited seems correct; but the view taken that damages do not inhere in the contract is not in consonance with other authorities, nor, as we think, correct.[74]

71. Dawson v. Morgan, 9 B. & C. 618; Simpson v. Griffin, 9 Johns. 131.
72. 1 Parsons on Notes and Bills, 663.
73. Page v. Warner, 4 Cal. 395.
74. See *ante*, § 1423.

CHAPTER XLVI.

LOST AND DESTROYED BILLS AND NOTES.

SECTION I.

DUTIES AND RIGHTS OF THE LOSER, FINDER, AND HOLDER OF A LOST NEGOTIABLE INSTRUMENT.

§ **1461.** As soon as it is ascertained by the owner that he has lost a bill, note, or check, he ought instantly to give notice of the loss to all the parties thereto, and to warn them not to pay the amount to any one but to the loser or his order; and if an unaccepted draft be lost, he should advise the drawee not to accept the same.[1] For if the party liable to pay the amount should pay it at maturity of the instrument, *bona fide* and without notice of the loss to the holder, he discharges the debt, and the loss falls upon the loser, provided the instrument be payable to bearer or indorser in blank.[2] But the party liable will not be discharged if he pay the amount to the holder of the lost instrument before maturity, such a payment not being in the usual course of business.[3] Nor will he be discharged if he had notice of the loss,[4] unless the holder were a *bona fide* holder for value who could enforce payment.[5] In other words, the loser of a negotiable instrument has no claim on a payor who pays it when he is bound to do so, but generally has such claim when the payor pays it when he is under no compulsion of liability to do so, although without notice of the loss.[6]

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1. Edwards on Bills, 308; Chitty on Bills (13th Am. ed.) [*260], 296.

2. Lawson v. Weston, 4 Esp. 56.

3. Da Silva v. Fuller, Chitty on Bills (13th Am. ed.), 296; Wheeler v. Guild, 20 Pick. 545; *ante*, § 1233; Hinckley v. Union Pac. R., 129 Mass. 52.

4. Lovell v. Martin, 4 Taunt. 799.

5. 2 Parsons on Notes and Bills, 256; Bainbridge v. City of Louisville, 83 Ky. 285.

6. 2 Parsons on Notes and Bills, 256. In Hinckley v. Union Pac. R., 129 Mass. 52 (1880), it appeared that Hinckley was the owner of certain coupons of Union Pacific Railroad bonds, payable to bearer and falling due at the company's office in Boston, on the 1st March, 1876. They were stolen on the

§ 1462. The loser should also immediately notify the public of the loss or theft of a negotiable instrument, and warn all persons from trading for or negotiating it, by advertisement in the newspapers, by circulation of handbills, and by giving notoriety of the fact through whatever medium he may command. And such notice should describe the lost or stolen instrument in unmistakable terms. In this way the loser may be able to render the circumstance of loss so well known that no banker or other person will trade for the same, and no one become a *bona fide* holder without notice, who could demand payment. But the notice to the public will be unavailing unless it actually reach the holder before he receives the instrument;[7] although advertisement in a paper and general publicity of the fact of loss or theft would be evidence from which knowledge on his part might be presumed by a jury, when coupled with the circumstance of his taking or reading the paper or the like.[8]

§ 1463. Advertisement of loss not necessary to holder's recovery.— The law formerly viewed the advertisement of loss by the loser as a condition precedent to his right to recover of those who had taken the instrument, because it considered that if the holder received it negligently he acquired no title against the rightful owner; but, on the other hand, if the owner neglected to advertise the loss, his negligence counterbalanced that of the holder, and the maxim was applied, *potior est conditio possidentis.*[9] But the

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26th January, 1876, and on February 26, 1876, Hinckley notified the company of the theft, specified the numbers of the coupons, and requested protection. On April 18, 1879, he demanded payment of the stolen coupons from the company, offering to give a bond of indemnity. On 21st April the company's agent paid the coupons to certain bankers, who presented them without making any inquiry as to their title. The court held that the payment was bad, and that Hinckley could recover of the company on tendering a bond of indemnity. Lord, J., delivered a very instructive and interesting opinion which discusses the questions under consideration. See also Hinckley v. Merchants' Bank, 131 Mass., and § 1470.

7. Beltzhoover v. Blackstock, 3 Watts, 20; Mathews v. Poythress, 4 Ga. 287; Lawson v. Weston, 4 Esp. 56; Byles on Bills (Sharswood's ed.) [*362], 539.

8. Beckwith v. Corrall, 11 J. B. Moore, 335, where it is said: "If in this case the plaintiff had used due diligence, and had given proper notice of the loss of the bill in question, the defendants might have been presumed to have been apprised of that fact." But see Beltzhoover v. Blackstock, 3 Watts, 20.

9. Snow v. Peacock, 3 Bing. 411 (11 Eng. C. L.). See Strange v. Wigney, 6 Bing. 677 (19 Eng. C. L.); Beckwith v. Corrall, 11 J. B. Moore, 335; Byles

law on this subject is now entirely changed. Even gross negligence, unless accompanied with fraud or actual notice, does not vitiate the holder's title.[10] And advertisement of the loss by the owner is not necessary in any case to his recovery and prior claim against any party who has taken or paid the instrument (except to a *bona fide* holder without notice) with actual notice of the loss.[11] In short, the question of the actual holder's paramount right against the world is narrowed now to the single inquiry as to his *bona fides*.[12]

§ 1464. Loss of instrument no excuse for want of demand, protest, or notice.— The loss of a bill or note is no excuse for want of a demand, protest, or notice, because it does not change the contract of the parties, and the drawer and indorsers will be at once discharged if there be failure in respect of either the demand, protest, or notice.[13] This rule applies whether the bill has been accepted or not; for the loss of the instrument does not relax the duty of the holder to make the demand for acceptance within due season.[14] And it is well settled that demand, protest, and notice upon a copy where the original is lost is as effectual as if made upon the original itself.[15] But it does not seem absolutely requisite that any copy should be used.[16]

§ 1465. It is proper, as suggested by Marius, to accompany the protest of a lost bill with an offer of security against its appearance; and he expresses the opinion that if the acceptor refuses payment on such an offer, he will be liable for all damages, including re-exchange and charges.[17] But the better opinion is, that the drawee, or acceptor, has a right to insist on the production of

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on Bills (Sharswood's ed.) [*361], 538; Chitty on Bills (13th Am. ed.) [*253], 289.

10. See chapter XXIV, § 774 *et seq.*, vol. I.

11. Mathews v. Poythress, 4 Ga. 287; Snow v. Peacock, *supra*. In Louisiana the Code requires advertisement of loss as a prerequisite to recovery upon a lost draft or note.

12. See chapter XXIV, § 774 *et seq.*, vol. I.

13. *Ante*, § 1173; Thackray v. Blackett, 3 Campb. 164; Blackie v. Pidding, 6 M., G. & S. 196; Chitty on Bills (13th Am. ed.) [*262, 263], 299; Story on Bills, § 348; Edwards on Bills, 304, 305. But see Aborn v. Bosworth, 1 R. I. 401, as to delay; Kavanaugh v. Bank, 59 Mo. App. 540, citing text.

14. See *ante*, §§ 1173, 1174.

15. Hinsdale v. Miles, 5 Conn. 331; Dehers v. Harriott, 1 Show. 163; Thompson on Bills (Wilson's ed.), 204.

16. 2 Parsons on Notes and Bills, 261. 17. Marius, 80.

the bill, or legal proof of its loss in an action with indemnity furnished under supervision of a court before he is obliged to pay it.[18]

Neglect to offer indemnity to the maker or acceptor on demand of payment does not deprive the payee of his right of action, but it will prevent him from recovering costs, and will compel him to bear any special damages resulting from the neglect on his subsequent suit.[19]

§ 1466. In France it has long been established that the drawer and indorsers of a bill shall be compellable to give the holder of it another of the same tenor, in case the original bill, or the accepted part, has been lost.[20] In England, Mr. Chitty says: "No such general rule prevails in the case of inland bills." There is, however, a proviso in the statute of 9 & 10 Wm. III, c. 17, § 3, by which it is enacted "that in case any such inland bill shall happen to be lost or miscarried within the time limited for the payment of the same, then the drawer of the said bill is, and shall be, obliged to give another bill of the same tenor with the first given; the person to whom they are delivered giving security, if demanded, to the drawer to indemnify him against all persons whatsoever, in case the said bills so alleged to be lost or miscarried shall be found again."[21] And the same author adds:[22] "It should seem, that from the word 'such' the statute does not extend to all bills of exchange, but only to the particular bills therein mentioned, namely, such as are expressed to be for value received, and payable after date;[23] but it has been observed that the equity of the statute would comprehend indorsements also, and that the 3 & 4 Anne, c. 9, which gives the like remedies upon notes as were then in use on inland bills, would extend the statute of William to notes."[24] It is stated in Byles on Bills that the above-quoted provision "is not peculiar to the law of England, but agreeable to the mercantile law of other countries."[25]

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18. Thompson on Bills (Wilson's ed.), 204; Chitty on Bills (13th Am. ed.) [*263], 299; 2 Parsons on Notes and Bills, 262, note *i*.

19. Farmers' Bank v. Reynolds, 4 Rand. 186; Commercial Bank v. Benedict, 18 B. Mon. 307; Allen v. State Bank, 1 Dev. & B. Eq. 3.

20. Chitty on Bills (13th Am. ed.) [*263], 299.

21. Chitty on Bills [*263], 299. **22.** Ibid.

23. *Sed quære* (he says). See Walmsley v. Child, 1 Ves. Sr. 346, 347; Leftly v. Mills, 4 T. R. 170, 2 Campb. 215.

24. Powell v. Monnier, 1 Atk. 613; Walmsley v. Child, 1 Ves. Sr. 346, 2 Campb. 215.

25. Byles on Bills (Sharswood's ed.) [*366], 544.

§ **1467.** "In case of a foreign bill drawn in sets, if one part be lost by the drawee, or be by his mistake given to a wrong person, or otherwise disposed of, so that the holder cannot have a return of the bill, either accepted or not accepted, it is said that the drawee is bound to give to the holder, or to his order, a promissory note for payment of the amount of the bill on the day it becomes due, on the delivery of the second part, if it arrive in time; if not, upon the note; and that if the acceptor refuse to give the note, the holder should immediately protest for nonacceptance, and, when due, demand the money, though he have neither note nor bill; and that if payment be refused, a protest must be regularly made for nonpayment." [26]

§ **1468. The finder acquires no title** to a lost bill or note, and the owner, upon identifying it, and tracing it to his possession, may maintain trover against him.[27] And he may also maintain an action for money had and received for his use, if the finder has received payment of the bill or note.[28] The finder has no lien on the bill or note for his expenses on account of finding the same. But in action upon lost bills such expenses would probably be set off against the owner's claim.[29] When there is no question as to such expenses, he is liable for the full value of the bill or note.[30]

§ **1468a. A bailee who tortiously converts a negotiable instrument** may be sued either in trover, or for money had and received.[31] And trover lies also against the maker or drawer who

26. Edwards on Bills, 304, citing Beawes, 188.

27. Lucas v. Haynes, 1 Salk. 130; Adkin v. Blake, 2 J. J. Marsh. 40; Byles on Bills (Sharswood's ed.) [*365], 543.

28. Down v. Halling, 4 B. & C. 330. May likewise maintain an action of replevin. See Pritchard v. Norwood, 155 Mass. 539, 30 N. E. 80; Halbert v. Rosenbalm, 49 Nebr. 498, 68 N. W. 622.

29. 2 Parsons on Notes and Bills, 264, 265.

30. Holiday v. Sigil, 2 Car. & P. 176. As to rights of finder of bank note, see vol. II.

31. Bleaden v. Charles, 7 Bing. 246; Marston v. Allen, 8 M. & W. 494; Garlock v. Geortner, 7 Wend. 198. In Gilbert v. Walker, 64 Conn. 390, 30 Atl. 132, held, that where note deposited with collecting bank and by said bank sent to another institution, and by last bank collected and not remitted, that first bank is not liable to depositing owner of note for conversion, although owner might have action for damages for any negligence in respect to the collection of the note. For case when liable for conversion, see Lovell v. Hammond Co., 66 Conn. 500, 34 Atl. 511; Scollans v. Rollins, 173 Mass. 275, 53 N. E. 863, 73 Am. St. Rep. 284; Thomson v. Gortner, 73 Md. 474, 21 Atl. 371; Harlan v. Brown, 4 Ind. App. 319, 30 N. E. 928; Seehorn v. American Nat. Bank, 148 Mo. 256, 49 S. W. 886.

wrongfully seizes or detains the note or bill.[32] The measure of damages when the action is for the conversion of the negotiable note of a third person, is the amount of such note and interest, unless it is of less value by reason of payment of the same, insolvency of the maker, or some other lawful defense which legitimately impairs or diminishes its value, or affects its validity.[33] If the maker wrongfully destroy the note, he may be sued for conversion, and the payee may recover its face value, with interest, as damages, notwithstanding it be barred by the Statute of Limitations.[34]

§ **1468b. A thief, of course, acquires no title to a negotiable security** which he steals, nor can any one else who has notice of the theft; and the owner may follow the security itself, or its proceeds so long as they or their substitute can be identified or distinguished, in the hands of the thief or any assignee with notice.[35]

§ **1469. How title may be acquired from thief or finder.**— Although the robber, or finder of a negotiable instrument, can ac-

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32. Knight v. Legh, 4 Bing. 589; De la Chaumette v. Bank of England, 9 B. & C. 208; Reynolds v. French, 8 Vt. 85; Lamb v. Moberly, 3 T. B. Mon. 179. Where two persons owning a trust in common, agree upon their respective interests therein, that the draft shall be delivered to a third person to collect and divide the proceeds, and upon faith of such agreement, one of the owners indorses the draft, and afterward the other wrongfully obtains possession thereof with the indorsement thereon, and claiming to be thus sole owner, denies that such indorser has any interest therein, the action of such person constitutes such a wrongful appropriation of the draft, in violation of the contract of the parties, as to constitute a conversion. See Lawatsch v. Cooney, 86 Hun, 546, 33 N. Y. Supp. 775.

33. Thayer v. Manley, 73 N. Y. 308; Sedgwick on Damages (2d ed.), 488; Merchants & P. Nat. Bank v. Trustees, 62 Ga. 271; Halbert v. Rosenhalm, 49 Nebr. 498, 68 N. W. 622. See Nelson v. First Nat. Bank, 16 C. C. A. 425, 69 Fed. 798.

34. Outhouse v. Outhouse, 13 Hun, 130. The Supreme Court of New York, in the case of O'Connor v. Jones, 65 Hun, 48, 19 N. Y. Supp. 725, thus defines a conversion: "Where a note is placed in another's possession for a definite purpose, and any other use of it is made, it is a violation of trust, and it is this abuse of trust or breach of such lawful possession which constitutes a conversion. * * * The principle of this case (referring to Hines v. Patterson, 95 N. Y. 1) follows the rule laid down in many others, that a diversion of a note from the purpose for which it was given will constitute a conversion." Thomson v. Gortner, 73 Md. 472, 21 Atl. 371; Ruskin v. Tharpe, 88 Ga. 779, 15 S. E. 830.

35. Newton v. Porter, 69 N. Y. 133.

quire no title against the real owner, still if it be indorsed in blank, or payable or indorsed to bearer, a third party acquiring it from the robber, or finder, *bona fide*, for a valuable consideration, and before (but not so, if after)[36] maturity, without notice of the loss, may retain it as against the true owner, upon whom the loss falls, and enforce payment by any party liable thereon; upon the principle that whenever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it.[37] And it is now settled in England and in the United States that even gross negligence on the part of such *bona fide* holder in receiving the instrument does not impair his title, nothing short of *mala fides* impeaching it.[38] Not only does the *mala fide* transferee or holder of a negotiable instrument acquire no right to enforce payment, but the loser may at once hold him liable in an action of trover or assumpsit, or for money had and received.[39] But under a forged indorsement even a *bona fide* holder without notice acquires no title.[40]

§ 1470. Presumptions as to bona fide ownership of lost bills and notes.— Some doctrines of evidence remain to be stated. The legal presumption is that the holder of a note is not a finder or thief, but a *bona fide* transferee for value.[41] When, however, the loss by the original owner, or the theft from him, is proved, the burden of proof shifts, and the holder must show that he acquired

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36. See *post*, §§ 1505, 1506.

37. Murray v. Lardner, 2 Wall. 710; chapter XXIV, § 776, vol. I; Chitty on Bills [*254], 290. See Garvin v. Wiswell, 83 Ill. 216.

38. See chapter XXIV, on Rights of Purchaser of Negotiable Instruments, § 775 *et seq.*, vol. I; Story on Notes, § 382; Story on Bills, § 416; Chitty on Bills (13th Am. ed.) [*254, 255], 291–294. Although certificates of stock are classed as *quasi*-negotiable, the doctrine of the text is not applicable thereto. And it has been held in New York that the title of the true owner of a lost or stolen certificate of stock may be asserted against any one subsequently obtaining its possession, although the holder may be a *bona fide* purchaser. See Knox v. Eden Musee Co., 148 N. Y. 441, 42 N. E. 988, 51 Am. St. Rep. 700; Clark v. Evans, 13 C. C. A. 433, 66 Fed. 263.

39. Clarke v. Shea, 1 Cowp. 197; Smith v. Braine, 16 Q. B. 244; Mason v. Waite, 17 Mass. 560; Henderson v. Irby, 1 Speers, 43.

40. Colsen v. Arnot, 57 N. Y. 253; vol. I, § 677; Graves v. American Exch. Bank, 17 N. Y. 205; Roach v. Woodall, 91 Tenn. 206, 18 S. W. 407, 30 Am. St. Rep. 883, citing and approving text.

41. King v. Milsom, 2 Campb. 5; *ante*, § 812, vol. I.

it *bona fide* for value,[42] and before maturity, or from some one who had a perfect title.[43]

§ **1471. The original existence, genuineness, identity, and loss or destruction of the instrument must be proved,** if disputed in a suit against the maker, otherwise a copy will not be received in evidence.[44] And if evidence of destruction is not conclusive, the plaintiff must generally show that diligent search has been made for it in those places where if existing it would be most likely to be found.[45] The loss where alleged can seldom be proved by "direct and positive evidence," and, therefore, must, in almost all cases, be made out by circumstances.[46] "As it is generally occasioned by negligence, it is seldom capable of being given."[47] The courts will be less exacting as to the measure of proof of loss or destruction, where the maker is safe against any future claim of a *bona fide* transferee;[48] and more exacting where the circumstances are suspicious as against the plaintiff's claim, or the maker is not so protected and safe. Where the note is not negotiable the proof need not be so strong as where it is negotiable.[49] It is not necessary for a creditor to show that a debt evidenced by a lost paper is not paid.[50] When the note has been fraudulently destroyed by the holder, he can have no recovery upon it. It must be shown to have been destroyed through ignorance, accident, or mistake.[51]

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42. See chapter XXIV, on Rights of Bona Fide Holder or Purchaser, section VII, vol. I, § 815; Union Nat. Bank v. Barber, 9 N. W. 890, Iowa Sup. Ct., Oct., 1881; Macdonald v. Piper, 193 Pa. St. 319, 44 Atl. 455.

43. Hinckley v. Merchants' Bank, 131 Mass. 147. See Hinckley v. Union Pacific R. Co., 129 Mass. 52. See *ante*, § 1461, and note.

44. Farmers' Bank v. Reynolds, 4 Rand. 186; Palmer v. Logan, 3 Scam. 56; Grimes v. Talbot, 1 A. K. Marsh. 205; Jackson v. Jackson, 6 Dana, 257; Field v. Anderson, 55 Ark. 546, 18 S. W. 1038.

45. Palmer v. Logan, 3 Scam. 56; Herndon v. Givens, 16 Ala. 261; Viles v. Moulton, 11 Vt. 470; Foster v. Mackay, 7 Metc. 531. But in Indiana it has been held that it is not necessary to aver a search for a note. See Clark v. Trueblood, 16 Ind. App. 98, 44 N. E. 679; Bascom *et al.* v. Toner *et al.*, 5 Ind. App. 229, 31 N. E. 856.

46. Holiday v. Sigil, 2 Car. & P. 176; Greenstreet v. Carr, 1 Campb. 251; Lewis v. Petayvin, 16 Mart. 4.

47. Walmsley v. Child, 1 Ves. Sr. 341.

48. Swift v. Stevens, 8 Conn. 431; Bainbridge v. City of Louisville, 83 Ky. 285, citing the text; Grimes v. Hilliary, 150 Ill. 141, 36 N. E. 977.

49. Nagel v. Mignot, 8 Mart. 488. **50.** Bell v. Young, 1 Grant's Cas. 175.

51. McDonald v. Jackson, 56 Iowa, 643.

§ **1472. The plaintiff's affidavit** addressed to the court is admissible to prove the loss of a bill or note, and to lay the foundation for secondary evidence of its contents.[52] And the question of loss or destruction is in general for the court, and not the jury. In many of the States there are statutory regulations on this subject, and to them and the adjudicated cases interpreting them, reference should be made in any particular case. A duplicate protest may be offered in evidence, without producing the original bill, when it is proved to have been lost after protest.[53] And so may a duplicate notarial copy of the bill when the loss has been proved.[54] In respect to a note, it has been held that the notarial copy is not necessary as primary evidence of its contents when lost.[55] The copy of a lost bill or note sued on must be a full copy as to all parties.[56] It will not be presumed, but must be affirmatively shown, that the lost instrument was negotiable.[57] Neither an acknowledgment of the debt, or a promise to pay it, dispenses with necessity of producing the instrument, or accounting legally for its absence; for they import no more than the instrument itself, that is, an obligation to pay upon proper voucher or indemnity.[58]

§ **1473. In the case of a bill or note lost after suit brought at law,** the court is not ousted of its jurisdiction,[59] but the plaintiff may recover as in other cases of lost notes.[60] It will not be necessary for the plaintiff to offer indemnity against future liability, but the court, if asked, will stay execution until indemnity is fur-

52. See Katzenberg v. Lehman, 80 Ala. 513.

53. Usher v. Gaither, 2 Har. & McH. 457.

54. Wright v. Hancock, 3 Munf. 521; 2 Parsons on Notes and Bills, 307.

55. Renner v. Bank of Columbia, 9 Wheat. 581.

56. Bond v. Whitfield, 32 Ga. 215.

57. Wright v. Wright, 54 N. Y. 437; Lazell v. Lazell, 12 Vt. 443; Hough v. Barton, 20 Vt. 455; Youngling v. Kohlkass, 18 Md. 148; McNair v. Gilbert, 3 Wend. 344; Pintard v. Tackington, 10 Johns. 104; Edwards on Bills, 296, 302.

58. Vanauken v. Hornbeck, 2 Green, 178; Story on Notes, § 450.

59. Bliss v. Covington, 9 Dana, 265; 2 Parsons on Notes and Bills, 309. *Contra*, Chitty on Bills (13th Am. ed.) [*266], 303.

60. Abbott v. Striblem, 6 Iowa, 191; Jones v. Fales, 5 Mass. 101; Jacks v. Darrin, 3 E. D. Smith, 548; Weston v. Hight, 17 Me. 287; Renner v. Bank of Columbia, 9 Wheat. 581; Brown v. Messiter, 3 Maule & S. 281; Clarke v. Quince, 3 Dowl. 26; 2 Parsons on Notes and Bills, 309; Boteler v. Dexter, 20 D. C. Rep. 26.

nished.[61] In the case of a note which had been lost, and a copy sued on — but was found before the trial, and there produced — it was held that the suit at law could be sustained, though no indemnity was offered.[62]

Where a lost note was found before trial of an action at law, and it appeared that it was lost at the time of demand and notice, but this was not known to any of the parties, and no indemnity was tendered, it was held that recovery could be had against the maker and indorser.[63]

§ 1474. When a debtor remits his creditor a bill or note by post or otherwise, of his own motion, and it be lost or stolen, it is his own risk and loss; but if done by the creditor's direction, the loss falls on him.[64]

SECTION II.

SUIT AGAINST PARTIES TO A LOST NEGOTIABLE INSTRUMENT.

§ 1475. The owner who has lost a negotiable instrument, and has duly fixed the liability of the parties thereto by regular demand, protest, and notice, where they are necessary, may undoubtedly enforce payment by legal proceedings against such parties. But the authorities are not in harmony as to the proper form of procedure. In England, where the line of demarcation between legal and equitable jurisdiction is well defined, and strictly observed, it is well settled that the remedy upon a lost negotiable instrument can be sought only in a court of equity; which alone can require the plaintiff to secure the defendants by execution of sufficient indemnity, and administer fully the equities between the parties. If the instrument be payable to bearer, or indorsed in blank, it is obvious that it might reach the hands of a *bona fide* holder for value, without notice of the loss; and that if the parties liable were compellable to pay the amount thereof to the owner in a suit at law, without indemnity, such parties might, without the slightest negligence on their part, be forced to pay it a second time to such *bona fide* holder. The courts of law which proceed in accordance with established and unbending forms do not possess the elastic machinery necessary to require the owner to make

61. Bisbing v. Graham, 14 Pa. St. 14.

62. Smith v. Rockwell, 2 Hill, 482, Nelson, C. J.

63. Gilbert v. Dennis, 3 Metc. (Mass.) 495; Helzer v. Helzer, 187 Pa. St. 243, 41 Atl. 40.

64. Warwick v. Noakes, Peake N. P. 67. See *ante*, § 287, vol. I.

suitable indemnity against the loss which might thus occur, or the lesser loss produced by defending a suit brought by a party in actual possession of the instrument. And, therefore, such cases are remitted to the exclusive cognizance of courts of equity.[65]

§ **1476.** It is said also, that in strict law the defendant is entitled to the instrument on payment thereof, as his voucher of discharge, as he only covenanted to pay its value on its presentment.[66] And it is intimated to be an exercise of equitable jurisdiction to permit a recovery without its production. But the inability of courts of law to provide indemnity is the main ground of requiring a resort to equity.[67] When suit is brought against the indorser of a lost bill or note, the reasons for requiring a resort to equity apply with peculiar force.[68]

§ **1477. Whether suit at law is maintainable on a negotiable instrument lost after maturity.**— A distinction was attempted to be established at one time, in England, between the case of loss of the bill or note before it was due, and the loss of it after it had become overdue; it being contended that in the latter case, as the

65. Hansard v. Robinson, 7 B. & C. 90; Wain v. Bailey, 10 Ad. & El. 616; Price v. Price, 16 M. & W. 232; Pierson v. Hutchinson, 2 Campb. 211; Davis v. Dodd, 4 Taunt. 602; Mossop v. Eadon, 16 Ves. 430; Powell v. Roach, 6 Esp. 76; *Ex parte* Greenway, 6 Ves. Jr. 812; Mayor v. Johnson, 3 Campb. 324; Crowe v. Clay, 9 Exch. 604; Rolt v. Watson, 12 J. B. Moore, 510; Wright v. Maidstone, 1 Kay & J. 701; Kirby v. Sesson, 2 Wend. 551; Lazell v. Lazell, 12 Vt. 443; Commack v. Conrad, 30 La. Ann. 503 (when note lost before maturity); 2 Parsons on Notes and Bills, 288–289, 296; Story on Notes, §§ 445–450; Story on Bills, § 448; Chitty on Bills (13th Am. ed.) [*265], 301. (Brown v. Messiter, 3 Maule & S. 281; Glover v. Thompson, Ryan & M. 403; and Glynn v. Bank of England, 2 Ves. Sr. 38, are overruled.)

66. Hansard v. Robinson, 7 B. & C. 90; Hilder v. Seelye, 8 Barb. 408.

67. 2 Parsons on Notes and Bills, 289; *Ex parte* Greenway, 6 Ves. Jr. 812.

68. In Story on Promissory Notes, where the English doctrine is approved (see § 448), it is said: "When we come to the case of the indorser, who is called upon to pay the note, in default of payment by the maker, it will be difficult to find any solid reason upon which the holder can be entitled to recover against him, without the note being produced, upon any mere parol proof of the loss of it; since the indorser may or must thereby be put to great embarrassment in making out his own title against the maker, or against other parties, liable to him, without the production of the note. What right can the holder have to shift upon him the burden of proving the loss of the note? Or what adequate means can he have of preserving and commanding all the proof for future use, in case of future litigation? The English doctrine must, under such circumstances, apply to the indorser with double propriety and force." Tuttle v. Standish, 4 Allen, 481.

bona fide holder could only acquire it subject to all the equities between antecedent parties, the very circumstance of its staleness being constructive notice of defect of title, the owner should be entertained in a suit at law, without giving indemnity. But the contrary doctrine is well settled. For, although a bill or note ceases to be negotiable, in the most enlarged sense of that term, at its maturity, it still passes from hand to hand by indorsement or delivery; the actual holder is always presumed to have acquired it before maturity; a court of law cannot judge whether an indemnity is, or is not, sufficient; and, although the defendant may have a good defense against the subsequent holder, he may be put to risk, trouble, and expense in establishing it. And the courts of equity, therefore, maintain exclusive jurisdiction, even when the instrument has been lost overdue.[69]

§ **1478.** In the United States the decisions of the courts vary. In Massachusetts it has been held that an action can be maintained at law against the parties to a negotiable note lost before maturity, the court considering the idea that a court of law could not order or judge of the sufficiency of an indemnity "rather ideal than solid;" and that the objection that the action at law would not lie, because protest of the instrument could not be made, as equally applicable in a court of equity.[70] There is undoubtedly great force in the reasoning of this decision; but, as we think, the weight of authority and reason are both against it. And in those States where the distinction between law and equity is well preserved, the law may be regarded as settled to the contrary, in accordance with the English precedents.[71] In some of the States

69. Hansard v. Robinson, 7 B. & C. 90; Story on Notes, § 450; Story on Bills, § 307; Chitty on Bills (13th Am. ed.) [*266], 303; Byles on Bills (Sharswood's ed.) [*363], 541.

70. Fales v. Russell, 16 Pick. 315; Hinckley v. Union Pacific R., 129 Mass. 52. To same effect, see Union Bank v. Warren, 4 Sneed, 167; Meeker v. Jackson, 3 Yeates, 442; Bullett v. Bank of Pennsylvania, 2 Wash. C. C. 172; Anderson v. Robson, 2 Bay, 495; Bridgeford v. Masonville Co., 34 Conn. 546; Nagel v. Mignot, 7 Mart. 657, 8 Mart. 488; Brent v. Ervin, 3 Mart. (N. S.) 303; Lewis v. Petayvin, 16 Mart. 4; Bean v. Keen, 7 Blackf. 152; Welton v. Adams, 4 Cal. 37; Robinson v. Bank of Darien, 18 Ga. 65, 111; Commercial Bank v. Benedict, 18 B. Mon. 307; Freeman v. Boynton, 7 Mass. 483; Page v. Page, 15 Pick. 368; Willis v. Cresey, 17 Me. 9; O'Neill v. O'Neill, 123 Ill. 361; First Nat. Bank v. Wilder, 43 C. C. A. 461, 104 Fed. 187.

71. Moses v. Trice, 21 Gratt. 556; Rowley v. Ball, 3 Cow. 303 (1824); Posey v. Decatur Bank, 12 Ala. 802; Morgan v. Reintzel, 7 Cranch, 273; Hinsdale v. Bank of Orange, 6 Wend. 378; Thayer v. King, 15 Ohio, 242; Swift v.

the distinction between negotiable instruments lost before, and those lost after maturity, is recognized; and where lost after maturity, the right to an action at law, without making an indemnity, is maintained.[72] But the better opinion, sustained by high authority, is that the distinction is not well taken, and that equity must be resorted to.[73] If the bill or note be indorsed specially to a particular person its negotiation is restricted, as may be seen in another part of this work;[74] and in that case no indemnity is needful or required in the event of its loss.[75]

§ **1479.** The like rule, that an action at law is not maintainable, has been applied in England, where bills and notes, and bank notes (which are more frequently transmitted in halves), are divided and transmitted by post, and one half is lost and the other half arrives in safety. In such cases it has been considered that the holder of one half cannot recover at law, because the other half may have passed into the hands of another *bona fide* holder.[76] But the contrary view seems more reasonable, because the party who takes a half instrument does not acquire the whole, but only a part, which imposes inquiry upon him and opens all equitable defenses; and it has prevailed in the United States, the severed note being placed on the same footing as one destroyed.[77]

Stevens, 8 Conn. 431; Aborn v. Bosworth, 1 R. I. 401; Edwards v. M'Kee, 1 Mo. 123; Wofford v. Board of Police, 44 Miss. 579; Story on Notes, § 448; Story on Bills, § 348; Edwards on Bills, 295; 2 Parsons on Notes and Bills, 297, 298.

72. Thayer v. King, 15 Ohio, 242; Smith v. Walker, 1 Smedes & M. 432; Jones v. Fales, 5 Mass. 101; Chaudron v. Hunt, 3 Stew. 31; Brent v. Ervin, 7 Mart. 518; Mowrey v. Mast, 14 Nebr. 512; Schuttler v. King, 13 Mont. 226, 33 Pac. 938.

73. Moses v. Trice, 21 Gratt. 556; Rowley v. Ball, 3 Cow. 303; Chewning v. Singleton, 2 Hill, 371; Lazell v. Lazell, 12 Vt. 443; Hopkins v. Adams, 20 Vt. 407; Story on Notes, §§ 446, 450; Edwards on Bills, 297. See *ante*, § 1477; Mackey v. Mackey, 16 Colo. 134, 26 Pac. 554.

74. See §§ 692, 698.

75. Dudman v. Earl, 49 Iowa, 37; Palmer v. Carpenter, 53 Nebr. 394, 73 N. W. 690.

76. Mayor v. Johnson, 3 Campb. 324; Byles on Bills (Sharswood's ed.) [*365], 543; 1 Parsons on Notes and Bills, 231; Farmers' Bank v. Reynolds, 4 Rand. 168; Bank of Virginia v. Ward, 6 Munf. 169; Exchange Bank v. Morrall, 16 W. Va. 551 (*semble*); Story on Bills, § 448. See chapter L, on Bank Notes, section VI, *infra*.

77. Bank of United States v. Sill, 5 Conn. 106; Hinsdale v. Bank of Orange, 6 Wend. 378; Martin v. Bank of United States, 4 Wash. C. C. 253; Bullett v.

Notwithstanding these views, equity is generally admitted to have jurisdiction of lost instruments, even where there is concurrent jurisdiction at law.[78]

§ 1480. Tender of indemnity before payment can be required.— The parties liable upon a bill or note are entitled to its production and surrender before payment; but, as this is physically impossible when it has been lost, the owner should, and must, tender a sufficient indemnity in some form against any future claim, by a finder or holder, upon the lost instrument.[79] This indemnity is not, in the nature of things, as adequate a protection as the delivery of the instrument to the payor, but it approximates it as nearly as practicable. And it should be offered to every party of whom payment is demanded. The indorser and drawer should be tendered indemnity as well as the maker and acceptor of a lost note or bill, because, as the principals are not bound to pay without production of the instrument, or indemnity in case of loss, for that very reason payment ought not to be required of the drawer or indorser till the proper steps have been taken to secure them recourse against their principals. Besides, the indorser's and drawer's own liability upon the paper demands indemnity to himself, which should be given without delay, so that he may be in a situation to pay the demand at any time after notice, and look to the maker or acceptor.[80]

Bank of Pennsylvania, 2 Wash. C. C. 172; Armat v. Union Bank, 2 Cranch C. C. 180; Allen v. State Bank, 1 Dev. & Bat. Eq. 1; Bank of Virginia v. Ward, 6 Munf. 169; 2 Parsons on Notes and Bills, 312, 313; Redfield & Bigelow's Lead. Cas. 706; Edwards on Bills, 307. See chapter L, section VI.

78. Farmers' Bank v. Reynolds, 4 Rand. 186; Bank of Virginia v. Ward, 6 Munf. 166; Allen v. State Bank, 1 Dev. & Bat. Eq. 3; Stout v. Ashton, 5 T. B. Mon. 251; Smith v. Walker, 1 Smedes & M. Ch. 432; Irwin v. Planters' Bank, 1 Humphr. 145; Jackson v. Jackson, 6 Dana, 257; *Ex parte* Greenway, 6 Ves. Jr. 812; Mossop v. Eadon, 16 Ves. 433; Davis v. Dodd, 4 Taunt. 602.

79. Fisher v. Carroll, 6 Ired. Eq. 485; Meeker v. Jackson, 3 Yeates, 442; Freeman v. Boynton, 7 Mass. 483; Donelson v. Taylor, 8 Pick. 390; Fales v. Russell, 16 Pick. 315; Almy v. Reed, 10 Cush. 421; Exchange Bank v. Morrall, 16 W. Va. 546; 2 Parsons on Notes and Bills, 302; Edwards on Bills, 304; Bainbridge v. City of Louisville, 83 Ky. 285, citing the text; Means v. Kendall, 35 Nebr. 693, 53 N. W. 610; Burrows v. Million, 43 Mo. App. 79; First Nat. Bank v. Wilder, 43 C. C. A. 461, 104 Fed. 187.

80. In Smith v. Rockwell, 2 Hill, 484 (1842), Nelson, C. J., said: "Tender of indemnity should be made to both maker and indorser at the time of demand and notice, because, as the former is not bound to make payment without the production of the note, or indemnity in case of loss, for that very

§ 1481. Exceptions as to indemnity.—The rule requiring indemnity is applied by the courts of law, in which actions upon lost instruments are considered maintainable, as well as by courts of equity. But there are some cases in which the defendant can run no risk, and in which the plaintiff is, therefore, entertained in a court of equity or law without giving a bond of indemnity; that is, (1) where the note is not negotiable;[81] and the note will not be presumed to be negotiable in the absence of proof;[82] (2) where, though negotiable, it is payable to order and unindorsed, or has been specially indorsed;[83] (3) where the instrument is clearly shown to have been destroyed;[84] (4) where the lost instrument has been traced to the defendant's custody;[85] and (5) when it is shown that the defendant is protected by the Statute of Limitations against future liability.[86] In Louisiana

reason payment ought not to be required of the latter till the proper steps have been taken to secure his immediate recourse against his principal. Besides, the indorser's own liability upon the paper demands indemnity to himself, which should be given without delay, so that he may be in a situation to pay the demand at any time after notice, and look to the maker. Any prejudice he might suffer by reason of neglect on the part of the holder to give the necessary indemnity in either case, would, no doubt, afford ground for refusing to enforce payment against him on application to a court of equity for that purpose. The holder, therefore, should take the necessary steps with all reasonable diligence to secure a speedy resort to that court in behalf of the surety, as the consequences of delay would justly fall upon the holder, so far as the indorser, or any other party standing in that relation upon the paper, is concerned." Wilder v. Seelye, 8 Barb. 410; Edwards on Bills, 305.

81. Clark v. Reed, 12 Smedes & M. 554; Lazell v. Lazell, 12 Vt. 443; 2 Parsons on Notes and Bills, 303; Wright v. Wright, 54 N. Y. 437; Citizens' Nat. Bank v. Brown, 45 Ohio, 39, citing the text; Clay v. Gage, 1 Tex. Civ. App. 661, 20 S. W. 948, citing text; Hoil v. Rathbone, 98 Mich. 323, 57 N. W. 183.

82. Wright v. Wright, 54 N. Y. 437.

83. See *post*, § 1484, note; Hopkins v. Adams, 20 Vt. 407; Lazell v. Lazell, 12 Vt. 443; Citizens' Nat. Bank v. Brown, 45 Ohio, 39, citing the text. This case applies the doctrine of the text to the case of a lost certificate of deposit, payable to the order of the depositor and unindorsed by him. Mackey v. Mackey, 16 Colo. 134, 137, 26 Pac. 554, supporting the text. The court said: "If it (note) remained unindorsed, no right of action can ever pass to any holder of it, and upon proof of this fact a recovery at law without a bond of indemnity is always permitted. Filby v. Turner, 9 Colo. App. 202, 47 Pac. 1037. But before such recovery can be had in case note voluntarily destroyed, extraordinary proof of good faith required.

84. See *post*, § 1482.

85. See *post*, § 1483.

86. See *post*, § 1485.

it has been held that no indemnity will be required when it has been proved that the instrument was protested and returned to the plaintiff, because an indorsee would palpably acquire it subject to all precedent equities.[87] But this is against the better doctrine elsewhere stated.[88]

Professor Parsons, after stating the general principles of the subject, observes:[89] "In short, the American rule upon indemnity is simply that if it can be shown in any way that the defendant may be wrongfully injured by paying, he may require security, but only then. It has, nevertheless, in some jurisdictions been thought best, upon the whole, to require indemnity in all cases, whether the note be alleged to be lost or destroyed, notwithstanding its occasional hardship and inconvenience."[90]

In Massachusetts, where the maker of a lost negotiable note may be sued at law, indemnity being given, an indorser cannot be likewise sued, the distinction being taken that a bond of indemnity will not sufficiently protect him as it would the maker; and the plaintiff is, therefore, required to resort to equity.[91]

§ 1482. Exceptions to the general rule as to suit at law.— The rule is different as to nonnegotiable instruments, parties to which may be sued at law, and no indemnity is necessary. And there are several exceptions to the rule denying the right to sue at law when the lost instrument is negotiable. *First:* When the lost negotiable paper is proved to have been destroyed, for in that case it can never rise in judgment against the defendants. This view obtains now both in the United States[92] and in England,[93] although at one time in the latter country the doctrine prevailed

87. Brent v. Ervin, 15 Mart. 303, 3 Mart. (N. S.) 303, 7 Mart. 518.

88. See *ante*, §§ 1477–1478.

89. 2 Parsons on Notes and Bills, 304.

90. Welton v. Adams, 4 Cal. 37; Price v. Dunlap, 5 Cal. 583; Wade v. New Orleans, etc., Co., 8 Rob. (La.) 140.

91. Tuttle v. Standish, 4 Allen, 481. Hoar, J., delivered the opinion of the court, explaining and qualifying Jones v. Fales, 5 Mass. 101, and Renner v. Bank of Columbia, 9 Wheat. 581.

92. Hinsdale v. Bank of Orange, 6 Wend. 378; Scott v. Meeker, 20 Hun, 163; Moore v. Fall, 42 Me. 450; Des Arts v. Leggett, 16 N. Y. 582; Thayer v. King, 15 Ohio, 242; Bank of United States v. Sill, 5 Conn. 106; Moses v. Trice, 21 Gratt. 556; Hough v. Barton, 20 Vt. 455; Patton v. State Bank, 2 Nott & McC. 464; Branch Bank v. Tillman, 12 Ala. 214; Dean v. Speakman, 7 Blackf. 317; Wade v. Wade, 12 Ill. 89; Aborn v. Bosworth, 1 R. I. 401; 2 Parsons on Notes and Bills, 293, 294; Wells v. Wade, 20 Kan. 62.

93. Wright v. Maidstone, 1 Kay & J. 701; Woodford v. Whitely, Moody & M. 517; Clarke v. Quince, 3 Dowl. 26; Blackie v. Pidding, 6 C. B. 196;

that, notwithstanding the alleged destruction of the instrument, equity should be resorted to[94] for the several reasons: (1) that because he who pays a bill or note is entitled to receive it back as a voucher; (2) because it may have been negotiated before its destruction, and have become the property of another; and (3) because (as stated by Story)[95] "evidence which is merely presumptive may be offered of the destruction of the note, and then it may expose the maker to all the inconveniences of a subsequent second payment, if the note should subsequently reappear." But if it be shown that the plaintiff himself destroyed the note or bill, this right to recover would be affected. If done deliberately and voluntarily, he could not recover at all;[96] but if done by accident or mistake — of which clear proof should be required — he would then be entitled to recover.[97]

§ **1483.** *Second:* If the bill or note, payable to order and indorsed in blank, or payable to bearer, be traced to the defendant's possession after its loss, then the action at law would lie, because it could then never be negotiated save by his fault, and there would be no just ground for his demanding an indemnity.[98] In such a case it would not be necessary to notify the defendant to produce the paper, but simply to substitute a copy for it, and sue at law.[99] Equity, it has been held, would have no jurisdiction

Pierson v. Hutchinson, 2 Campb. 211; Chitty on Bills (13th Am. ed.) [*267, 268], 305; Chitty, Jr., on Bills, 776; 2 Parsons on Notes and Bills, 292–295.

94. Hansard v. Robinson, 7 B. & C. 90, Lord Tenterden.

95. Story on Notes, §§ 107, 108, 448.

96. Angel v. Felton, 6 Johns. 149; Van Anken v. Hornbeck, 2 Green, 178; Fisher v. Mershon, 3 Bibb, 527; Blade v. Noland, 12 Wend. 173; 2 Parsons on Notes and Bills, 293; Edwards on Bills, 303. But it has been held, that a wife, under the influence of strong feeling, induced by cruel and unmanly treatment by her husband, destroyed a note held by her against him, such destruction will not amount to a discharge and satisfaction of the debt where no fraudulent design is assigned. Schlemmer v. Schendorf, 20 Ind. App. 447, 49 N. E. 968.

97. Clarke v. Quince, 3 Dowl. 26.

98. Smith v. McClure, 5 East, 476; Knight v. Legh, 4 Bing. 589; Paterson v. Hardacre, 4 Taunt. 114; De la Chaumette v. Bank of England, 9 B. & C. 208, 2 B. & Ad. 385; Decker v. Mathews, 12 N. Y. 313; Murray v. Burling, 10 Johns. 172; Lamb v. Moberly, 3 T. B. Mon. 179; Buck v. Kent, 3 Vt. 99; Edwards on Bills, 303; Chitty on Bills (13th Am. ed.) [*265], 301; 2 Parsons on Notes and Bills, 293.

99. Garlock v. Goertner, 7 Wend. 198; McLean v. Hertzog, 6 Serg. & R. 154; Robinson v. Curry, 6 Ala. 842; Burton v. Payne, 2 Car. & P. 520; Bucher v. Jarratt, 3 Bos. & P. 143.

under such circumstances, as there would be a complete and adequate remedy at law.[1] Instead of suing the defendant upon the instrument itself, the plaintiff might sue in trover for its possession.[2] Thus, where the plaintiff placed a bill of exchange in his attorney's hands for collection, and it was left on his office table, and there was circumstantial evidence that the acceptor had abstracted it, it was left to a jury, after notice given to produce it, to say whether or not such was the case, and to give a verdict for the plaintiff without production of the bill.[3]

§ **1484.** *Third:* When the instrument is not payable to order or to bearer, or is payable to order and is unindorsed by the payee, or has been indorsed in full to a particular person (and remains unindorsed in blank or to bearer by the indorsee), for in such a case no legal title could pass so as to invest any one with the privileges of a *bona fide* holder in the usual course of business, and no indemnity would be necessary.[4] In England, this view, which obtains in the United States, was at one time adopted,[5] but was subsequently overruled, and the right of action at law confined to those cases in which the instrument was never negotiable.[6]

§ **1485.** *Fourth:* When the debt, at the time of contesting the action at law, would be barred by the Statute of Limitations, if a third party were to demand payment of the instrument, it is said that then also the action at law would be sustainable, because the defendant would not be exposed to danger.[7]

1. Cooke v. Darwin, 18 Beav. 60.

2. How v. Hale, 14 East, 274.

3. Smith v. McClure, 5 East, 477.

4. Rowley v. Ball, 3 Cow. 303; Pinterd v. Tackington, 10 Johns. 104; Branch Bank v. Tillman, 12 Ala. 214; Rogers v. Miller, 4 Scam. 333; Dean v. Speakman, 7 Blackf. 317; Depew v. Wheelan, 6 Blackf. 485; Moore v. Fall, 42 Me. 450; Price v. Dunlap, 5 Cal. 483; Cleveland v. Worrell, 13 Ind. 545; Hough v. Barton, 20 Vt. 455; Mossop v. Eadon, 16 Ves. 430; Long v. Bailie, 2 Campb. 214; 2 Parsons on Notes and Bills, 289–291; Edwards on Bills, 302; Chitty on Bills (13th Am. ed.), 305. But in the District of Columbia it has been held, that an action cannot be maintained upon a lost negotiable instrument which at the time of its loss was capable of transfer. See Butler v. Joyce, 20 D. C. 191, explaining and distinguishing Boteler v. Dexter.

5. Ralt v. Watson, 4 Bing. 273, 11 J. B. Moore, 510; Long v. Bailie, 2 Campb. 214.

6. Ramuz v. Growe, 1 Exch. 167, overruled in Clay v. Crowe, 8 Exch. 295, but re-established in Crowe v. Clay, 9 Exch. 604.

7. Moore v. Fall, 42 Me. 450; Torrey v. Foss, 40 Me. 74; 2 Parsons on Notes and Bills, 296, 303.

BOOK VI.

VARIETIES OF NEGOTIABLE INSTRUMENTS OTHER THAN BILLS AND NOTES.

CHAPTER XLVII.

COUPON BONDS.

SECTION I.

DEFINITION AND NATURE OF COUPON BONDS.

§ **1486.** The inventive spirit of modern finance and commerce, stimulated by the prodigious strides of internal improvements, has thrown into circulation a new species of security for money which has sprung at once to the front rank of negotiable instruments. This security is styled a "coupon bond." It is issued by the Federal Government,[1] by States,[2] by Territorial Governments, or the local divisions thereof,[3] by municipalities, by railroad, canal, and steamboat companies, and all manner of trading corporations. A vast portion of the wealth of the country is represented in "coupon bonds." The reports of all the courts have been filled for the last ten years with decisions respecting their

1. Ringling v. Kohn, 4 Mo. App. 444; Lafayette Sav. Bank v. Stoneware Co., 4 Mo. App. 276.

2. See chapter XVI, on the Federal and State Governments as Parties to Negotiable Instruments, vol. I, §§ 440, 446.

3. In National Bank v. County of Yankton, 101 U. S. (11 Otto) 133, Waite, C. J., said: "The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations." Held, therefore, that railroad-aid bonds of Yankton county, Dakota Territory, authorized by act of Congress, were valid. The restrictions of an act of Congress are binding on a Territory of the United States and its subdivisions; and if they be violated in the issue of bonds the bonds are void. Bonds issued in aid of a railroad would not come under authority to contract debt "necessary to the administration of internal affairs." Lewis v. Pima County, 155 U. S. 54, 57, 15 Sup. Ct. Rep. 22.

nature and uses. Every banker, merchant, capitalist, and business man is deeply interested in the law concerning them; and we shall endeavor here to summarize the settled principles which control their issue and negotiation.

§ 1487. Whether individuals, as well as corporations and States, may execute negotiable coupon bonds.— Since the seal does not affect the negotiability of such securities issued by corporations and States, there is no reason why the same principle should not be extended to them when issued by individuals. In a recent New York case, in the United States District Court, where individual coupon bonds were in suit, Blatchford, J., said: "I think that on the authority of the decision of the highest courts of this State, and of the United States, the bonds and coupons in question are negotiable instruments, although issued by an individual under his seal, and not by a corporation, and are not specialties so as to make them subject, in the hands of their assignee, to equities existing against their assignor. Although under seal, they were issued, as shown on their face, to secure the payment of money on time; and they contain on their face expressions showing that they are expected to pass from one to another by delivery. Therefore, the attributes of commercial paper attach to them. Their character cannot be controlled or varied by the mere fact that their maker put a seal after his name.[4] Such bonds and their coupons pass by delivery; a purchaser of them in good faith is not affected by want of title in their vendor, and the burden of proof on a question as to such good faith lies on the party who assails the possession. The evidence in this case shows that the Union Square National Bank became, to all substantial intents, the purchaser of these bonds and coupons in good faith for a full and fair consideration, in the usual course of business, and without notice of any possible defect in the title of their assignor. These views proceed on the assumption that the claim of the bank will absorb all dividends on the bonds and coupons, and apply only to the interest of the bank therein. If there shall be a surplus beyond paying the claim of the bank, questions as to the title and position of their assignor may become material." [5] There is no doubt that an individual may execute bonds and coupons, but whether or not

4. Citing Brainard v. N. Y. C. & H. R. R. Co., 25 N. Y. 496; White v. Vermont R. Co., 21 How. 575; Mercy County v. Hacket, 1 Wall. 83; Fairbanks v. Sargent, 46 N. Y. S. C. 592.

5. Simeon Leland in Bankruptcy, 6 Bened. 175.

they are negotiable instruments may depend upon the statutory provisions of the States wherein they are issued. Custom has fixed the negotiability of corporate securities of this character regardless of statutory tests; but it remains to be seen whether individual securities of the like kind will be generally considered upon the same footing.[6]

§ 1488. Description of coupon bonds.— A *coupon bond* is an instrument complete in itself, and yet composed of several distinct instruments, each of which is in itself as complete as the whole together. As originally issued, the "coupon bond" consists of — (1) an obligation to pay a certain amount of money at a future day; and (2), annexed to it is a series of coupons, each one of which is a promise for the payment of a periodical instalment of interest. The contract between the payor and the holder is contained in the bond, but the coupons are furnished as convenient instruments to enable the holder to collect interest without presenting the bond, by separating and presenting the proper coupon; and it also enables him to anticipate his interest by negotiating the coupon, which represents it, to another person, at any time before its maturity.

§ 1489. Definition and use of coupons.— The term "coupon" is derived from the French "*couper* — to cut," and it is defined by Worcester, in his dictionary, to signify "one of the interest certificates attached to transferable bonds, and of which there are usually as many as there are payments to be made; so called, because it is *cut off* when it is presented for payment." This is a succinct and clear definition, and indicates the design of the coupons. They are furnished as attached to the bond as evidence of successive periodical liabilities. They may be severed and negotiated before the maturity of the interest they represent, and thus pass as separate and independent securities,[7] like other commercial instruments. For in whosesoever hands they are, they are evidence

6. See *post*, § 107*a*.

7. Arents v. Commonwealth, 18 Gratt. 776; Clark v. Iowa City, 20 Wall. 584; Commissioners of Knox County v. Aspinwall, 21 How. 539; Thomson v. Lee County, 3 Wall. 327; Town v. Culver, 19 Wall. 84; City v. Lamson, 9 Wall. 477; Beaver County v. Armstrong, 44 Pa. St. 63; Clarke v. Janesville, 10 Wis. 136; Maddox v. Graham, 2 Metc. (Ky.) 56; Rose v. City of Bridgeport, 17 Conn. 243; Brainard v. N. Y. & H. R. Co., 25 N. Y. 496; Railway v. Cleneay, 13 Ind. 161; Evertsen v. National Bank of Newport, 4 Hun, 694, 5 Roh. Pr. 238; Spooner v. Holmes, 102 Mass. 503; Commonwealth v. Emigrant In-

of title to demand the interest on the bond, and they serve the purpose of vouchers when the interest is paid; but the contract to pay the interest is in the bond. Yet so intimate is the relation between it and the coupons, that legislative authority to issue bonds implies authority to issue coupons attached to them for interest.[8] "Coupons are substantially a minute repetition of what is contained in more concise terms in the bond. They are attached to the bond to be separated therefrom at the convenience of the holder, and to be thereafter negotiated as money, or the representative of money by simple delivery."[9] A legacy of a coupon bond carries with it the coupons though overdue.[10]

§ 1490. Coupons are either actually notes, or like them.— Coupons are more closely assimilated to promissory notes than to bank notes, bills of exchange, or checks, although in their formal wording they may sometimes less resemble them.

It is obvious from their nature and purpose that they are not intended for indefinite circulation like bank notes. They are made to facilitate the prompt payment of interest, and by no means designed to become a part of the currency of the country, although sometimes made use of as a substitute for money.

Therefore, even when drawn in the form of checks upon banks, they are regarded as due on the very day fixed for payment, and not as payable on demand like bank notes.[11] Nor are they like checks, which must be presented to the bank before the drawer can be sued, even when worded like them. They are the primary engagements of their payor, and if payable at a bank, they are simply like notes so payable; if sued upon without previous presentment at the bank, the defendant may show that there were funds to meet them, but otherwise must stand suit.[12]

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dustrial Association, 98 Mass. 12; National Exchange Bank v. Hartford R. Co., 8 R. I. 375; Langston v. S. C. R. Co., 2 S. C. 249; Clokey v. Evansville & Terre Haute R. Co., 16 App. Div. 304, 44 N. Y. Supp. 631; Townsend v. Col. Fuel & Iron Co., 16 App. Div. 314, 44 N. Y. Supp. 849; Atlantic Trust Co. v. Kinderhook & Hudson Ry. Co., 17 App. Div. 212, 45 N. Y. Supp. 492.

8. Arents v. Commonwealth, 18 Gratt. 773.

9. Evertsen v. National Bank, 4 Hun, 569.

10. Ogden v. Pattee, 149 Mass. 84.

11. Arents v. Commonwealth, 18 Gratt. 750. See *In re* Knaup, 144 Mo. 653, 46 S. W. 151, 66 Am. St. Rep. 435.

12. Virginia & Tenn. R. Co. v. Clay, MS., Special Ct. App. Va.; Trustees of I. I. Fund v. Lewis, 34 Fla. 424, 16 So. 325, 43 Am. St. Rep. 209.

§ **1490a. Differences between coupons and bills; not entitled to grace.**— Coupons are unlike bills of exchange, from which they differ in several distinctive respects: (1) They are not intended for acceptance when drawn upon a bank or banking-house. (2) They are not entitled to grace.[13] (3) In short, they are simply in effect promissory notes payable on the very day of their maturity without grace. It has, however, been recently held in New York, that coupons are entitled to grace like other commercial paper, in a case directly presenting that question; so that judicial views of that point are now contradictory.[14] As the coupons are mere separable fragments of the bond, we think the text contains the better view. And it is evident from the very nature of coupons, and of the bonds to which they are attached, that the reasons out of which the allowance of grace is made upon mercantile paper do not apply to them. They are instruments of investment and traffic, and not ordinarily used like bills and notes to effect exchanges.

§ **1491. Bonds and coupons are not bills of credit.**— Bonds and coupons, though designed to circulate as marketable commodities, are not bills of credit within the meaning of the United States Constitution.[15]

§ **1491a. Bonds and coupons secured by mortgage.**— A coupon is part of the debt covered by the mortgage which secures its bond, and the security of the mortgage inures to the assignee of the coupon.[16] Interest on the coupon is also covered by the mort-

13. Arents v. Commonwealth, 18 Gratt. 773; Chaffee v. Middlesex R. Co., 146 Mass. 233. *Contra*, Evertsen v. National Bank, 66 N. Y. 18, 4 Hun, 692. See §§ 1505, 1506; Alabama, etc., Co. v. Robinson, 6 C. C. A. 79, 56 Fed. 690.

14. In Evertsen v. National Bank, 66 N. Y. 22 (1876), Allen, J., said: "It is probably true that they are regarded and treated, as well by promisor as promisee, as payable at the day, and paid as if in terms payable without grace; but this cannot destroy the character or change the legal effect of the instruments, the interpretation of which is for the courts. It is only as negotiable commercial paper that the plaintiff, as a *bona fide* purchaser, could acquire a good title to the coupons from one having no title thereto; and he can only acquire such title by a purchase under the same circumstances that would give him a title to other commercial paper; and if there were no days of grace for the payment of these coupons, they could not be transferred so as to give a good title." See Cooper v. Town of Thompson, 13 Blatchf. 434, and Jones on Railroad Securities, § 323.

15. McCoy v. Washington County, 3 Wall. Jr. 386.

16. Miller v. Rutland, etc., R. Co., 4 Vt. 399; County of Beaver v. Armstrong, 44 Pa. St. 63; Haven v. Grand Junction R. Co., 109 Mass. 88; Union

gage.[17] All of the same series of bonds secured by a mortgage share ratably in the proceeds, and their holders should be paid *pari passu*, without regard to the amounts they paid for the bonds.[18] In New York it has been held, that the interest coupons upon the bonds of a railroad corporation, received by one who has advanced the money with which they are taken up, under an agreement with him that they were to be delivered to him uncanceled, as security for the advances, were valid securities in the hands of the holder; and that the mortgage upon the corporate property given to secure the bonds might be enforced for his benefit; but as between him and the bondholders who received the amount of their coupons in ignorance of the transaction, and supposing their coupons to have been paid, that the latter had the prior equities, and if, upon foreclosure and sale of the mortgaged property, the sum realized were insufficient to pay the face of the bonds, the holder of the coupons would not be entitled to share in the proceeds.[19]

Trust Co. v. Monticello, etc., R. Co., 63 N. Y. 314; Broadfoot v. Fayetteville, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610.

17. Gilbert v. W. C. V. M., etc., R. Co., 33 Gratt. 599.

18. *In re* Regent's Canal Iron Works Co., 3 Chan. Div. 43 (1876); Stanton v. A. & C. R. Co., 2 Woods C. C. 523; Hodge's Appeal, 84 Pa. St. 359 (1877), in which case it was also held that if the holder of the bond was entitled to share in proceeds, other holders would not set up any informality in the manner of its acquisition. In Ketchum v. Duncan, 96 U. S. (6 Otto) 671, it was held that coupons had no superior equity to that of the bonds from which they were taken, or the subsequently maturing coupons. Strong, J., said: "The mortgage in this case secures no priority to the coupons past due, nor to those first due. It places all bondholders or coupon holders on the same level." See also Pennock v. Coe, 23 How. 130. Following the doctrine stated in the text, it has been held in Ohio that where bonds are secured by a mortgage on the roadway and other property of the maker, executed to a trustee for that purpose, and are issued at different times, the lien of all the bonds outstanding, in the hands of *bona fide* holders for value, are equal in rank — the lien of each bond dating from the record of the mortgage that secured it, and not from the time it was issued. See Pittsburg, etc., Ry. Co. v. Lynde, 55 Ohio St. 23, 44 N. E. 596.

19. In Union Trust Co. v. Monticello & P. J. R. Co., 63 N. Y. 311, Earl, J., said: "Equity will keep the securities in life, in such cases, to promote the ends of justice; but not against any person having a superior equity." Harbeck v. Vanderbilt, 20 N. Y. 398; Robinson v. Leavitt, 7 N. H. 100; Miller v. Rutland, etc., R. Co., 40 Vt. 399; James v. Johnson, 6 Johns. Ch. 423; Haven v. Grand Junction R. Co., 109 Mass. 88. Where parts of bonds authorized by a mortgage has been illegally issued, and a part thereof legally issued, the holders of the bonds legally issued are entitled to the whole proceeds of the

If the mortgage securing bonds provides that in case of default a certain number in amount of bondholders may require the trustee to sell, and the same clause also provides that the bonds shall become one on default, it has been considered that a single bondholder could not precipitate the sale.[20]

§ **1491b. When consideration paid corporation for invalid bond may be recovered.**— When the transaction is not *malum in se*, and the parties are not *particeps criminis* in a violation of law, money received by a corporation, as well as by a person, for a security issued, may be recovered by the party paying it, if such security be void by reason of some technical defect or illegality.[21] And if a county should repudiate a bond given in payment of an antecedent debt, the original consideration would revive.[22] Where a city issued bonds falsely dated, and which were invalidated by a registry act in force at time of their issue, and received the money for them, a purchaser for value without notice, although not entitled to enforce the bond, it has been held, may recover the amount he paid with interest from time the obligation of the city to pay was denied.[23]

§ **1491c. The bonds of a county are debts** as fully as any other of its liabilities, and though issued in pursuance of a law which authorizes a levy of a special tax to pay them, " not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year," but contained no provision that only the funds so derived should be applied to their payment — in such a case any balance remaining due after applying the proceeds of the special tax to payment of the bonds, should be paid out of the general funds of the county.[24]

mortgaged property, so far as may be necessary to constitute their bonds, and not simply to an aliquot part of the said proceeds. See Badger v. Sutton, 30 App. Div. 294, 295, 52 N. Y. Supp. 16.

20. American Nat. Bank v. American Wood Paper Co., 19 R. I. 149–155, 32 Atl. 305, 61 Am. St. Rep. 746.

21. Thomas v. City of Richmond, 12 Wall. 354; Oneida Bank v. Ontario Bank, 21 N. Y. 496; Draper v. Springport, U. S. Sup. Ct., Jan., 1882, Morrison's Transcript, vol. III, No. 3, p. 432, Bradley, J.: "If valid, a recovery may be had on it; if invalid, a recovery may be had upon the original consideration."

22. Jackson County v. Hall, 55 Ill. 444.

23. Louisiana v. Wood, 102 U. S. (12 Otto) 294, affirming 5 Dill. C. C. 122. See Travelers' Ins. Co. v. Mayor of Johnson City, 40 C. C. A. 58, 99 Fed. 663.

24. United States v. County of Clark. 96 U. S. (6 Otto) 211; Hotchkiss v. Marion, 12 Mont. 218, 29 Pac. 821.

SECTION II.

THE FORMAL PARTS OF NEGOTIABLE BONDS AND COUPONS.

§ **1492.** The bond, with its coupons annexed, is usually printed upon a sheet of paper resembling in texture and style that used in the issue of currency. And the engraver's art is taxed, as a general thing, to invest the instrument with as much attraction to the eyes of capitalists as possible, and, as well, for the purpose of fortifying it against the ingenious imitations of the forger. The bond is usually large and showy in its lettering and its devices, while the coupons are usually small (as they must needs be on account of their number) and less ostentatious. They are generally arranged so as to be easily severable in the order of their maturity.

§ **1492a. The signature to the bonds and coupons** is generally written by the president of the corporation, or the chief executive of the municipality issuing them; and there is generally a counter signature by the secretary, or treasurer, or chief clerk of the corporation or municipality. The signature to the coupons, where the bonds are properly signed and sealed, need not be written, but may be printed in *fac-simile*, or otherwise;[25] and if the bonds be properly executed, it is no valid objection to the coupons that they are signed by only one of the officers who signed the bonds.[26]

§ **1493. Wording of coupons, and various forms.**— It is entirely immaterial in what words the coupons are expressed, provided they indicate by whom they are due, and the amount and time of payment. Sometimes they contain words of promise, making them substantially promissory notes in themselves. Thus, in Thomson v. Lee County, 3 Wall. 327, the form was: "Promise to pay to the bearer, at the Continental Bank, in the city of New York, forty dollars interest on bond No. ——." Sometimes they are in the form of a bill of exchange, or draft upon the treasury of the corporation issuing them. Thus, in Moran v. Commissioners

25. Pennington v. Baehr (Sup. Ct. Cal.), Cent. L. J. of St. Louis, vol. II, No. 6, p. 92, Feb. 5, 1875; Lynde v. County, 16 Wall. 6; McKee v. Vernon County, 3 Dill. C. C. 210; Dillon on Municipal Bonds, 12, note.

26. Thayer v. Montgomery County, 3 Dill. C. C. 389.

of Miami County, 2 Black, 722, the form was: "The treasurer of said county will pay the legal holder hereof one hundred dollars on the first day of September, 1857, on presentation thereof, being for interest due on the obligation of said county, No. 16, given to the Peru & Indianapolis Railroad Company." Sometimes they are in the form of a mere ticket, or token or "Interest Warrant," as it is called. Thus, in Woods v. Lawrence County, 1 Black (U. S.) 360, the coupon is in this form: "County of Lawrence — Warrant No. ——, for thirty dollars, being for six months' interest on bond No. ——, payable on the ——— day of ————, at the office of the Pennsylvania Railroad Company, in the city of Philadelphia." Sometimes they are in the form of a check upon a banking-house, as in Arents v. Commonwealth, 18 Gratt. 753, where the form was: "Duncan, Sherman & Co., of New York, will pay the bearer thirty dollars, the half-yearly interest on the Wheeling bond due 1 January, 1867." [27] Sometimes they are in the form of drafts or bills, but name no drawee, as in Mercer County v. Hubbard, 45 Ill. 140, where the form was: "Six per cent. stock, Mercer County, State of Illinois, Railroad Bond No. 20. Pay the bearer sixty dollars on the first day of July, 1863, interest to that date. John Cowden, Chairman of Board of Supervisors of Mercer County." However the forms may vary, the intent and legal effect are the same. In all of the cases the coupon is furnished as evidence of a sum due on the bond for interest at a particular time and place, and as authority to the holder to receive it. And whether the coupon be assimilated to a note, bill, or check, or be a mere ticket or warrant of amount, and place of payment, the holder may sue on it without producing the bond; but in all cases he receives a sum due and payable according to the terms of the bond.

§ **1494. Payee.**— The fact that no payee is mentioned in the coupon — an omission which would vitiate an ordinary promissory note — will make no difference, for it is sufficiently evident from the general character of the instrument that it was issued as the binding obligation of the payor to the purchaser of the bond, and was designed to be paid to him or to the bearer.[28] Nor will

27. See also Mayor, etc. v. Potomac Ins. Co., 58 Tenn. 298.

28. Woods v. Lawrence County, 1 Blackf. 360; Virginia & Tenn. R. Co. v. Clay (Special Ct. App. of Va., unreported). See §§ 1496, 1499.

it matter that it contains no words of promise. For while they may be necessary to constitute an ordinary promissory note, which without them may be a mere memorandum, the very form of the coupon clearly evinces an intention that it shall be an obligation to pay the amount designated, and the intention of the payor is what the law at all times seeks to enforce.[29] We have thus stated what seems to us the true theory as to coupons; but in a New York case, reported since the first edition of this work was in the press, variant views have been expressed.[30] The requisite certainty in designating the payee of negotiable instruments in general has been discussed in another portion of this work.[31]

§ 1495. The bond not necessarily sealed.—In common parlance the term "bond" is generally understood to signify a sealed instrument, in contradistinction to bills and notes of hand, which are unsealed, and need only the party's signature to their completion. And as a general rule a bond is a sealed instrument. But it does not follow that it always is or must be. It is certainly usual for the coupon bonds of States and corporations to be authenticated by the State or corporate seal; and it has been said by high authority that it is necessary they should be so authenticated, for the reason that they are executed by States and corporations.[32] But the old idea that States and corporations can only bind themselves under seal is utterly obsolete.[33] Their bills and notes are as binding as their sealed obligations. And it is now pretty well settled by authority, as indeed it is clear in reason, that it is not necessary to constitute a corporate obligation a bond that it should bear its seal. And the term "bond," as now applied to State and corporate obligations, is simply intended to signify a permanent investment security in contradistinction to those of an ordinary and current nature, such as bills of exchange and promissory notes. In New York, where the Legislature authorized the town of Genoa to issue "bonds," and instruments were issued with coupons attached, and formal in all respects except that they bore no seals, it was held that they were valid bonds not-

29. Woods v. Lawrence County, *supra*, and cases cited.

30. Evertsen v. National Bank, 66 N. Y. 19, 20. See *post*, § 1497.

31. *Ante*, § 99.

32. Mercer County v. Hackett, 1 Wall. 83.

33. Dinsmore v. Duncan, 57 N. Y. 577; Connecticut Mut. Life Ins. Co. v. Cleveland, etc., R. Co., 41 Barb. 22. See § 381, vol. I.

withstanding.[34] The like view has also prevailed in Maine.[35] And in Virginia, where no seals were discoverable in a certain number of the instruments issued by the Virginia and Tennessee Railroad Company styled bonds, and having coupons attached, while on others in the same suit the seals appeared, being distinctly impressed by an instrument on the paper, it was held that those without were as valid as those with seals, there being nothing in the act of Assembly which required that seals should be used.[36]

§ **1495a. Decisions of United States Supreme Court as to seals.**— In a case before the United States Supreme Court, it was said by Swayne, J.: "The principal securities delivered to the company were not bonds, because they were unsealed; but this is immaterial. The twelfth section, under which they were issued, expressly declared that those charged with the duty of subscribing may issue bonds bearing interest, or otherwise pledge the faith of the city."[37] But we do not think these remarks necessarily conflict with the views of the text.

In another and recent case before the United States Supreme Court, it appeared that the town of Springport, N. Y., was authorized to subscribe to a railroad, and issue bonds to pay for such subscription; and that the subscription was to be made by commissioners, who were to execute the bonds under their hand and seal. The bonds were duly executed with the exception that seals were omitted; and it was held that the requirement as to seals was merely directory and formal, and their omission immaterial.[38]

§ **1496. To whom payable.**— Coupon bonds are generally made payable to the party to whom they are issued, or bearer; and in

34. The People v. Mead, 24 N. Y. 124 (1861). The act provided that they should be executed under official signatures of supervisors and commissioners. Denio, J., said: "Whatever force there may generally be in the words 'bond or bonds,' which were used in the act, it is overcome by the explicit direction as to their execution which has been mentioned." The case shows in what sense the Legislature of New York used the word "bond." So in Conn. Mut. Life Ins. Co. v. Cleveland, etc., R. Co., 41 Barb. 22, the bonds had no seals. See Phelps v. Yates, 16 Blatchf. C. C. 192. So in Town of Solon v. Williamsburgh Sav. Bank, 42 N. Y. S. C. 1.

35. Augusta v. Augusta Bank, 56 Me. 176.

36. Virginia & Tenn. R. Co. v. Clay, Va. Spec. Ct. of App. (1873), unreported.

37. San Antonio v. Meharty, 96 U. S. (6 Otto) 315.

38. Draper v. Springport, U. S. Sup. Ct., Jan., 1882, Morrison's Transcript, vol. III, No. 3, p. 429.

such cases are transferable by delivery.[39] By the Supreme Court of Illinois it has been said: "It is the well-settled doctrine that bonds of this character are to be treated as commercial paper; and this court has held coupons attached to them to be negotiable by delivery only without indorsement." [40] Sometimes they are payable to order, and then pass by indorsement.[41] Sometimes they are payable to the holder, which term is regarded as equivalent to bearer. Any other equivalent expression manifesting an intention to make the instrument negotiable will suffice for that purpose.[42] Sometimes they are payable to a certain party, "or his assign;" and in that case the party's assignment is necessary to pass title. But if he makes an assignment in blank, the title then passes by delivery.[43] It has been held, however, that a county bond payable to a certain corporation "or its assigns" was not negotiable in Virginia.[44] A bond or coupon payable to "A. B. or bearer," is in legal effect payable to bearer, and passes

39. Morris Banking & Canal Co. v. Lewis, 1 Beasl. 323; Brookman v. Metcalf, 32 N. Y. 591; Eaton & H. R. Co. v. Hunt, 20 Ind. 457; Conn. Ins. Co. v. C. C. & C. R. Co., 41 Barb. 9; Carr v. Le Fevre, 27 Pa. St. 413; City of Kenosha v. Lamson, 9 Wall. 478; Mercer County v. Hackett, 1 Wall. 83; Roberts v. Bolles, 101 U. S. (11 Otto) 122; Johnson v. County of Stark, 24 Ill. 75; Supervisors of Mercer County v. Hubbard, 45 Ill. 139.

40. Town of Eagle v. Kohn, 84 Ill. 292; Roberts v. Bolles, 101 U. S. (11 Otto) 122.

41. City of Lexington v. Butler, 15 Wall. 295. See § 1499*b*.

42. *Ante*, vol. I, § 99; County of Wilson v. National Bank, 103 U. S. (13 Otto) 776; Porter v. City of Janesville, 3 Fed. 619.

43. Brainard v. New York, etc., R. Co., 25 N. Y. 496, 10 Bosw. 832.

44. In Cronin v. Patrick County, 4 Hughes, 529, Hughes, J., said that the bond "is under seal in the ordinary form of a single bill long used in Virginia. It is payable to the obligee or assignee, which latter is the old term used in bonds under seal." Upon the question of negotiability he said: "When there are no negotiable words in a bond, and it is not made payable to order or bearer, but is made payable to assigns, the use of that word imports non-negotiability, and is one of the distinguishing features of a bond intended to be nonnegotiable. In Virginia it is usual, in order to find the negotiable character of a bond or promissory note, to make it payable at a particular bank or place of business. No such place is named in the bonds under suit here, and they are payable, therefore, at the county of Patrick. Being dated in Virginia, executed in Virginia, and payable in Virginia, they can have no other character or attribute than is given to them by the laws of Virginia, and they cannot, therefore, be affected by any custom obtaining in New York. Had they been made payable in New York, then a custom of New York might have affected them; it cannot otherwise." In a subsequent case Bond, Circuit Judge, and Paul, District Judge, took the same view. See also De Voss v. City of Richmond, 18 Gratt. 338.

by delivery.[45] When payable to bearer the holder is regarded as in direct line of contract with the maker, so far as to enable him to sue in the United States courts when he is a citizen of another State.[46] Sometimes the place for the payee's name is left blank, in which case any holder may fill the space with his name, and thus make the instrument payable to himself; but until filled up it circulates by delivery as if payable to bearer.[47]

§ 1496a. In Virginia, where the act of Assembly made certain bonds "payable to the holder," it was held a sufficient indication that they were designed to be negotiable and payable to bearer. Joynes, J., said:[48] "The act of March 29, 1857, in terms makes the coupons 'transferable by delivery,' but does not in terms make the bonds themselves transferable by delivery. This, however, is implied in the provision that 'they shall be payable to the holder,' the obvious intent being that they shall be payable to such persons as may, from time to time, be the holder. These bonds, therefore, as well as the coupons, pass from hand to hand by delivery." But if the bond contained no negotiable words, it would not be deemed negotiable,[49] nor would the coupons without negotiable words, if detached from the bonds, be negotiable, as has been held in New York, where it was said of a coupon without such words, by Allen, J.: "In this, as in other contracts, its negotiability depends upon its terms; and the rule is, with certain exceptions not applicable to this case, that in instruments for the payment of money, if no one be designed as payee, either by name or as bearer, the instrument is not a promissory note. If these warrants are not promissory notes they are not negotiable. * * * There is no usage or custom proved that would give these warrants a negotiable character, even if custom and usage so recent as one applicable to these instruments would be, could change their legal effect." [50]

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45. See vol. I, § 633. It is different in Illinois by statute. See Garvin v. Wiswell, 83 Ill. 218, and vol. I, § 633, note; § 105, note.

46. Thompson v. Perrine, 106 U. S. 583. And see cases cited *ante*, §§ 10*a* and 729.

47. White v. Vermont, etc., R. Co., 21 How. 575; Preston v. Hull, 23 Gratt. 613. See § 1499; Memphis Bethel v. Bank, 101 Tenn. 130, 45 S. W. 1072, citing text; Lyon County v. Savings Bank, 40 C. C. A. 391, 100 Fed. 337.

48. Arents v. Commonwealth, 18 Gratt. 750.

49. City of Atchison v. Butcher, 3 Kan. 104.

50. Evertsen v. National Bank, 66 N. Y. 20, 22; McClelland v. Norfolk & So. R. Co., 110 N. Y. 475. See Jones on Railroad Securities, § 323.

§ **1496b. Amount payable.**— The amount payable must be certain in order to render the bond or coupon negotiable, the same rule in this respect applying to them as to other negotiable instruments.[51] This doctrine was well illustrated in a case before the United States Supreme Court, in which it appeared that a railroad company in Louisiana prepared certain bonds, promising to pay the bearer either £225 sterling in London, or $1,000 in New York or Louisiana, and declaring that the president of the company was authorized by his indorsement to fix the place of payment — a blank being left for insertion of such place. This blank was never filled; and the bonds were seized and carried off during the Confederate war, and sold, with past-due coupons, for a small consideration, in New York. The court held, that in the absence of the required indorsement, the uncertainty in the amount payable deprived the bonds of negotiability; and the defect being patent, the purchaser could not be regarded as a *bona fide* holder without notice.[52]

§ **1497. Place of payment — whether it may be outside of the State.**— It is not unusual for the bonds of municipal and other corporations to specify a particular banking-house as a place of payment, and still more frequently is it the case that such a place of payment is specified in the coupons. The city of New York, as the great monetary and commercial center of the country, is often selected for purposes of convenience as the place of payment, and a particular banking-house designated.

But the Supreme Court of Illinois has held that, unless specially authorized so to do by the Legislature of the State, a municipal corporation cannot bind itself to pay its indebtedness at any other place than its treasury.[53] The Supreme Court of the United

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51. Vol. I, § 53.

52. Parsons v. Jackson, 99 U. S. (9 Otto) 434. See Jackson v. Vicksburg, etc., R. Co., 2 Woods C. C. 141; § 1501.

53. Prettyman v. Tazewell County, 19 Ill. 406; Pekin v. Reynolds, 31 Ill. 530; People *ex rel.*, etc. v. Tazewell County, 22 Ill. 151, Walker, J., saying: "It is objected that the county had no right to issue bonds or other obligations, payable at any other place than at the county treasury. This court held, in the case of Prettyman v. The Board of Supervisors of Tazewell County, 19 Ill. 406, that it was only by virtue of the act of February, 1857, authorizing the county courts of each county which had subscribed to the Tonica and Petersburg road to make the interest of their bonds payable at any place they might choose. That act only applied to subscriptions to that particular road, and can have no application to any other. And it was there

States has, however, taken a different view; and where bonds of the city of Muscatine were made payable in New York city, and objection was made that it was unauthorized, Swayne, J., said: "It was according to general usage to make such bonds and coupons payable in the city of New York. It added to the value of the bonds, and was beneficial to all parties. No legal principle forbids it. The power of a municipal corporation to make any contract does not depend upon the place of performance, but upon its scope and object." [54] This case, which seems to us correct, has been followed in subsequent ones by the same tribunal, in which it has enforced coupons payable beyond State limits. And the like course has been pursued by some of the State courts in suits on the coupons of railroad companies.[55] In Illinois, where the corporation exceeds its authority by making its securities payable outside of the State, it has been held that, although that particular provision would be invalid, nevertheless the se-

held that the county court had no power to issue bonds payable in the city of New York, for want of express authority by legislative enactment. States, counties, and corporations, created for public convenience only, are not required to seek their creditors to discharge their indebtedness, but when payment is desired the demand should be made at their treasury. That is the only place at which payment can be legally insisted upon, and it is the only place where the treasurer can legally have the public funds with which he is intrusted. To authorize the auditor to draw his warrants on the treasurer, payable in a sister State or in a foreign country, necessarily imposes an obligation on the creditor to provide funds at that place to meet them. And his duties requiring him at the treasury, would require the employment of agents, the transmission of the funds at a risk of loss and at a considerable expense in charges, insurance, and discounts, which are not incident to its payment at the treasury. And the same reasons apply with equal force to cities, counties, and public corporations of a similar character. The Legislature has conferred no such general power upon such bodies, and in its absence they have no power to make their indebtedness payable at any other place than at their Treasury." Johnson v. County of Stark, 24 Ill. 75; Sherlock v. Winneteka, 68 Ill. 530.

54. Thompson v. Lee County, 3 Wall. 338 (coupons of Lee County, Iowa, payable at the Continental Bank, New York); Gelpcke v. Dubuque, 1 Wall. 178 (coupons of the city of Dubuque, payable at the Metropolitan Bank, New York); City of Kenosha v. Lamson, 8 Wall. 478; Lynde v. County of Winnebago, 16 Wall. 13; City of Lexington v. Butler, 14 Wall. 289 (coupons of Lexington, Ky., payable in New York); Skinker v. Butler County, 112 Mo. 332, 20 S. W. 613; Cairo v. Zane, 149 U. S. 122, 13 Sup. Ct. Rep. 803.

55. Conn. Mut. Life Ins. Co. v. Cleveland, etc., R. Co., 41 Barb. 9. The coupons were issued by the Columbus, Piqua, and Indiana R. Co. of Ohio, and were payable at the office of the Life and Trust Co., in New York city.

curity would be binding and payable at its treasury, in like manner as if it had been so expressed upon its face. Walker, J., said: "If this coupon had not contained the language, 'at the city of New York,' it would have been a legal instrument, strictly conforming to all the requirements of the law authorizing counties to issue evidences of indebtedness. If, then, this unauthorized portion of the coupon were rejected, it would be in conformity to the law, and for the purpose of upholding it the law will reject that portion as surplusage." [56]

§ 1498. Delivery.— Delivery is essential to the validity of a coupon bond, as it is to every contract for the payment of money. If an incomplete bond be stolen, without any delivery preceding, it has been held that it would be void in all hands.[57] But if completed, it is conceived that the law would be different.[58] The name of the payee may be left blank for the purpose of having the blank filled by the name of the holder.[59] If the coupons refer to the bonds to which they were attached, and purport to be for interest thereon, the purchaser of them is chargeable with notice of all that the bonds contain.[60]

§ 1499. Bonds blank as to payee, and right of holder to sue in Federal courts.— In the United States Supreme Court, where suit was brought upon coupon bonds of a railroad company payable in blank, no payee being named, and it appeared that they were issued in Massachusetts to a citizen of that State, and passed through several intervening holders to the plaintiff, a citizen of New Hampshire, who inserted his name as payee, and brought suit on the bonds in the Circuit Court of the United States, it was objected that, as the bonds were issued to a citizen of Massachusetts, and as they were not negotiable, or, if negotiable, were not payable to bearer, the plaintiff could not sue in the Federal Court. But the United States Supreme Court held, that "it

56. Johnson v. County of Stark, 24 Ill. 91; Skinker v. Butler County, 112 Mo. 332, 20 S. W. 613.

57. Ledwick v. McKim, 53 N. Y. 315. See Redlick v. Doll, 54 N. Y. 236; and chapter XXVI, §§ 841, 842, vol. I; 1 Parsons on Notes and Bills, 114; § 840, note 1, vol. I.

58. Chapter XXVI, § 1, p. 630, vol. 1.

59. See chapter V, § 145, note 3, vol. I; and chapter XXVI, §§ 843, 844, vol. I.

60. McClure v. Township of Oxford, 94 U. S. (4 Otto) 429; Silliman v. Fredericksburg, etc., R. Co., 27 Gratt. 119.

was the intention of the company, by issuing the bonds in blank, to make them negotiable and payable to the holder as bearer, and that the holder might fill up the blank with his own name, or make them payable to himself or bearer, or to order. In other words, the company intended by the blank to leave the holder his option as to the form or character of negotiability without restriction. * * * Until the plaintiff chose to fill up the blank, he is to be regarded as holding the bonds as bearer, and he held them in this character until made payable to himself or order. At that time he was a citizen of New Hampshire, and, therefore, competent to bring the suit in the court below." [61]

§ 1499a. Figures denoting number of bond are no part of it.— Frequently the bond and its coupons are marked by the party, with figures denoting their number in the particular series to which they belong. The number is put upon them for the convenience and protection of the maker, but it does not enter into, or in anywise affect, the agreement embodied in them. The purchaser of the bond or coupon has nothing to do with it, and need give it no heed. Therefore, an alteration or erasure of the number is immaterial, and will not affect the rights of the holder of the instrument.[62]

§ 1499b. Transfer by indorsement and by delivery; sales of bonds. — We have seen already that negotiable bonds may be transferred by indorsement, or by delivery, as the case may be.[63] It has been held that a railroad company, which has transferred by indorsement a negotiable bond issued by a municipal corporation, is bound as an indorser of negotiable paper, if its liability be fixed by a proper demand and notice. It has been suggested that such a liability is not fairly within the contemplation of the parties to an indorsement of a bond which may have twenty or even forty years to run; but the reply is made that "whatever force this view might have in case of an indorsement of

61. White v. Vermont, etc., R. Co., 21 How. 575, quoted and approved in Preston v. Hull, 23 Gratt. 613. See §§ 1494, 1496; Lyon County v. Savings Bank, 40 C. C. A. 391, 100 Fed. 337.

62. City of Elizabeth v. Force, 29 N. J. Eq. 591, overruling 28 N. J. Eq. 587; Berdsell v. Russell, 29 N. Y. 220; Commonwealth v. Industrial Emigration Savings Bank, 98 Mass. 12. See *ante*, § 86. The same doctrine applies to bank notes. Note Holders v. Bank of Tennessee, 16 Lea, 46; Wylie v. Mo. Pac. R. Co., 41 Fed. 623.

63. *Ante*, § 1496.

such an instrument by an individual, it has none in case of a corporation which does not die." [64] The transferrer by delivery of a negotiable bond engages that it is the genuine article it purports to be; and if it turn out to be forged, the transferee may recover the purchase money from the transferrer, without any offer to return the bond.[65] The sale of bonds is elsewhere considered.[66]

§ **1499c.** Where bonds of a corporation, as prepared for issue and sale, promise payment in lawful money, and as such are guaranteed by a State, a stipulation that they shall be paid in coin subsequently indorsed upon them by the corporation in accordance with the requirement of purchasers from it, is supplementary and subsidiary, and binds only the corporation.[67]

SECTION III.

THE NEGOTIABILITY OF COUPON BONDS, AND THE RIGHTS AND DUTIES OF THE HOLDER OR PURCHASER.

§ **1500. As to the negotiability of coupon bonds.**— There no longer remains a shadow of doubt that the coupon bonds of the United States, of the several States, and of municipal and other corporations, when expressed in negotiable words, are as negotiable to all intents and purposes as bills of exchange or promissory notes. They have been so declared by the courts of highest resort in many of the States,[68] and by a series of decisions of the

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64. Jones on Railroad Securities, § 348; Bonner v. City of New Orleans, 2 Woods, 135.

65. Smith v. McNair, 19 Kan. 330; First Nat. Bank v. Peck, 8 Kan. 660. See § 731 *et seq.*

66. §§ 1533, 1534.

67. Wallace v. Loomis, 97 U. S. (7 Otto) 147.

68. Arents v. Commonwealth, 18 Gratt. 773; Virginia & Tennessee R. Co. v. Clay (Special Court of Appeals of Virginia, 1873, not reported); Railway v. Cleneay, 13 Ind. 161; Clark v. Janesville, 10 Wis. 136; Mills v. Jefferson, 20 Wis. 50; Clapp v. County of Cedar, 5 Clarke, 15; Barrett v. County Court, 44 Mo. 197; Ringling v. Kohn, 4 Mo. App. 63; Lafayette Sav. Bank v. Stoneware Co., 4 Mo. App. 276. See Johnson v. County of Stark, 24 Ill. 75; Craig v. City of Vicksburg, 31 Miss. 216; Chapin v. Vt. & Mass. R. Co., 8 Gray, 575; Society for Savings v. City of New London, 29 Conn. 174; National Exch. Bank v. Hartford, etc., R. Co., 8 R. I. 379; Virginia v. Ches. & Ohio Canal Co., 32 Md. 501; Connecticut Mut. Life Ins. Co. v. Cleveland, etc., R. Co., 41 Barb. 9; Spooner v. Holmes, 102 Mass. 503; Hinckley v. Union Pacific R. Co., 129 Mass.

Supreme Court of the United States.[69] A solitary decision here or there to the contrary may be found,[70] but as authority it would doubtless weigh as lightly before any State tribunal which has not yet determined the question as a decision of Lord Holt against the negotiability of a promissory note would now weigh in Westminster Hall. If the bond contain no negotiable words, it is not negotiable.[71]

§ **1501.** In the United States Supreme Court,[72] a case was heard from Pennsylvania, in which the obligatory part of the bonds ran: "*Know all men by these presents,* that the county of Mercer, in the Commonwealth of Pennsylvania, is indebted to the Pittsburgh & Erie Railroad Company, in the full and just sum of $1,000, which sum of money said county agrees and promises to pay twenty years after the date hereof to the said

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52; Morris Canal, etc., Co. v. Fisher, 1 Stockt. 667; Langston v. South Carolina R. Co., 2 S. C. (N. S.) 248; Weith v. City of Wilmington, 68 N. C. 341; San Antonio v. Lane, 32 Tex. 405; Bank of Rome v. Village of Rome, 19 N. Y. 24; Seybel v. National Currency Bank, 54 N. Y. 288; Evertsen v. National Bank of Newport, 4 Hun, 695, 66 N. Y. 15; Consolidated Association v. Avegno, 28 La. 552; City of Elizabeth v. Force, 29 N. J. Eq. 587; Durant v. Iowa County, 1 Woolw. C. C. 72; State *ex rel.* Plock v. Cobb, 64 Ala. 128; Blackman v. Lehman, 63 Ala. 519; Reid v. Bank of Mobile, 70 Ala. 210, citing the text; Mason v. Frick, 105 Pa. St. 162; Texas Banking Co. v. Turnley, 61 Tex. 368, citing the text; First Nat. Bank v. Mount Tabor, 52 Vt. 87; American Nat. Bank v. American Wood Paper Co., 19 R. I. 149, 32 Atl. 305, 61 Am. St. Rep. 746; Strauss v. United Telegraph Co., 164 Mass. 130, 41 N. E. 57; Chase Nat. Bank v. Faurot, 149 N. Y. 532, 44 N. E. 164, citing text; Rockville Nat. Bank v. Citizens' Gas-Light Co., 72 Conn. 576, 45 Atl. 361.

69. White v. Vermont & Massachusetts R. Co., 21 How. 575; Moran v. Commissioners of Miami County, 2 Blackf. 722; Mercer County v. Hackett, 1 Wall. 83; Gelpcke v. City of Dubuque, 1 Wall. 175; Meyer v. Muscatine, 1 Wall. 382; Murray v. Lardner, 2 Wall. 110; Thompson v. Lee County, 3 Wall. 227; Supervisors v. Schenck, 5 Wall. 772; Aurora City v. West, 7 Wall. 82; Commissioners of Manor v. Clark, 94 U. S. (4 Otto) 279; Morgan v. United States, 113 U. S. 491, and many other cases. See next chapter.

70. Diamond v. Lawrence County, 37 Pa. St. 353. "We will not treat these bonds as negotiable securities. On this ground we stand alone. All the courts, American and English, are against us." The Supreme Court of Peennsylvania now holds coupon bonds of corporations to be negotiable. Mason v. Frick, 105 Pa. St. 162; Gibson v. Lenhart, 101 Pa. St. 522. See also Bunting v. Camden, etc., R. Co., 81 Pa. St. 254; County of Beaver v. Armstrong, 44 Pa. St. 63.

71. City of Atchison v. Butcher, 3 Kan. 104.

72. Mercer County v. Hackett, 1 Wall. 83.

Pittsburgh & Erie Railroad Company, *or bearer,* with interest at the rate of six per centum per annum, payable semi-annually, etc.," and was signed under the corporate seal of the county.

The court sustained their negotiability, and said Grier, J.: "This species of bond is a modern invention, intended to pass by manual delivery; and their value depends mainly upon this character. Being issued by States and corporations, they are necessarily under seal.[73] But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usages of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone; and this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer, and gives a bond with negotiable qualities, and by this means obtains funds for the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer."

Thus we see that the usages of trade, overriding the ancient doctrines of the common law, engrafted the quality of negotiability upon these instruments — exhibiting a lively illustration of the progressive spirit of commercial law which is continuously moulding itself to conform to the wants of society and the transactions of business men. Where the bonds are for an uncertain sum — as, for instance, for so many pounds sterling, if payable in London, or for so many dollars, if payable in New York or New Orleans, and the coupons are of like purport,— neither bonds nor coupons will be negotiable, the uncertain element depriving them of their otherwise negotiable character.[74]

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73. This is not a correct statement of the law. The seal may be omitted except where the corporation can only contract by its charter by a sealed instrument. *Ante,* § 1485; Chase Nat. Bank v. Faurot, 149 N. Y. 532, 44 N. E. 164, citing text — holding that negotiability is not destroyed by a corporate seal attached to the instrument.

74. Jackson v. Vicksburg, etc., R. Co., 2 Woods C. C. 141. See *ante,* § 1496*a;* McClelland v. Norfolk So. R. Co., 110 N. Y. 475.

§ 1501a. Whether statutory tests of negotiability apply to bonds and coupons.— In some of the States there are peculiar requisites to the negotiability of notes, as in Virginia, for instance, where it is necessary that they be payable at a bank.[75] But coupons of bonds, and the bonds themselves, when issued by corporations with negotiable words, are there deemed negotiable instruments, although not conforming to the statutory test.[76] In Alabama it is provided by statute that "all bonds, bills, or notes, except those issued to circulate as money, payable to anything or bearer, to any fictitious person or bearer, or to bearer only, must be construed as payable to the person from whom the consideration moved; if payable to an existing person or bearer, must be construed as payable to such person or order."[77] This statute has been there held to apply to municipal bonds payable to bearer, and it was adjudged that they were not negotiable unless indorsed.[78]

§ 1501b. Registered bonds.— It would seem from the few decisions that exist on the subject, that registered bonds are not negotiable; and that they are in fact registered so as to make them transferable in such manner as to exclude equities between the original parties only by registry upon the books of the corporation issuing them.[79] The provision in a bond that it may be

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75. See *ante*, §§ 90, 1497.

76. Arents v. Commonwealth, 18 Gratt. 750; *ante*, § 1496.

77. Code of Alabama of 1876, § 2098.

78. Blackman v. Lehman, 63 Ala. 547.

79. In Cronin v. Patrick Co., 4 Hughes, 529, Hughes, J., said: "There are two classes of bonds known to the stock markets, essentially distinct in character and intended to be so. They are negotiable bonds and registered bonds. Those of the first class, the negotiable bonds, are made payable to some payee or his order, in which case they are transferable by indorsement and delivery, or they are made payable to payee or bearer, or simply to bearer, in which case they are transferable by mere delivery. The other class, the registered bonds, are made payable to an obligee or his assigns, and they are only transferable by regular assignment on books of the obligor. The bonds of Patrick county, now under suit, are in the familiar form of the single bill, are executed under seal, and made payable to an obligee and 'assigns.' Although they are nonnegotiable, there is nothing on the face of the bonds proper to indicate that they were put out as registered bonds and were intended by the county of Patrick to be transferred on books kept by the county for that purpose; but on the same sheet with each bond proper is an annex in the form of a power of attorney, signed by the president of the railroad company to which the bond is made payable and to which it was

" registered and made payable by transfer only on the books of the company " issuing it, does not of itself make it nonnegotiable by the customary methods of transfer. Such provisions are frequently inserted in bonds, and they entitle the holder to convert them into registered bonds, and to render them transferable only upon the books of the company.[80]

§ 1502. The holder or purchaser of coupon bonds.— The rights of the purchaser or holder of a coupon bond are determined by the same principles which control those of the purchaser or holder of a bill or note. If a party proposes to purchase a bond from the State or corporation issuing it, he should inquire in the *first* place whether or not the State or corporation has legal power to issue it. For as the bill or note of an infant or lunatic is utterly void, so is any instrument issued by a State or corporation when it has no legal power to do so. In the *second* place, the negotiator should see that the person undertaking to represent the State or corporation is authorized to do so. For if the instrument be in fact a forgery, and never had any legal inception as an obligation,

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delivered, describing these bonds as 'registered bonds,' and in each case containing a blank to be filled with the name of an attorney empowered to transfer the bond from the railroad company to an assignee. This paper indicates the intention of the original parties to the bond and fixes its character to be a registered as distinguished from a negotiable bond. The plaintiff in this suit, in receiving the bond with this annexed paper, in the original form, received it as a 'registered bond.' It is true that he afterward so erased words and filled up blanks as to have changed the character of the annexed paper from a power of attorney authorizing some agent to transfer the bond as a registered bond to himself into an assignment of the bond directly to himself; but this alteration could not obliterate the fact that the bond was originally issued as a registered bond. Independently, however, of this fact, the bond is nonnegotiable, and the plaintiff holds it either as a registered bond or as a bond which has come to him by mere assignment." See also De Voss v. City of Richmond, 18 Gratt. 338; Scollans v. Rollins, 173 Mass. 275, 53 N. E. 863, 73 Am. St. Rep. 284.

80. Savannah & Memphis R. Co. v. Lancaster, 62 Ala. 563; Reid v. Bank of Mobile, 70 Ala. 210; Manhattan Sav. Inst. v. New York Nat. Bank, 42 App. Div. 147, 49 N. Y. Supp. 51, holding that municipal coupon bonds are negotiable, notwithstanding the fact that the corporate seal of the municipality is affixed and the bonds registered in the city clerk's office; and further, that when such bonds are stolen from the purchaser, a person who in good faith advances money upon the bonds before their maturity, and while the blanks in them are still unfilled, obtains a good title to them. See Am. Nat. Bank v. Am. Wood Paper Co., 19 R. I. 149, 32 Atl. 305, 61 Am. St. Rep. 746; Dickerman v. Northern Trust Co., 176 U. S. 181, 20 Sup. Ct. Rep. 311.

it cannot be enforced, because the forgery was so skilfully performed as to deceive an innocent purchaser.[81] In the *third* place, the competency of principal and agent being established, he should see that all the formalities of a public character required by law are pursued in the execution and issue of the instrument. And then in the *fourth* place, let him see that there is no usury in his purchase.

§ 1503. Gross negligence does not vitiate holder's title.— Where the holder has acquired the bond or the coupons under such circumstances as constitute him a *bona fide* holder for value and without notice, he is entitled to full protection against all equities and frauds which would have affected the title of a previous holder.[82] And it is well settled that gross negligence in the purchaser will not alone vitiate the holder's title.[83] In a leading case decided by the Supreme Court of the United States, it appeared that Lardner owned Camden and Amboy Railroad coupon bonds, payable to bearer, which were deposited in an iron safe in Philadelphia. On the night of 23d of February, 1859, they were stolen, and on the morning of the next day, the 24th, they were negotiated to Murray, a broker, at his office on Wall street, New York. Lardner sued Murray in detinue for the bonds, but was cast in the suit before the Supreme Court of the United States.

Mr. Justice Swayne, who delivered the opinion, disapproved Gill v. Cubitt, 3 Barn. & Cres. 466, and quoted with approval Goodman v. Harvey, 4 Ad. & El. 870, in which Lord Denman said: "I believe we are all of opinion that gross negligence only would not be a sufficient answer, where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides,* but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed

81. Maas v. M. K. & T. R. Co., 11 Hun, 13. So, where marks of cancellation were fraudulently erased from a paid certificate of indebtedness, which was afterward put in circulation and passed into the hands of a *bona fide* holder for value before maturity, the corporation was held not liable thereon. District of Columbia v. Cornell, 130 U. S. 655.

82. Kerr v. City of Corry, 105 Pa. St. 282; Copper v. Mayor, etc., 44 N. J. L. 634; Spencer v. Mobile, etc., R. Co., 79 Ala. 586, citing the text; Gilman v. New Orleans, etc., R. Co., 72 Ala. 585; Saloy v. Bank, 39 La. Ann. 93; Fairex v. Bier, 38 La. Ann. 509; Wylie v. Missouri Pacific R. Co., 41 Fed. 623; Town of Ontario v. Hill, 31 App. Div. 324, 52 N. Y. Supp. 328; Memphis Bethel v. Bank, 101 Tenn. 130, 45 S. W. 1072.

83. See chapter XXIV, section I, p. 767, vol. I.

to the plaintiff, without any proof of bad faith in him, there is no objection to his title;" and considering that the good faith of Murray in the transaction had not been impeached, decided in his favor. He cited also Swift v. Tyson, 16 Pet. 1; Goodman v. Simonds, 20 How. 343; and Bank of Pittsburg v. Neal, 22 How. 96; and declared it to be the settled law of the court in respect to commercial papers —

1. That possession and title are one and inseparable.

2. The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.

3. The burden of proof lies on the person who assails the right claimed by the party in possession.[84] It should be observed, and

84. Murray v. Lardner, 2 Wall. 110. In his opinion it was said by Mr. Justice Swayne: "What state of facts should be deemed inconsistent with the good faith required, was not settled by the earlier cases. In Lawson v. Weston, 4 Esp. 56, Lord Kenyon said: 'If there was any fraud in the transaction, or if a *bona fide* consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover; but to adopt the principle of the defense to the full extent stated, would be at once to paralyze the circulation of all the paper in the country, and with it all its commerce. The circumstance of the bill having been lost might have been material, if they could bring knowledge of that fact home to the plaintiffs. The plaintiffs might or might not have seen the advertisement; and it would be going a great length to say that a banker was bound to make inquiry concerning every bill brought to him to discount; it would apply as well to a bill for £10 as for £10,000.' In the later case of Gill v. Cubitt, 3 B. & C. 466, Abbott, C. J., upon the trial, instructed the jury, 'That there were two questions for their consideration: First, whether the plaintiff had given value for the bill, of which there could be no doubt; and, second, whether he took it under circumstances which ought to have excited the suspicion of a prudent and careful man. If they thought he had taken the bill under such circumstances, then, notwithstanding he had given the full value for it, they ought to find a verdict for the defendant.' The jury found for the defendant, and a rule *nisi* for a new trial was granted. The question presented was fully argued. The instruction given was unanimously approved by the court. The rule was discharged, and judgment was entered upon the verdict. This case clearly overruled the prior case of Lawson v. Weston, and it controlled a large series of later cases. In Cook v. Jadis, 5 B. & Ad. 509, the action was brought by the indorsee of a bill against the drawer. It was held that it was 'no de-

remembered in considering this subject, that the cases in which estoppels and waivers are held binding upon the corporation issuing coupon bonds, are those in which the bonds are in the hands of *bona fide* holders for value without notice of defects, and irregularities in their issue. Such defects and irregularities, if material, are available against a holder who paid nothing, or who

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fense that the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained; the defendant must show that the plaintiff was guilty of gross negligence.' In Backhouse v. Harrison, 5 B. & Ad. 1098, the same doctrine was affirmed, and Gill v. Cubitt was earnestly assailed by one of the judges. Patterson, J., said: 'I have no hesitation in saying that the doctrine laid down in Gill v. Cubitt, and acted upon in other cases, that a party who takes a bill under circumstances which ought to have excited the suspicion of a prudent man cannot recover, has gone too far, and ought to be restricted. I can perfectly understand that a party who takes a bill fraudulently, or under such circumstances that he must know that the person offering it to him has no right to it, will acquire no title; but I never could understand that a party who takes a bill *bona fide*, but under the circumstances mentioned in Gill v. Cubitt, does not acquire a property in it. I think the fact found by the jury here, that the plaintiff took the bills *bona fide*, but under circumstances that a reasonably cautious man would not have taken them, was no defense.' In Goodman v. Harvey, 4 Ad. & El. 870, the subject again came under consideration. Lord Denman, speaking for the court, held this language: 'I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff, without any proof of bad faith in him, there is no objection to his title.' A final blow was thus given to the doctrine of Gill v. Cubitt. The rule established in this case has ever since obtained in the English courts, and may now be considered as fundamental in the commercial jurisprudence of that country. In this country there has been the same contrariety of decisions as in the English courts, but there is a large and constantly increasing preponderance on the side of the rule laid down in Goodman v. Harvey. The question first came before this court in Swift v. Tyson. Goodman v. Harvey, and the class of cases to which it belongs, were followed. The court assumed the proposition, which they maintain to be too clear to require argument or authority to support it. The ruling in that case was followed in Goodman v. Simonds, and again in Bank of Pittsburg v. Neal. In Goodman v. Simonds the subject was elaborately and exhaustively examined, both upon principle and authority. That case affirms the following propositions: The possession of such paper carries the title with it to the holder. 'The possession and title are one and inseparable.' The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicions in the mind of a prudent man, or gross negligence

had notice of them,[85] unless, indeed, he sustains himself through the perfected title of an antecedent holder.[86]

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on the part of the taker, at a time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it. The rule may, perhaps, be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike involve the result of bad faith. They are the same in effect. Where there is no fraud there can be no question. The circumstances mentioned, and others of a kindred character, while inconclusive in themselves, are admissible in evidence; and fraud established, whether by direct or circumstantial evidence, is fatal to the title of the holder. The rule laid down in the class of cases of which Gill v. Cubitt is the antitype, is hard to comprehend and difficult to apply. One innocent holder may be more or less suspicious under similar circumstances at one time than at another, and the same remark applies to prudent men. One prudent man may also suspect where another would not, and the standard of the jury may be higher or lower than that of other men equally prudent in the management of their affairs. The rule established by the other line of decisions has the advantage of greater clearness and directness. A careful judge may readily so submit a case under it to the jury that they can hardly fail to reach the right conclusion. We are well aware of the importance of the principle involved in this inquiry. These securities are found in the channels of commerce everywhere, and their volume is constantly increasing. They represent a large part of the wealth of the commercial world. The interest of the community at large in the subject is deep-rooted and wide-branching. It ramifies in every direction, and its fruits enter daily into the affairs of persons in all conditions of life. While courts should be careful not so to shape or apply the rule as to invite aggression or give an easy triumph to fraud, they should not forget the considerations of equal importance which lie in the other direction. In Miller v. Race, Lord Mansfield placed his judgment mainly on the ground that there was no difference in principle between bank notes and money. In Grant v. Vaughn, he held that there was no distinction between bank notes and any other commercial paper. At that early period his far-reaching sagacity saw the importance and the bearings of the subject. The instruction under consideration in the case before us is in conflict with the settled adjudications of this court." See also Morgan v. United States, 113 U. S. 491; Boughner v. Meyer, 5 Colo. 75, citing the text; Morris Canal & Banking Co. v. Fisher, 1 Stockt. Ch. 667; Mechanics' Bank v. New York & New Haven R. Co., 13 N. Y. 599; Moran v. Commissioners, 2 Blackf. 722; and *ante*, § 770 *et seq.*, vol. I; City of Elizabeth v. Force, 29 N. J. Eq. 587.

85. Chambers County v. Clews, 21 Wall. 321; National Life Ins. Co. v. Board of Education, 10 C. C. A. 637, 62 Fed. 778.

86. See vol. I, § 803 *et seq.*; Commissioners v. Bolles, 94 U. S. (4 Otto) 109; Commissioners v. Clark, 94 U. S. (4 Otto) 279; McClure v. Township of Oxford, 94 U. S. (4 Otto) 432; Morgan v. United States, 113 U. S. 491; Suffolk Sav. Bank v. Boston, 149 Mass. 365.

§ 1504. Views of the English courts as to the negotiability of investment securities.— In England there is a growing disposition to favor the negotiability of instruments similar to the coupon bonds of this country, but they are not yet placed upon so clear and stable a footing.

In 1811, the Court of King's Bench having expressed strong doubt whether a *bona fide* purchaser for value of bonds of the East India Company would be protected against a former owner, from whom they had been obtained by fraud or theft, upon the ground that being choses in action they were not assignable at law, and that the purchaser acquired no legal title,[87] Parliament immediately enacted that such bonds should be assignable and transferable by delivery, and that the money secured by, and the property in, them should be absolutely vested in the assignee at law as well as in equity.[88] Soon after, it was held that an exchequer bill passed by delivery, and that the property vested in a *bona fide* holder.[89] Subsequently, the same doctrine was applied to Prussian bonds, payable to the holder,[90] and, later still, it was left to a jury to determine whether Neapolitan bonds, with coupons, passed in like manner.[91] More recently, in the House of Lords, it has been held (affirming the judgment of the Court of Exchequer Chamber, which accorded with the previous judgment of the Court of Exchequer), that the scrip of a foreign government, issued by it on negotiating a loan (which scrip promised to give to the bearer, after all instalments should have been duly paid, a bond for the amount paid, with interest), is, by the custom of all the stock markets of Europe, a negotiable instrument, and passes by mere delivery to a *bona fide* holder for value; that the English law follows this custom, and any person taking it in good faith obtains a title to it, independent of the title of the person from whom he took it.[92] And the like views were taken as to scrip of a banking company, which certified that the bearer would be entitled to be registered as the holder of certain of its shares.[93]

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87. Glyn v. Baker, 1 East, 510.

88. 51 George III, chap. 64.

89. Wookey v. Pole, 4 B. & Ald. 1.

90. Gorgier v. Melville, 3 B. & C. 45.

91. Lang v. Smith, 7 Bing. 284.

92. Goodwin v. Roberts, 1 App. Cas. 476 (1876), 16 Moak's Eng. Rep. 119 (affirming judgment of the Court of Exchequer Chamber), L. R., 10 Exch. 337 (1875), 14 Moak's Rep. 591; and of the Court of Exchequer, L. R., 10 Exch. 76 (1875), 12 Moak's Rep. 525. The same doctrine is held in Rumball v. Metropolitan Bank (1877), 2 Q. B. Div. 194, 20 Moak's Eng. Rep. 276.

93. Rumball v. Metropolitan Bank, 2 Q. B. Div. 194 (1877).

§ **1505. Overdue coupons.**— A coupon becomes due, as we have already seen, on the very day fixed for payment of interest on the bond (without grace), whether it be drawn in the form of a bill, note, check, or mere interest warrant.[94] And as soon as that day passes it is regarded as dishonor, like other commercial paper remaining unpaid at maturity; and if thereafter transferred, the transferee takes it subject to all frauds and equities with which it was affected in the hands of his transferrer. In a case in Virginia, it appeared that the coupons of certain bonds of the city of Wheeling, which were guaranteed by the State of Virginia, became due and payable at different times from January 1, 1862, to January 1, 1864, inclusive. The plaintiff purchased them *bona fide* from the Farmers' Bank in November, 1864. It did not appear by what title the bank held, and the coupons had been stolen from the second auditor of the State of Virginia, by whom they had been taken up soon after they became payable. They were held by the court as overdue after the 1st of January, 1864, the day of payment, and that accordingly the plaintiff could not recover against the State. "No principle," said Joynes, J., "is better settled than that a party who takes a negotiable instrument by indorsement or delivery, after it has become due, gets no better title than the party had from whom he received it. These coupons were overdue when they came into the hands of the plaintiff, and the transfer to him was subject to the rules applicable to the transfer of overdue paper." [95]

§ **1506.** A different view from that above stated was taken in New York, where it appeared that coupons due April 1, 1871, were stolen from an express company on April 3, 1871, and sold to the plaintiff, a banker, on the same day. The court, in its opinion, made no reference to the fact that the coupons were overdue — which, it seems to us, was sufficient to defeat the plaintiff

94. Arents v. Commonwealth, 18 Gratt. 773; Bank of Louisiana v. City of New Orleans, 5 Am. Law Reg. (N. S.) 555; *ante*, § 1490; Alabama, etc., Co. v. Robinson, 6 C. C. A. 79, 56 Fed. 690.

95. Arents v. Commonwealth, 18 Gratt. 773 (citing Ashurst v. Bank of Australia, 37 Eng. L. & Eq. 195); First Nat. Bank v. County Commissioners, 14 Minn. 79; Wood v. Guarantee, etc., Deposit Co., 128 U. S. 416; Northampton Nat. Bank v. Kidder, 106 N. Y. 224; Morgan v. United States, 113 U. S. 476; Hinckley v. Merchants' Nat. Bank, 131 Mass. 147; McKim v. King, 58 Md. 502; Fox v. H. & W. H. H. R. Co., 70 Conn. 8, 38 Atl. 871, citing text.

— and held that he was entitled to recover.[96] No authority was quoted in support of the particular point decided, and the decision seems to be at direct variance with the settled doctrine that after maturity negotiable instruments are stripped of that peculiar characteristic which enables the transferrer to convey a better title than the transferrer himself possesses.[97] [Since the foregoing was written, the opinion of the Court of Appeals of New York, in the case cited, has been published, and it will there be seen that the court held the coupons to be entitled to grace, and hence not overdue at the time they were acquired.][98] When a negotiable instrument is overdue, that fact is alone such a suspicious circumstance as makes it incumbent on the purchaser to look to his transferrer's title.[99]

It will always be presumed in favor of a holder of coupons, as of other negotiable instruments, that he acquired them *bona fide* before maturity, and for value, without notice of any defects.[1]

§ **1506a. Effect of nonpayment of coupons on bonds.**— The simple fact that an instalment of interest is overdue and unpaid, discon-

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96. Evertsen v. National Bank of Newport, 4 Hun, 694 (1875). The opinion may have been based on the view that the coupons were entitled to grace, and consequently were not to be regarded as overdue when stolen; but no allusion is made to that argument of counsel, and the better opinion is that no grace attaches to coupons. *Ante*, §§ 1490, 1505.

97. See chapter XXI, on Transfer by Indorsement, § 724, vol. I; chapter XXIV, on *Bona Fide* Holder, §§ 782, 788; chapter XLIX, on Checks, section IX, vol. II. See also Ashurst v. Bank of Australia, 37 Eng. L. & Eq. 195; Brown v. Davies, 3 T. R. 80. In Arents v. Commonwealth, 18 Gratt. 777, Joynes, J., said: "The point of the objection as to the theft is simply that the coupons had been stolen, not that they had been stolen from the State (the guarantor). The objection to the plaintiff's title on this ground would be the same, no matter from whom they were stolen. * * * A person who takes a negotiable instrument after it has become due, cannot recover upon it if it has been previously stolen, unless it was stolen before maturity and passed afterward into the hands of a *bona fide* holder, from whom the plaintiff derived his title." 2 Parsons on Notes and Bills, 279; Chitty on Bills (13th Am. ed.) [*217], 247; Higgins v. Lansingh, 154 Ill. 301–304, 40 N. E. 362.

98. Evertsen v. National Bank, 66 N. Y. 22, 23 (1876), Allen, J. See *ante*, § 1490.

99. Brown v. Davies, 3 T. R. 80; Rothschild v. Corney, 9 B. & C. 391; Hinckley v. Union Pacific R. Co., 129 Mass. 52.

1. City of Lexington v. Butler, 15 Wall. 295; chapter XXI, § 728, vol. I, p. 583; chapter XXIV, §§ 769, 784, vol. I.

nected from other facts, is not sufficient to affect the position of one taking the bonds and subsequent coupons before their maturity for value as a *bona fide* holder. To hold otherwise would throw discredit upon a large class of securities issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually. Temporary financial pressure, the falling off of expected revenues or income, and many other causes having no connection with the original validity of such instruments, have heretofore, in many instances, prevented a punctual payment of every instalment of interest as it matured; and similar causes may be expected to prevent a punctual payment of interest in many instances hereafter. To hold that a failure to meet the interest as it matures, renders them, though they may have years to run, and all other coupons dishonored paper, subject to all defenses against the original holders, would greatly impair the currency and credit of such securities, and correspondingly diminish their value.[2] But the presence of overdue and unpaid coupons on bonds may be a circumstance which, when coupled with other significant indications of invalidity, prove sufficient to put a purchaser on inquiry.[3] Where it is provided in the bonds themselves, that if default be made as to any interest coupon, the

2. Railway Co. v. Sprague, 103 U. S. (13 Otto) 762, distinguishing the case of Parsons v. Jackson, 99 U. S. (9 Otto) 434; Cromwell v. County of Sac, 96 U. S. (6 Otto) 58, Field, J., saying: "All that we now decide is, that the simple fact that an instalment of interest is overdue and unpaid, disconnected from other facts, is not sufficient to affect the position of one taking the bonds and subsequent coupons before their maturity for value, as a *bona fide* purchaser." Fox v. Hartford, etc., R. Co., 70 Conn. 9, 38 Atl. 871. See also to same effect, Indiana, etc., R. Co. v. Sprague, Alb. L. J., May, 1881, p. 434; National Bank v. Kirby, 108 Mass. 497; Boss v. Hewitt, 15 Wis. 260; Gilbough v. Norfolk, etc., Co., 1 Hughes, 410; State *ex rel.* Plock v. Cobb, 64 Ala. 158. See *ante*, § 787. *Contra*, First Nat. Bank v. County Commissioners, 14 Minn. 77.

3. Parsons v. Jackson, 99 U. S. (9 Otto) 434, explained in Railway Co. v. Sprague, 103 U. S. (13 Otto) 762; Morton v. N. O. & Selma R. Co., 79 Ala. 612; Fairex v. Bier, 37 La. Ann. 825; McLane v. Sacramento, etc., R. Co., 66 Cal. 606; Town of Lansing v. Lytle, 38 Fed. 205; German-Am. Bank v. City of Brenham, 35 Fed. 185. In Texas it has been held that where five notes are given which show on their face that they are parts of the same transaction, and in effect for instalments of one common consideration, and the first being overdue when all are transferred to the plaintiffs, plaintiffs were charged with notice of defenses to the notes. Harrington v. Claflin & Co., 91 Tex. 294, 295, 42 S. W. 1055.

bonds shall be due and payable, they so become on default of payment of any coupon.[4]

§ **1506b. Lis pendens.**— The doctrine of *lis pendens,* which is elsewhere considered, in reference to negotiable instruments, does not extend to any security of their class before maturity; and, therefore, the title of a purchaser of negotiable coupon bonds before their maturity is not affected by a pending suit impeaching their validity, and of which he has no actual notice.[5]

§ **1507. The presentment of coupons for payment.**— The degree of diligence to be exercised by the holder of a coupon in presenting it for payment is to be ascertained by reference to the relations of the parties liable upon it. It is due and payable on the very day fixed for payment of interest on the bond. And like a promissory note, payable on a day certain, it need not be demanded, as against the maker, on that day to preserve his liability,[6] and though in the form of a draft on a bank, neither demand nor notice are necessary to charge the drawer.[7]

§ **1508. Presentment as to guarantors and indorsers.**—If there be a guarantor, the coupon must be presented within a reasonable time to charge him.[8] And if there were an indorser, it should be, no doubt, presented at maturity, or else he would be discharged.[9] It was argued in Virginia, in a case in which the coupons ran, "Duncan, Sherman & Co., of New York, will pay the bearer thirty dollars, the half-yearly interest on the Wheeling bond, 269, due 1st January, 1867," that they must be regarded as payable

4. Mayor, etc., of Griffin v. City Bank, 58 Ga. 584. See also Walnut v. Wade, 103 U. S. (13 Otto) 695; Pittsburg, etc., Ry. Co. v. Lynde, 55 Ohio St. 23, 44 N. E. 641. *Quære,* whether the negotiability of the bonds would be restored by a subsequent payment of the interest. Martin v. Bank, 5 Tex. Civ. App. 167, 23 S. W. 1032; Alabama, etc., Co. v. Robinson, 6 C. C. A. 79, 56 Fed. 690; Boyer v. Chandler, 160 Ill. 394, 43 N. E. 803.

5. See *ante,* § 800*a;* County of Warren v. Marcy, 97 U. S. (7 Otto) 96; Farmers' Loan & Trust Co. v. Toledo, etc., R. Co., 4 C. C. A. 561, 54 Fed. 759.

6. Arents v. Commonwealth, 18 Gratt. 773; City of Jeffersonville v. Patterson, 26 Ind. 16; Langston v. S. C. R. Co., 2 S. C. (N. S.) 248.

7. Mayor, etc. v. Potomac Ins. Co., 58 Tenn. 296.

8. Arents v. Commonwealth, 18 Gratt. 773.

9. Bonner v. New Orleans, 2 Woods C. C. 135; *ante,* §§ 1496, 1499*b*. But held in Tennessee that if the liability of the indorser of the bond has been fixed by demand of payment at its maturity, he is liable for the payment of coupons attached to the bond thereafter falling due, without further presentment, protest, or notice. Lane v. Railroad Co., 13 Lea, 547.

on demand on or after the day specified, and not on that day, because the bond provides that the interest shall be paid by Duncan, Sherman & Co. "on presenting" to them the proper coupons. But the Court of Appeals held otherwise, and Joynes, J., said: "Sometimes the form of expression in such bonds is that the coupons shall be 'surrendered' or 'delivered.' But the meaning is the same, whether the coupon is to be 'presented,' or 'surrendered,' or 'delivered.' The coupon passes by delivery, and is evidence of the title of the holder to demand the interest. This evidence of title must be produced before the money it calls for can be demanded, and it must be surrendered when the money is paid. This is just what the law requires of every holder of a negotiable security, and no more. But can it be said that a bill of exchange or promissory note, payable on a specified day, or so many days after date, is not payable on a day certain, because payment cannot be maintained without a presentment or surrender of the note? I conclude, therefore, that these coupons are negotiable instruments, payable at a day certain, namely, the day mentioned in each as the day the interest called for by the coupon is payable, though the holder was not bound to present them for payment on that day, so as to save the liability of the city (the principal obligor), or of the State (the guarantor)."

§ **1508a.** In Alabama, it is provided by statute that county commissioners must audit all claims, and no suit can be brought upon a claim against a county until presentment of the claim and the statutory provisions have been complied with. But where, pursuant to legal authority, the county commissioners had subscribed to a railroad company, and issued coupon bonds, the statute above referred to, it has been held, would not require presentment of either the bonds or coupons to the commissioners before bringing suit upon them.[10]

SECTION IV.

ACTION ON NEGOTIABLE BONDS AND COUPONS.

§ **1509.** There is no doubt that the holder of a corporation or State bond, payable to the holder or to bearer, may sue upon it

10. County of Greene v. Daniel, and County of Pickens v. Daniel, 102 U. S. (12 Otto) 187.

in his own name;[11] and so also may the holder of coupons payable in like manner.[12]

In determining the jurisdiction of a United States court in an action to recover on a bond, the matured coupons are treated as separable independent promises, and not as interest due upon the bond.[13]

§ 1509a. Interest not recoverable on bond without producing coupon.— Where a suit is brought for the collection of interest upon coupon bonds, the court will not allow the holder of the bond to take judgment for the interest, without producing the coupons, as they might be outstanding and valid in the hands of other parties.[14]

§ 1509b. Suit maintainable on severed coupon without producing bond.— From what has been already said it might be inferred, and it is now well established, that suit may be sustained upon a severed coupon, without producing the bond, for the coupon was intended for the very purpose of being disconnected from the bond. In the United States Supreme Court, on the point being raised that suit could not be maintained on the coupons without producing the bond to which they had been attached, Nelson, J., said: "The answer is, that the coupons or warrants for the interest were drawn and executed in a form and mode for the very purpose of separating them from the bond, and thereby dispensing with the necessity of its production at the time of the accruing of

11. Carr v. Le Fevre, 27 Pa. St. 413; Society for Savings v. New London, 29 Conn. 175; Ettlinger v. Persian Rug & Carpet Co., 142 N. Y. 189, 36 N. E. 1055.

12. Johnson v. County of Stark, 22 Ill. 75; Philadelphia & Reading R. Co. v. Smith, 105 Pa. St. 195; Same v. Fidelity Co., 105 Pa. St. 195.

13. Edwards v. Bates County, 163 U. S. 269, 69 Sup. Ct. Rep. 967.

14. City of Kenosha v. Lamson, 9 Wall. 482; Redfield on Railways, 605; U. S. Circuit Court, Williamson v. New Albany & Salem R. Co., 9 Am. Ry. Times, No. 37. Where the principal of bonds, made payable by their terms at a specific time and place, is not paid or shown to have been deposited ready for payment on demand, at the time and place agreed upon, interest is recoverable up to the time when the principal is actually paid; and a notice published subsequent to the date on which the principal was due in three New York papers for one week, stating that the principal would be paid at a certain time and place, does not constitute a tender of payment of the principal as will stop the running of interest thereon, where some of the bondholders are residents of other States, and the notice is not actually brought to their attention. See Kelley v. The Phenix Nat. Bank, 17 App. Div. 496, 45 N. Y. Supp. 533.

each instalment of interest, and at the same time to furnish complete evidence of the payment of the interest to the makers of the obligation." [15]

Under the statutory provisions in New York, action will not lie on an overdue interest coupon until after foreclosure and sale of mortgaged property to secure them.[16]

§ 1510. Payment of bonds does not affect coupons.— The fact that the bonds from which the coupons sued on have been detached, have been paid and surrendered, does not affect the right of recovery upon them. They thereby lose their character as incidents of the bond, but are still independent and self-sustaining instruments.[17] It has been held that in declaring on coupons the instruments in suit should be identified on the face of the declaration by the number of the bond, date, sum, and time of payment.[18]

§ 1511. Decision in Maine criticised.— It has been held in Maine that the holder of a detached coupon running, "The York & Cumberland Railroad Company will pay nine dollars on this coupon in Portland," could not maintain an action upon it as a dis-

15. Commissioners of Knox County v. Aspinwall, 21 How. 54. To same effect, see National Exchange Bank v. Hartford, etc., R. Co., 8 R. I. 375; County of Beaver v. Armstrong, 44 Pa. St. 63; Thomson v. Lee County, 3 Wall. 327; Kennard v. Cass County, U. S. C. C., Cent. L. J., Jan. 15, 1874; Mayor, etc. v. Potomac Ins. Co., 58 Tenn. 296; Town of Cicero v. Clifford, 53 Ind. 191; Kennard v. Cass County, 3 Dill. C. C. 147; Walnut v. Wade, 103 U. S. (13 Otto) 695; First Nat. Bank v. Mount Tabor, 52 Vt. 87; Welch v. First Division St. Paul & P. R. Co., 25 Minn. 320. Mr. Justice Finch, speaking for the Court of Appeals, in the case of Williamsburg Sav. Bank v. Town of Solon, 136 N. Y. 465, 32 N. E. 1058, said: "In Bailey v. County of Buchanan, 115 N. Y. 297, 22 N. E. 155, Earl, J., said that while it was true that past-due coupons, payable to bearer when detached from the bonds, are for many purposes separate and independent instruments, which may be negotiated and sued upon without the production of the bonds, yet such coupons always have some relation to the bonds; that until negotiated or used in some way, they serve no independent purpose; that while they are in the hands of the holder, they remain mere incidents of the bonds, and have no greater force or effect than the stipulation for the payment of interest contained in the bonds; and that while they continue in such ownership and possession, it can make no difference whether they are attached or detached, as they are then mere evidences of the indebtedness for the interest stipulated in the bonds."

16. Holmes v. Seashore Electric Ry. Co., 57 N. J. L. 16, 29 Atl. 419.

17. National Exchange Bank v. Hartford, etc., R. Co., 8 R. I. 375; Trustees of I. I. Fund v. Lewis, 34 Fla. 424, 16 So. 325.

18. Kennard v. Cass County, 3 Dill. 147.

tinct and independent security, as the language did not imply any negotiable or independent character.[19] But the opinion of Goodenow, J., who dissented, and sustained his views in an elaborate and able argument, has received general commendation, and the whole tendency of recent decisions is to concurrence with him. The fact that the coupon contains no word of promise is immaterial, as it clearly evinces an intention to constitute in itself an obligation to pay, and could have been designed for no other purpose.[20]

§ **1512. Decision in Connecticut criticised.**—It has been also held in Connecticut,[21] that suit could not be maintained on a coupon alone, unless it contained a distinct promise to pay the amount represented. The following case was before the court: The railroad company's bonds acknowledged indebtedness in certain amounts to certain trustees, payable to bearer, with semi-annual interest thereon, payable to bearer, at the office of the company, on delivery of certain interest warrants annexed. An interest warrant annexed was as follows: "Interest warrant for $30, being half-yearly interest on bond No. 30 of the N. L. W. & P. R. R. Co., payable on the first day of February, 1856—J. D., Treasurer." An action of debt being brought on the warrant, the Supreme Court of the State held that it could not be made a ground of action, as it was a mere acknowledgment of interest on the bond itself, and did not import a promise; and that the bond should have been declared on, as it alone contained a promise to pay the interest. But Judge Redfield, commenting on this decision in a contribution to "The American Law Register,"[22] observes: "We apprehend no such distinction as this is maintained in practice; but that the coupons are regarded as equally negotiable with the bonds; and that they pass currently as money, the same as the bonds themselves. And the fact that they do not contain the name of any payor, or purport to be made payable to bearer, does not seem to us of any practical importance, if, in fact, among business men they have acquired the character of

19. Jackson v. Y. & C. R. Co., 1 Am. Law Reg. (N. S.) 585.

20. See Judge Redfield's note in 2 Am. Law Reg. (N. S.) 585; Virginia & Tenn. R. Co. v. Clay (Virginia Special Court of Appeals, unreported); Mercer County v. Hubbard, 45 Ill. 142; Johnson v. Stark County, 24 Ill. 75; *ante*, § 1483.

21. Crosby v. New London, etc., R. Co., 26 Conn. 121.

22. Vol. II, New Series, 597.

negotiable securities, and of this we think there can be no question." And this language expresses the true view of the law as we conceive it. The design of the instrument is unmistakable. What further inquiry can be necessary?[23]

§ **1512a.** Coupons, being notes or drafts not sealed, are admissible in evidence, and may be recovered upon under the common money counts.[24] A judgment that a party is a *bona fide* owner of certain coupons does not establish that he is a *bona fide* owner of the bonds.[25]

The aggregate amount of coupons sued upon in one of the Federal courts of the United States determines its jurisdiction of the suit.[26]

§ **1513. Interest and exchange are recoverable on coupons.**— The coupons being in themselves promissory notes, designed to secure the prompt payment of interest on an investment, it is but just and right that if not paid when due, they should themselves bear interest until paid. As has been said by the Supreme Court of the United States: "Being written contracts for the payment of money, and negotiable because payable to bearer, and passing from hand to hand like other negotiable instruments, it is quite apparent on general principles that they should draw interest after it is unjustly neglected or refused."[27] And this view is

23. Virginia & Tenn. R. Co. v. Clay (Virginia Special Court of Appeals, unreported). In the recent case of Fox v. Hartford & West Hartford H. R. Co., 70 Conn. 1, 38 Atl. 871, it was decided that coupons providing for payment to bearer of interest on bond, at a certain bank on a certain day, constitutes, independent of the bond itself, a negotiable contract, and action thereon maintainable. The court cites with approbation, section 1509 *et seq.* of text, and criticises and limits the case of Rose v. Bridgeport, 17 Conn. 243.

24. Mercer County v. Hubbard, 45 Ill. 142; Johnson v. Stark County, 24 Ill. 75.

25. Steward v. Lansing, 4 Morrison's Transcript, No. 1, p. 85.

26. Smith v. Clark County, 54 Mo. 58.

27. Aurora City v. West, 7 Wall. 105; Town of Genoa v. Woodruff, 92 U. S. (2 Otto) 502; Amy v. Dubuque, 98 U. S. (8 Otto) 471; Koshkonong v. Burton, U. S. S. C., March, 1882, Alb. L. J. for May 6, 1882, vol. XXV, No. 18, p. 350; Walnut v. Wade, 103 U. S. (13 Otto) 695; Scotland County v. Hill, 132 U. S. 117; Philadelphia R. Co. v. Knight, 124 Pa. St. 58; Philadelphia & Reading R. Co. v. Smith, 105 Pa. St. 195; Philadelphia & Reading R. Co. v. Fidelity Co., 195 Pa. St. 216; Williamsburg Sav. Bank v. Town of Solon, 65 Hun, 166, 20 N. Y. Supp. 27; Stickney v. Moore, 108 Ala. 590, 19 So. 76; Martin v. Bank, 5 Tex. Civ. App. 167, 23 S. W. 1032. See Bowman v. Neely, 151 Ill. 37, 37 N. E. 840.

concurred in by numerous authorities.[28] For like reasons, exchange should be recoverable upon coupons under circumstances which would warrant its recovery on any other species of commercial paper. The Supreme Court of the United States has expressed its opinion to the effect that: "Municipal bonds with coupons payable to bearer, having by universal usage and consent all the qualities of commercial paper, a party recovering on the coupons is entitled to the amount of them with interest and exchange at the place where by their terms they were made payable."[29] Interest on the coupons is covered by a mortgage securing the principal of the debt.[30] If the coupons are payable in a place in another State than that of their issue, they draw interest according to the law of the State in which they are to be paid.[31]

§ 1514. Prior demand of payment not necessary to recovery of interest on coupons.—In Illinois it has been held that coupons do not bear interest; and in a case where suit was brought on coupons from bonds of the city of Pekin, it was held that at any rate a demand was necessary. The court said: "There was no averment of a demand upon the city treasurer for payment of these coupons. If such instruments could in any event draw interest without an express agreement, it could only be after an express demand of payment. Until a demand is made, such a body (a municipal corporation) is not in default. They are not like individuals, bound to seek their creditors to make payment of their indebtedness. It was held in the case of the People ex rel. v. Tazewell County, 22 Ill. 147, that municipal corporations could not even bind themselves to pay their indebtedness at any other place than their treasury, unless specially authorized by legisla-

28. Arents v. Commonwealth, 18 Gratt. 776; Gilbert v. W. C. V. M., etc., R. Co., 33 Gratt. 599; Gelpcke v. Dubuque, 1 Wall. 206; Thomson v. Lee County, 3 Wall. 332; Hollingsworth v. City of Detroit, 3 McLean, 472; Mills v. Town of Jefferson, 20 Wis. 50; North Pennsylvania R. Co. v. Adams, 54 Pa. St. 94; San Antonio v. Lane, 32 Tex. 405; Virginia v. Chesapeake & O. Canal Co., 32 Md. 501; National Exchange Bank v. Hartford, P. & F. R. Co., 8 R. I. 375; Langston v. South Carolina R. Co., 2 S. C. (N. S.) 248; Beaver County v. Armstrong, 6 Wright, 63; Connecticut Mut. Ins. Co. v. Cleveland, etc., R. Co., 41 Barb. 9; Welsh v. First Division St. Paul & P. R. Co., 25 Minn. 320; Fox v. Hartford, etc., R. Co., 70 Conn. 1, 38 Atl. 871.

29. Gelpcke v. Dubuque, 1 Wall. 20; City of Jeffersonville v. Patterson, 26 Ind. 16 (1866); Koshkonong v. Burton, U. S. S. C., March, 1882. Bowman v. Neely, 137 Ill. 443, 37 N. E. 840, *contra*.

30. Gibert v. W. C. V. M., etc., R. Co., 33 Gratt. 599.

31. Cairo v. Zane, 149 U. S. 122, 13 Sup. Ct. Rep. 803.

tive enactment."[32] But the Supreme Court of the United States has in several cases given judgment for interest on municipal coupons payable at particular banks named in another State, and without any evidence of a demand of payment at such places;[33] and it has been distinctly held, that no demand is necessary to be alleged or proved as a foundation of claim for interest, by the tribunals of some of the States.[34] And so the Supreme Court of the United States has recently directly decided.[35] This rule, however, would not apply to the indorser of coupon bonds or coupon notes where liability must be charged by demand and notice.[36]

§ 1515. Readiness of maker to pay at time and place of payment, abates interest on coupons.— But should the defendant corporation show a continued readiness to pay, at the time and place of payment, the interest would then be abated.[37] This is all that is necessary to protect the defendant, and it is no more than justice to the plaintiff.

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32. City of Pekin v. Reynolds, 31 Ill. 531 (1863); Chicago v. People, 56 Ill. 327; Johnson v. Stark County, 24 Ill. 75; Bowman v. Neely, 137 Ill. 37, 37 N. E. 840.

33. Gelpcke v. Dubuque, 1 Wall. 175; Thomson v. Lee County, 3 Wall. 327. See also Aurora City v. West, 7 Wall. 82; Clark v. Iowa City, 20 Wall. 583; Genoa v. Woodruff, 92 U. S. (12 Otto) 502; Huey v. Macon County, 35 Fed. 482.

34. North Penn. R. Co. v. Adams, 54 Pa. St. 97 (railroad coupons); Langston v. S. C. R. Co., 2 S. C. (N. S.) 248 (railroad coupons); Virginia & Tenn. R. Co. v. Clay (Virginia Special Court of Appeals, unreported). See also Mills v. Jefferson, 20 Wis. 50; San Antonio v. Lane, 32 Tex. 405; Jeffersonville v. Patterson, 26 Ind. 16; Gale v. Corey, 112 Ind. 43, citing the text; Virginia v. Chesapeake, etc., Canal Co., 32 Md. 501. *Contra*, Whittaker v. Hartford, etc., R. Co., 8 R. I. 47, Ames, C. J., saying: "Until presented, the defendant (a railroad company) could have been in no default for nonpayment; but after it, the coupons being due, the refusal to pay was a clear breach of the contract, and interest from the time of demand and refusal is recoverable by way of damages. Railroad bonds, with interest coupons attached, are purchased for investment and income, and when the latter is not paid at the time promised, no well-considered authority, properly understood, forbids what principle requires, that the damages from delay of payment should be compensated by interest on the amount due, computed from the day of demand and refusal.

35. Walnut v. Wade, 103 U. S. (13 Otto) 683; Ohio v. Frank, 103 U. S. (13 Otto) 697.

36. Codman v. Railroad Co., 16 Blatchf. 165; Mt. Mansfield Hotel Co. v. Bailey, 64 Vt. 151, 24 Atl. 136.

37. North Penn. R. Co. v. Adams, 54 Pa. St. 97; Walnut v. Wade, 103 U. S. (13 Otto) 683.

§ 1516. In respect to the Statute of Limitations, the negotiable bond and its coupons so far constitute an integral instrument, that the statute applicable to the bond will apply also to the coupons. Thus it has been held by the United States Supreme Court, that coupons of a bond of the city of Kenosha were not barred in less time than twenty years from their maturity, because that was the period applicable to the bond as a sealed instrument. Nelson, J., said: "These coupons are, substantially, but copies from the body of the bond in respect to the interest. * * * There was but one contract, and that evidenced by the bond, which covenanted to pay the bearer five hundred dollars in twenty years, with semi-annual interest, at the rate of ten per cent. per annum. The bearer has the same security for the interest that he has for the principal. The coupon is simply a mode agreed on between the parties for the convenience of the holder in collecting the interest as it becomes due. Their great convenience and use in the interests of business and commerce should commend them to the most favorable view of the court; but, even without this consideration, looking at their terms, and in connection with the bond, of which they are a part, and which is referred to on their face, in our judgment it would be a departure from the purpose for which they were issued, and from the intent of the parties, to hold, when they are cut off from the bond for collection, that the nature and character of the security changes, and becomes a simple contract debt, instead of partaking of the nature of the higher security of the bond, which exists for the same indebtedness. Our conclusion is, that the cause of action is not barred by lapse of time short of twenty years."[38]

38. City of Kenosha v. Lamson, 9 Wall. 483, 484, followed in City of Lexington v. Butler, 15 Wall. 296; Smith v. Town of Greenwich, 80 Hun, 18, 30 N. Y. Supp. 56. In this case an action was brought against the town of Greenwich upon certain of the coupons attached to twenty-year bonds. The municipality was without legal authority in the issuance of twenty-year bonds, the statute requiring that they should be issued for a period of thirty years. It was held, that the bonds were, therefore, void, but that the municipality was liable for the money advanced thereon as on an implied contract to repay the same, and further, upon a plea of the Statute of Limitations, suit having been commenced after the expiration of six years from the maturity of the coupons, it was held, that the bonds being void the coupons could not be deemed to be sealed instruments, and hence that such action, if brought after the expiration of six years, was barred by the statute, *Semble*, that if the bonds had been valid the coupons detached therefrom would have been deemed specialities, and in an action brought thereon the twenty-year limitation would apply.

But while the coupons and the bond constitute an integral contract, and the Statute of Limitations applying to the latter, applies also to the coupons, nevertheless it commences to run against the coupons from their respective periods of maturity, although not as against the bond until it also matures.[39]

§ **1517. Use of bonds as collateral security.** — When negotiable coupon bonds of counties, corporations, or States are pledged as collateral security for a debt, and there is a failure to pay such debt according to contract, the fair presumption is that they were designed to be held as a pledge, and were expected to be sold after due demand and notice. Such a deposit differs essentially from a deposit of ordinary bonds, mortgages, promissory notes, and like choses in action, which, in the absence of any agreement to that effect, the creditor cannot expose to sale, because they have no market value, and it cannot be presumed it was the intention of the parties thus to deal with them.[40] The debtor is entitled to notice of the time and place of sale;[41] but if he has knowledge, formal notice is unnecessary.[42]

§ **1517a. Amount of recovery.**— When negotiable bonds have been wrongfully put in circulation, it has been held that the *bona fide* purchaser may recover the full amount, although he paid less.[43] Undoubtedly he may recover the full amount where there is no infirmity in the creation of the bonds irrespective of what he pays for them.[44]

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39. Clark v. Iowa City, 20 Wall. 586, explaining previous cases; Amy v. Dubuque, 98 U. S. 471; Koshkonong v. Burton, Morrison's Transcript, vol. IV, No. 1, p. 152; Mt. Mansfield Hotel Co. v. Bailey, 64 Vt. 151, 24 Vt. 136.

40. Alexandria, Loudoun, etc., R. Co. v. Burke, 22 Gratt. 261; Morris Canal, etc., Co. v. Lewis, 1 Beasl. 329 (1858). See § 833, vol. I.

41. Ibid.

42. Alexandria, Loudoun, etc., R. Co. v. Burke, 22 Gratt. 263, 264.

43. Grand Rapids, etc., R. v. Sanders, 16 Hun, 552. See vol. I, § 724. And it has been held, that one who purchases bonds at less than their face, may enforce them to the full amount against the corporation, if they were legally issued. Seymour v. Cemetery Assn., 144 N. Y. 333, 39 N. E. 365, § 758*b*. See Cromwell v. County, 96 U. S. 60; Railroad Co. v. Schutte, 103 U. S. 45.

44. Wade v. Chicago, etc., R. Co., 149 U. S. 144, 327, 13 Sup. Ct. Rep. 892. See § 758*b*.

CHAPTER XLVIII.

THE VALIDITY OF MUNICIPAL BONDS.

§ **1518.** Municipal bonds constitute a vast portion of the wealth of the country, and the questions daily arising respecting their validity are of the utmost nicety, and of the highest importance to the communities bound for their payment, as well as to the capitalists and business men trading in them as mercantile commodities. We shall endeavor to discuss their nature and properties thoroughly, dividing the subject under the following heads: I. Nature of municipal corporations, and what powers may be conferred upon them. II. Express and implied powers of municipal corporations. When they may issue negotiable bonds. III. Power of the officer to bind the municipality. Views of the United States Supreme Court. IV. How invalidity of the bond is cured by acquiescence or ratification of the municipality. V. Review of the foregoing doctrines. Views which seem sustained by reason and authority. VI. Legislative control over municipal obligations.

SECTION I.

NATURE OF MUNICIPAL CORPORATIONS, AND WHAT POWERS MAY BE CONFERRED UPON THEM.

§ **1519.** A municipal corporation is an involuntary organization of the inhabitants within certain local confines, of all ages, sexes, and conditions, under the will and direction of the legislative branch of the government, by which they are clothed with a corporate character, for the purposes of local government.

A private corporation is a voluntary association of persons capable of contracting, who enter a joint enterprise of private business, and are clothed by the Legislature with a corporate character, for the purpose of carrying on such private business.

§ **1519a. Differences between a municipal and a private corporation.**— These definitions exhibit the fundamental, substantial, and numerous differences between the two incorporations.

(1) A municipal corporation is involuntary. The inhabitants within its limits need not accept, nay, may unanimously protest

against, its charter. But they are clay in the hands of the potter, and the Legislature, at its sovereign will, may mould them into a municipal corporation, and then may dissolve or change it at pleasure.[1] It may "erect, divide, and abolish at pleasure."[2] But a private corporation can only be formed by the voluntary act of each member.

(2) A municipal corporation is composed of all the inhabitants within its limits: men, infants, lunatics, and married women. A private corporation can only be formed of those whom the law designates, and who are capable of contracting.

(3) A municipal corporation involves no contract between its members. A private corporation involves a contract by its members *inter sese*, whereby, as against each other, they acquire vested rights and privileges, for the agreed consideration.

(4) A municipal corporation involves no contract between the State and itself, and none between the State and its members. A private corporation must accept its charter. And when accepted, it is a contract between the State and the artificial person constituted by it; and also between the State and the members composing it, subject only to such control as the State may reserve, or be entitled in its sovereign character to exercise over it.

(5) In a municipal corporation the members are not shareholders. They need have no property interest in it; and if any, their voice in the corporation is not proportioned to that interest. "The whole interests and franchises are the exclusive domain of the government."[3] In a private corporation the members are (as a general rule) shareholders, and their influence is proportioned to their interests.[4]

(6) A municipal corporation is formed purely for the purposes of local government. As said by the United States Supreme Court, "it is a representative not only of the State, but is a

1. Soper v. Henry County, 26 Iowa, 264.

2. 1 Dillon on Municipal Corporations (2d ed.), p. 139, § 30.

3. Dartmouth College v. Woodward, 4 Wheat. 636.

4. East Hartford v. Hartford County, 10 How. 531, Woodward, J.: "The members (of a municipal corporation) are not shareholders or joint partners in any corporate estate, which they can sell or devise to others, or which can be attached or levied on for their debts. Hence, generally, the doings between them and the Legislature are in the nature of legislation rather than compact." There are some private corporations to which this remark does not apply, such as schools and charities, which are *quasi public*, and of course the Legislature may provide by charter such rules as it may see fit.

portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State." [5] A private corporation is formed for the purpose of private business.

§ 1520. As to what powers may be conferred upon municipal corporations.— Remembering that the powers of a corporation are only such as are conferred "either expressly or as incidental to its very existence," and that the latter are such as "are best calculated to effect the object for which it is created," [6] we come to consider what powers are incidental to the existence of municipal corporations, and what powers are or may be expressly conferred. Quite certain it is, we think, that there is no incidental power in a municipal corporation to borrow money,[7] and none to execute negotiable or other securities for debt,[8] though there is upon these, as upon almost every question as to the powers of such bodies, a perplexing conflict of authority.[9] "A municipal corporation," says the United States Supreme Court, "cannot issue bonds in aid of extraneous objects (a railroad in the present case), without legislative authority, of which all persons dealing with the bonds must take notice." [10] But equally certain it is, that the Legislature may expressly or impliedly authorize a mu-

5. United States v. Baltimore & Ohio R. Co., 17 Wall. 322; 1 Dillon on Municipal Corporations (2d ed.), 139, note; Jones on Railroad Securities, § 222. In Hodges v. City of Buffalo, 2 Den. 110, it was held that the common council had no authority to furnish an entertainment at public expense, and the party providing it could not recover against the city.

6. Dartmouth College v. Woodward, 4 Wheat. 636; Congaree Construction Co. v. Columbia Township, 49 S. C. 535, 27 S. E. 570.

7. Miller v. Ray, 19 Wall. 468; Thomson v. Lee County, 3 Wall. 327; Starin v. Town of Genoa, 23 N. Y. 447–449; Hitchcock v. City of Galveston, U. S. Dist. Ct., Cent. L. J., May 21, 1875, p. 331; Jones on Railroad Securities, § 222. But it has been held that municipal corporations have all the powers of natural persons respecting their debts. Kelley v. Mayor, 4 Hill, 263.

8. Thomson v. Lee County, 3 Wall. 327; Starin v. Town of Genoa, 23 N. Y. 447–449; Dively v. Cedar Falls, 21 Iowa, 566; Clark v. Des Moines, 19 Iowa, 200.

9. Kelley v. Mayor, 4 Hill, 263.

10. Town of South Ottawa v. Perkins, 94 U. S. (4 Otto) 262. See also Pendleton County v. Amy, 13 Wall. 297; Kennicott v. Supervisors, 16 Wall. 452; St. Joseph Township v. Rogers, 16 Wall. 644; Town of Coloma v. Eaves, 92 U. S. (2 Otto) 484; Young v. Clarendon Township, 132 U. S. 340; Broadway Savings Institution v. Town of Pelham, 83 Hun, 96, 31 N. Y. Supp. 402; Claybrook v. Commissioners, 114 N. C. 453, 19 S. E. 593; Provident Trust Co. v. Mercer County (Ky.), 170 U. S. 593, 18 Sup. Ct. Rep. 788; Watson v. City of Huron, 38 C. C. A. 264, 97 Fed. 449.

nicipal corporation to borrow money, and to issue its securities therefor, negotiable or nonnegotiable, provided it be done for a public purpose.[11] And that it cannot authorize it to pledge its credit, or appropriate its means to a private purpose; for such a purpose is contrary to the very nature of its institution, and any diversion of the people's property to it, without their unanimous consent, would be taking one private citizen's substance for the benefit of another, and would operate a virtual confiscation.[12]

§ **1521. Municipal corporations, by authority, may make donations for public purposes.**— But, provided the purpose be a public one, the Legislature may empower the corporation not only to subscribe to it for a consideration, but also to devote to it its means or its credits.[13] Thus it has been recently decided by the United States Supreme Court, that where the Legislature of Nebraska authorized the county of Otoe to aid the Burlington and Missouri Railroad Company, by issuing its bonds to it as a donation, such bonds were valid,[14] and that decision has been followed and reaffirmed in other cases.[15]

§ **1522. As to what purposes are public.**— The construction and grading of streets;[16] the construction of water works;[17] of a bridge;[18] of a town hall;[19] courthouse or jail;[20] gas works;[21]

11. See *infra*, § 1522, and *post*, section VI.

12. National Bank v. City of Iola, 9 Kan. 700; Loan Assn. v. Topeka, 20 Wall. 655.

13. Davidson v. Ramsey County, 18 Minn. 482 (1872). See 1 Dillon on Municipal Corporations (2d ed.), 220, § 104, and notes.

14. Railroad Co. v. County of Otoe, 16 Wall. 667 (1872).

15. Olcott v. Supervisors, 16 Wall. 678 (1872); Town of Queensbury v. Culver, 19 Wall. 91 (1873); Township of Pine Grove v. Talcott, 19 Wall. 667; Harter v. Kernochan, 103 U. S. (13 Otto) 568; Clemens on Corporate Securities, 39.

16. Sturtevant v. City of Alton, 3 McLean, 393; Rogers v. Burlington, 3 Wall. 362.

17. Rome v. Cabat, 28 Ga. 50; Hale v. Houghton, 8 Mich. 458; Stein v. Mobile, 24 Ala. 591.

18. In County Commissioners v. Chandler, 96 U. S. (6 Otto) 205, Bradley, J., said: "Railroads, turnpikes, bridges, ferries, all are things of public concern, and the right to erect them is a public right. * * * In our judgment the bridge in question is a public bridge, and a work of internal improvement within the meaning of the statute." Bonds issued in aid of the bridge were held valid. See also Township of Burlington v. Beasley, 94 U. S. (4 Otto) 314; United States v. Dodge County, 110 U. S. 156.

19. Greeley v. People, 60 Ill. 19.

20. Wade v. Travis County, 174 U. S. 499, 19 Sup. Ct. Rep. 715.

21. City of Aurora v. West, 9 Ind. 74.

markets;[22] the providing of fire engines;[23] the laying out of cemeteries,[24] are proper objects of municipal care, and undoubtedly the Legislature may authorize the municipality to contract with reference to them, to borrow money for the purpose of effecting those objects, and to issue its negotiable securities therefor.[25] But the loaning of money to enable citizens to rebuild their burned houses,[26] to equip and furnish manufacturing establishment of individuals,[27] to construct saw or grist mills[28] (unless such mills be made public institutions, in which case it would be different),[29] to improve a water privilege and manufacture lumber,[30] to establish a citizen in business,[31] to provide destitute citizens with provisions and grain for seed and feed,[32] would not be within the scope of public purposes, and the Legislature could confer no authority to subscribe to such objects.

§ 1522a. Injunction lies to restrain subscription for private purposes.— If the municipal authorities undertake to subscribe on behalf of the municipality to a private object the citizens have their remedy; and it is well settled that resident taxpayers may invoke the interposition of the courts to prevent illegal disposition of municipal funds, or the illegal creation of a debt.[33]

22. State v. Madison, 7 Wis. 688.

23. Mills v. Gleason, 11 Wis. 470; Robinson v. St. Louis, 28 Mo. 488.

24. Mills v. Gleason, 11 Wis. 470; Robinson v. St. Louis, 28 Mo. 488.

25. 1 Dillon on Municipal Corporations, § 66; Charlotte v. Shepard, 122 N. C. 602, 29 S. E. 842; McCless v. Meekins, 117 N. C. 34, 23 S. E. 99.

26. Lowell v. Boston, 111 Mass. 454 (1873).

27. Loan Assn. v. Topeka, 20 Wall. 655; Commercial Nat. Bank v. Iola, 2 Dill. C. C. 353, 9 Kan. 700.

28. Allen v. Inhabitants of Jay, 60 Me. 124 (1871), 12 Am. Law Reg. (N. S.) 481; Osborne v. Adams County, 109 U. S. 1; State *ex rel.* v. Adams County, 15 Nebr. 568. Or to establish an electric plant, questioned. Slocomb v. Fayetteville, 125 N. C. 362, 34 S. E. 436.

29. Township of Burlington v. Beasley, 94 U. S. (4 Otto) 314.

30. Weismer v. Village of Douglass, 4 Hun, 211.

31. Cooley's Constitutional Limitations, 494.

32. The State *ex rel.* Griffith v. Osawkee Township, 14 Kan. 418. *Contra*, State of North Dakota v. Nelson County, 1 N. Dak. 88, 45 N. W. 33. Or to aid in constructing railroads. See Congaree Construction Co. v. Columbia Township, 49 S. C. 535, 27 S. E. 570.

33. Crampton v. Zabriskie, 101 U. S. (11 Otto) 601. Injunction can likewise be invoked when the municipality seeks to issue bonds in excess of the constitutional limit of indebtedness. See Fowler v. City of Superior, 85 Wis. 411, 54 N. W. 800. See also Crogster v. Bayfield County, 99 Wis. 1, 74 N. W. 635, 77 N. W. 167.

§ 1523. The promotion of railroads and highways is a public purpose.— Whether or not the construction of a railroad, or other highway, is a public purpose to which a municipal corporation may be authorized to contribute is a much debated question. The United States Supreme Court has affirmed that it is, in numerous decisions,[34] and so likewise have many of the State courts of last resort.[35] And it has been held that a municipal corporation might, under legislative authority, donate its bonds to a railroad company,[36] and even though it was outside of the State, but looking to a connection with it.[37] And also that it might subscribe under competent authority to a "Railroad and Banking Company;"[38] or to a railroad company whose charter vested it with power to carry on the business of a coal, mining, furnace, or manufacturing company.[39] But these decisions are combated with great power of reasoning in a few of the States,[40] and the disastrous frauds

34. Knox County v. Aspinwall, 21 How. 539; Gelpcke v. City of Dubuque, 1 Wall. 175 (1863); Seybert v. City of Pittsburg, 1 Wall. 272; Meyer v. City of Muscatine, 1 Wall. 390; Sheboygan County v. Parker, 3 Wall. 96; Havemeyer v. Iowa County, 3 Wall. 294; Thomson v. Lee County, 3 Wall. 330; Rogers v. Burlington, 3 Wall. 362; Mitchell v. Burlington, 4 Wall. 274; Campbell v. Kenosha, 5 Wall. 196, 200; Supervisors v. Schenck, 5 Wall. 776; The City v. Lamson, 9 Wall. 479; Bath County v. Amy, 13 Wall. 244; Pendleton County v. Amy, 13 Wall. 298; Kennicott v. Supervisors, 16 Wall. 452; St. Joseph Township v. Rogers, 16 Wall. 644; Olcott v. Supervisors, 16 Wall. 678; Township of Pine Grove v. Talcott, 19 Wall. 666.

35. Goddin v. Crump, 8 Leigh, 120 (1837) (navigation company); City of Bridgeport v. Housatonic R. Co., 15 Conn. 475 (1843); Nichol v. Mayor of Nashville, 9 Humphr. 252 (1848); Talbot v. Dent, 9 B. Mon. 526 (1849); Slack v. Maysville R. Co., 13 B. Mon. 1 (1852); Commonwealth v. McWilliams, 11 Pa. St. 61 (1849); Sharples v. Mayor, 21 Pa. St. 147; Moers v. City of Reading, 21 Pa. St. 188; Davis v. Ramsey County, 18 Minn. 482; Hallenbeck v. Habn, 2 Nebr. 377; Strickland v. Railroad Co., 27 Miss. 209; City v. Alexander, 23 Mo. 483; Leavenworth County v. Miller, 7 Kan. 479; Aurora v. West, 9 Ind. 74; Gibbons v. Railroad Co., 36 Ala. 410; Prettyman v. Supervisors, 19 Ill. 406; Butler v. Dunham, 27 Ill. 474; Augusta Bank v. Augusta, 49 Me. 507; Stein v. Mobile, 24 Ala. 591; Starin v. Genoa, 23 N. Y. 439; Gould v. Sterling, 23 N. Y. 439; Benson v. Mayor, 24 Barb. 248; Duanesburg v. Jenkins, 40 Barb. 579; San Antonio v. Lane, 32 Tex. 405.

36. Town of Queensbury v. Culver, 19 Wall. 84.

37. Railroad Co. v. County of Otoe, 16 Wall. 667. See also Quincy, etc., R. Co. v. Morris, 84 Ill. 410.

38. Winn v. City of Macon, 21 Ga. 275.

39. County of Randolph v. Post, 93 U. S. (3 Otto) 502.

40. People v. Township Board of Salem, 20 Mich. 452, against the power; so also Thomas v. Port Huron, 27 Mich. 320. In Iowa the decisions have

that have resulted from judicial recognition of their doctrines, reinforcing logic with great considerations of public policy, would doubtless now overthrow them, were they not so solidly imbedded in our jurisprudence, with vested rights of property resting upon them. Constitutional inhibitions are now coming to the relief of the people;[41] and it is probable that in a few years the constitutions of the States will, without exception, stand between the people and the repetition of such abuses as have disgraced the municipal history of this country, and overburdened its citizens with taxation.

§ **1523a. Consolidation of railroads.**— Where a municipal corporation has lawful authority to subscribe to a railroad company, which becomes afterward consolidated under constitutional enactments with other companies under another name, and the consolidated company succeeds to the rights and privileges of the company to which the subscription was authorized, the Supreme Court of the United States has held, that the municipal corporation may execute its power to subscribe to the consolidated company;[42] but that authority given to a County Court by a township election to subscribe to a certain railroad company would not extend to authorize subscription by such court on behalf of the township to another company which had absorbed the original by consolidation, the distinction being taken that the County Court in the latter case was the mere agent of the township, having no discretion to act beyond the power given, while the authorities of the county, invested with discretion as its official representatives, would have a more extended power.[43]

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vacillated. At first the power was affirmed, Dubuque County v. Railroad Co., 4 Greene, 1; then denied, State v. Wapello County, 13 Iowa, 388; Hanson v. Vernno, 27 Iowa, 28. In South Carolina held, that township bonds in aid of a railroad are unconstitutional, not having been issued for a corporate purpose. Congaree Construction Co. v. Columbia Township, 49 S. C. 535, 27 S. E. 570. See also Coleman v. Broad River Township, 50 S. C. 321, 27 S. E. 774.

41. In Ohio, Illinois, and Pennsylvania such subscriptions are prohibited by the Constitution.

42. County of Scotland v. Thomas, 94 U. S. (4 Otto) 692; County of Schuyler v. Thomas, 98 U. S. (8 Otto) 169; Pompton v. Cooper Union, 101 U. S. (11 Otto) 202. See also The State v. Greene County, 54 Mo. 540; County of Ray v. Van Syckle, 95 U. S. (5 Otto) 675.

43. Harshman v. Bates County, 92 U. S. (2 Otto) 569. See also County of Bates v. Winters, 97 U. S. (7 Otto) 83. But see Livingston County v. First Nat. Bank of Portsmouth, 128 U. S. 123, where the doctrine of these

§ 1524. Constitutional restrictions upon public subscriptions.— In those cases where it appeared there were constitutional restrictions upon the Legislature of States, forbidding the contracting of debts, or subscriptions to internal improvements by them, it has been held that such restrictions did not apply to the municipal divisions of a State.[44] And conversely, that restrictions upon the powers of municipal corporations do not apply to the State.[45] But if a Constitution forbid the General Assembly to "authorize any county, city, or town, to become a stockholder in, or loan its credit to, any company, association, or corporation," unless two-thirds of the qualified voters assent, townships will be comprehended in the interdict, as they are mere tracts of territory, having no more existence as corporations than the wards of a city.[46]

Where such provisions are incorporated into the Constitutions of the States, if they appear on their face, by fair and reasonable intendment, to apply only to future acts conferring authority by the Legislature, they will not abrogate and annul existing acts by which authority is conferred upon municipal bodies to make particular subscriptions, although those bodies have not carried them out. And bonds issued in pursuance of such pre-existing acts will

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two cases is spoken of as rigid and inapplicable to a very similar case. As to consolidation of corporations and effect on subscriptions, see County of Tipton v. Locomotive Works, 103 U. S. (13 Otto) 523; Harter v. Kernochan, 103 U. S. (13 Otto) 562; Menaska v. Hazard, 102 U. S. (12 Otto) 81.

44. Township of Pine Grove v. Talcott, 19 Wall. 674; Gelpcke v. City of Dubuque, 1 Wall. 204; Clark v. Janesville, 10 Wis. 136; Clapp v. Cedar County, 5 Iowa, 15; Thompson v. City of Peru, 29 Ind. 305; Cass v. Dillon, 2 Ohio St. 607; Slack v. Railroad Co., 13 B. Mon. 16; Prettyman v. Supervisors, 19 Ill. 406; Pattison v. Supervisors, 13 Cal. 175; Johnson v. Stark County, 24 Ill. 75; Butler v. Dunham, 27 Ill. 474; Robertson v. City of Rockford, 21 Ill. 452.

45. Cooley on Constitutional Limitations, 218, 219; 1 Dillon on Municipal Corporations, § 90, p. 208.

46. Harshman v. Bates County, 92 U. S. (2 Otto) 569. In many of the States there is the constitutional restriction upon the issuance of municipal bonds prohibiting contraction of such debts beyond a certain percentage of the taxable value of the property within the municipality. The Supreme Court of South Carolina, in construing a statute of this sort in that State, held that authority in the charter of a municipality which authorizes it to issue bonds to "any amount" is unconstitutional, because the constitutional limit must be read as a part of the statute. See Germania Sav. Bank v. Town of Darlington, 50 S. C. 337, 27 S. E. 846.

be valid.[47] But a distinction is to be observed between the operation of a constitutional limitation upon the power of the Legislature to confer such authority upon municipal bodies, and the operation of a constitutional inhibition upon the municipality itself. In the former case past legislative action is not necessarily affected, while in the latter it is annulled.[48] In Minnesota, where the Constitution forbade the Legislature to authorize the issue of municipal bonds in excess of ten per cent. of taxable property, it was construed to be applicable to future legislation, and not to laws in existence.[49] The United States Supreme Court, speaking of a prohibitory clause of the Constitution of Missouri, says: "This prohibition, it will be observed, is against the Legislature's authorizing municipal subscriptions or aid to private corporations; it does not purport to take away any authority already granted.

47. County of Cass v. Gillett, 100 U. S. (10 Otto) 585; County of Henry v. Nicolay, 95 U. S. (5 Otto) 619; County of Schuyler v. Thomas, 98 U. S. (8 Otto) 173; County of Scotland v. Thomas, 94 U. S. 682; Smith v. County of Clark, 54 Mo. 58; Smead v. Trustees of Union Township, 8 Ohio St. 394; Cass v. Dillon, 2 Ohio St. 398; Commissioners of Knox County v. Nichols, 14 Ohio St. 260; Woodward v. Supervisors of Calhoun County, U. S. D. C. Miss., Cent. L. J., June 18, 1875, p. 396; The State v. Sullivan County, 51 Mo. 522; The State v. Greene County, 54 Mo. 540; County of Callaway v. Foster, 93 U. S. (3 Otto) 567.

48. Norton v. Brownsville, 129 U. S. 490; Aspinwall v. Commissioners, 22 How. 364; Wadsworth v. Supervisors, 102 U. S. 534; Concord v. Portsmouth Sav. Bank, 92 U. S. 625; Falconer v. Railroad Co., 62 N. Y. 491.

49. State v. Town of Clark, 23 Minn. 423. In Wisconsin it has been held, that the issuance of bonds by a county in excess of 5 per cent. of its taxable property, being inhibited by constitutional provision, is an entire contract, and all bonds issued under it are absolutely void, and that the county cannot scale it down to an amount which the county might legally issue. Crogster v. Bayfield County, 99 Wis. 1, 74 N. W. 635, 77 N. W. 167. See also Fowler v. City of Superior, 85 Wis. 411, 412, 54 N. W. 800. In determining whether a proposed issue of municipal bonds is in excess of the constitutional limit of indebtedness, resort must be had to the last assessment of the municipality as equalized by the local board of review for the purposes of general taxation; and for this purpose, all forms of indebtedness must be included, except warrants for money actually in the treasury and contracts for ordinary expenses within the current revenue. Marinette v. Tomahawk Common Council, 96 Wis. 73, 71 N. W. 86. And it has also been held in Indiana, in the case of Wilcoxon v. The City of Bluffton, 153 Ind. 267, 54 N. E. 110, that school bonds issued under the Act of 1873 for the purpose of obtaining funds for the erection of school buildings, constitute an indebtedness against the civil city, and must be taken into consideration in ascertaining the aggregate indebtedness of such municipality.

It only limits the power of the Legislature in granting such authority for the time to come." [50]

§ 1525. Federal decisions as to the validity of municipal bonds.— It is a general principle of the jurisprudence of the United States that the construction given to a statute of a State by the highest court thereof, is a part of the statute itself, and is as binding upon the Federal courts of the United States as the text of the statute.[51] And if the highest court of a State adopt new views as to the proper construction of such a statute, and reverse its former decision, the Federal courts will follow the latest settled adjudications.[52] But still they will not follow every oscillation of opinion. And, therefore, where it appeared that at the time when the city of Dubuque issued certain coupon bonds, their legality had been determined by a series of decisions of the highest court of Iowa, the Supreme Court of the United States refused to follow subsequent decisions of the same tribunal holding such bonds invalid, Swayne, J., saying: "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice." And approved as the sound and true rule that "if the contract, when made, was valid by the laws of the State as then expounded by all the departments of the government, and administered in its courts of justice, its validity and obligations cannot be impaired by any subsequent action of Legislature or decision of its courts altering the construction of the law.[53]

50. County of Scotland v. Thomas, 94 U. S. (4 Otto) 688. See Moultrie County v. Fairfield, 4 Morrison's Transcript, No. 1, p. 140. In Missouri bonds issued in pursuance of a popular vote taken after the adoption of a constitutional provision absolutely prohibiting donations or subscriptions in aid of a railroad or other private corporation, were held void in the hands of innocent holders for value. Wade v. Town of La Moille, 112 Ill. 79. Under the provisions of the Constitution of New York, prohibiting a county containing a city of over 100,000 inhabitants or any such city, from becoming indebted to an amount, including existing indebtedness, exceeding 10 per cent. of the assessed value of its real estate, in order to determine whether the constitutional limit has been exceeded, the assessed valuation is to be taken distributively, not collectively, and a debt of the city cannot be charged against the county, or of the county against the city. See Adams v. The East River Sav. Inst., 136 N. Y. 52, 32 N. E. 622.

51. United States v. Morrison, 4 Pet. 124; Green v. Neal, 6 Pet. 291; Township of Elmwood v. Many, 92 U. S. (2 Otto) 287.

52. Leffingwell v. Warren, 2 Black, 599; Wade v. Travis County, 174 U. S. 499, 19 Sup. Ct. Rep. 715.

53. Gelpcke v. Dubuque, 1 Wall. 202. [See Ohio Life and Trust Co. v.

To hold otherwise "would enable the State to set a trap for its creditors by inducing them to subscribe for bonds, and then withdrawing their own security." [54]

§ **1526.** More recently the United States Supreme Court has taken a step farther, and held that questions relating to bonds issued in a negotiable form involve questions relating to commercial securities; and that whether under the Constitution of the State such securities are valid or void belongs to the domain of general jurisprudence. And, accordingly, that the decisions of the highest court of the State relating to such bonds will not be respected by that tribunal, when not satisfactory to its judges, and the question arises upon a bond in the hands of a *bona fide* holder who is a citizen of another State or a foreigner.[55]

SECTION II.

EXPRESS AND IMPLIED POWERS OF MUNICIPAL CORPORATIONS.— WHEN THEY MAY ISSUE NEGOTIABLE BONDS.

§ **1527.** The powers of corporations have been divided judiciously into three classes: (1) Those granted in express words. (2) Those necessarily implied or necessarily incident to the powers expressly granted. (3) Those absolutely essential to the declared purposes and objects of the corporation, not simply convenient, but indispensable.[56] Whatever power is implied is as effectual as what is expressed.[57]

§ **1527a. General doctrines as to municipal powers.**— In the United States the following propositions are sustained by weight of authority:

1. That whenever a municipal corporation has power conferred

Debolt, 16 How. 432.] To same effect, see also Havemeyer v. Iowa Co., 3 Wall. 294; Larned v. Burlington, 5 Wall. 275; Mitchell v. Burlington, 5 Wall. 274; Thomson v. Lee County, 3 Wall. 327; Lee v. Rogers, 7 Wall. 181; City of Kenosha v. Lamson, 9 Wall. 486; Campbell v. Kenosha, 5 Wall. 194; Clemens on Corporate Securities, 32, 33; Township of Elmwood v. Many, 92 U. S. (2 Otto) 298; Douglass v. County of Pike, 101 U. S. (11 Otto) 679.

54. Wade v. Travis County, 174 U. S. 499, 19 Sup. Ct. Rep. 715.

55. Township of Pine Grove v. Talcott, 19 Wall. 667. See *ante*, § 10, vol. I.

56. Dillon on Municipal Corporations (2d ed.), 173, § 55; Merriam v. Moody's Exrs., 25 Iowa, 163; Tucker v. City of Virginia, 4 Nev. 20.

57. United States v. Babbitt, 1 Black, 61; Gelpcke v. Dubuque, 1 Wall. 221; Lynde v. County of Winnebago, 16 Wall. 13.

to contract a debt, borrow money, or issue a negotiable security, it is to be regarded *quoad hoc* as a private corporation.[58]

2. That a municipal corporation has implied power to contract a debt whenever necessary to carry out any power conferred upon it.[59]

3. That whenever it may contract a debt, it may borrow money to pay it.[60]

4. That whenever it may contract a debt or borrow money, it may issue its negotiable coupon bonds for its payment.[61]

§ **1528.** The *first* proposition cannot be sustained, in our judgment. The differences between the public and the private corporation, indicated in the beginning of this chapter, show that their natures have little if anything in common. A municipal corporation, indeed, cannot be empowered to act for private purposes. Its character as a government cannot be divested. And in no sense can it be looked upon as anything else than as a local arm of the sovereign power.[62]

§ **1529.** The *second* proposition is undoubtedly correct, but the authorities differ as to the facts which justify its application. If a municipal corporation be empowered to erect public buildings, courthouses, markets, etc., it must necessarily contract debts for the material furnished, and services rendered. And it has been held that it may execute its negotiable bonds for the amounts

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58. De Voss v. City of Richmond, 18 Gratt. 338, 345, quoting Moodalay v. East India Co., 1 Brown C. C. 469; Touchard v. Touchard, 5 Cal. 307; City of Galena v. Corwith, 48 Ill. 424.

59. Lynde v. County, 16 Wall. 12.

60. Lynde v. County, 16 Wall. 12; City of Galena v. Corwith, 48 Ill. 424; City of Gladstone v. Throop, 18 C. C. A. 61, 71 Fed. 341.

61. De Voss v. City of Richmond, 18 Gratt. 338; Railroad Co. v. Evansville, 15 Ind. 395; Commonwealth v. Pittsburg, 34 Pa. St. 496; Middleton v. Alleghany County, 37 Pa. St. 241; Reinbath v. Pittsburg, 41 Pa. St. 278; Galena v. Corwith, 48 Ill. 423; Orchard v. School District, 14 Nebr. 378; German-Am. Bank v. City of Brenham, 35 Fed. 185.

62. Roosevelt v. Draper, 23 N. Y. 318, 325; Darlington v. Mayor, 31 N. Y. 164. Judge Dillon says in his Treatise on Municipal Corporations (2d ed., p. 152, note), that "the private character ascribed to it (a municipality) is difficult exactly to comprehend," and pertinently inquires, "Are not all powers conferred upon municipalities, whether many or few, and given only, for their better regulation and government, and to promote their welfare as parts of the State at large?" He evidently discountenances the idea of a municipality being regarded as private in any regard.

agreed to be paid to the contractors.[63] But if the statute law be such as to indicate that taxation, and not the contraction of debts, was contemplated by the Legislature as the method of raising money to accomplish the proposed objects, that method alone can be relied on; for authority to issue obligations must be conveyed in express terms, or by necessary implication.[64]

§ **1530.** The *third* proposition, that, whenever the municipality may contract a debt, it may borrow money to pay it, has been illustrated in numerous cases. Thus it has been held that, where the town of Chillicothe was empowered to purchase real estate, and erect public buildings, its power to borrow money for these purposes was implied, and its bonds for money borrowed valid.[65] The like decision has been rendered where money was borrowed to carry out authority to a municipal corporation to build markets; the court saying, that "corporations may resort to the usual and convenient means of carrying out powers granted," and that "no means is more usual for the execution of such objects than that of borrowing money." [66] So where a county was authorized to construct a courthouse, and levy a tax for that purpose, it was held that the county judge (the officer designated) had authority to borrow money, and issue negotiable county bonds therefor; and to sell the bonds outside of the State to raise money for the purpose indicated.[67]

But there is a fundamental difference between contracting a debt to one person, and borrowing money from another to pay it. It may be convenient to do so, but it cannot be necessary. And the power to contract a debt to A. cannot, by any reasonable intendment, be construed into a power to borrow money from B. In the one case the application of the credit is secured to the advancement of the authorized object, while money borrowed is liable to be lost, to be squandered, or to be diverted to illegitimate purposes. And the logic of the cases which impress this view seems

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63. Lynde v. County, 16 Wall. 12: Mills v. Gleason, 11 Wis. 470; Bank v. Chillicothe, 7 Ohio, pt. II, 31.

64. Wells v. Supervisors, 102 U. S. (2 Otto) 625.

65. Bank v. Chillicothe, 7 Ohio, pt. II, 31 (1836).

66. Mills v. Gleason, 11 Wis. 470; State v. Madison, 7 Wis. 688.

67. Lynde v. County of Winnebago, 16 Wall. 12 (1872), Chase, C. J., and Field and Miller, JJ., dissenting. See Wells v. Supervisors, 102 U. S. (12 Otto) 625.

to us unanswerable.[68] Recognizing the fact that corporation officers are special agents, and that municipal corporations are themselves but special agents of government, it is difficult to see how the power of the corporation or of its officers (who are agents of agents) can be so broadly extended by implication, as some of the cases maintain. If the corporation be authorized to contract with A. to build a courthouse, its bonds given for the amount due him would be good. But enlarging the power to authorize the borrowing of money, and, under color of building one courthouse, municipal officers might flood the markets with millions of negotiable bonds for money borrowed from different persons, which they might put in their pockets, and leave the building still unpaid for. In other words, a county officer, authorized, as in the case cited below,[69] to provide a single county edifice, may dissolve the whole property of the county in the twinkling of an eye, and by the magic of a negotiable bond, into his pocket. Courts which tolerate such doctrines, and support them by the narrow technicalities of estoppel, seem to us not exempt from that "epidemic insanity" which has induced extravagant corporate subscriptions to public works, and which has been so much deprecated.[70] In Louisiana the charter of a municipal corporation granted authority to it to give such bonds as might be necessary, to conduct its litigation, or on the current administration of its affairs. It was held that this did not authorize the issue of bonds for raising money; and that bonds issued for such a purpose were void, even in the hands of a *bona fide* holder;[71] and this seems now to be the settled doctrine of the United States Supreme Court.[72]

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68. Ketchum v. City of Buffalo, 14 N. Y. 256; Richmond, etc. v. Town of West Point, 94 Va. 668, 27 S. E. 460; The Mayor v. Ray, 19 Wall. 468; Lynchburg R. Co. v. Dameron, 95 Va. 545, 28 S. E. 951; Louisiana State Bank v. New Orleans Navigation Bank, 3 La. Ann. 294.

69. Lynde v. County of Winnebago, 16 Wall. 12.

70. See Mercer County v. Hacket, 1 Wall. 96, and *post*, § 1541.

71. In Wilson v. City of Shreveport, 29 La. 678 (1877), Marr, J., said: "The creditor of a corporation is bound to see that the contract or obligation of which he claims the benefit is within the power which the corporation may lawfully exercise. The fact that the obligation is in the shape of a negotiable instrument, or that it was acquired in good faith, for a valuable consideration, before maturity, in no manner enlarges the power of the corporation, or gives any additional force or validity to its unauthorized acts."

72. See § 1532. But see Lehman v. City of San Diego, 27 C. C. A. 668, 83 Fed. 669, *contra*.

§ **1531.** As to the *fourth* proposition, when the power to borrow the money is clear, it necessarily involves in its exercise the execution of a security for its repayment; and negotiable coupon bonds, being the common and most acceptable form of municipal securities, when given for money legitimately borrowed, would undoubtedly be valid, as has been stated.[73] And it is generally considered that when the municipality has authority to contract a debt it has the power to evidence the same by a bill, note, bond, or other instrument.[74]

The power to borrow money includes the power to issue bonds and other usual securities.[75]

§ **1532. Decisions of United States Supreme Court.**— The United States Supreme Court has held that authority to a city to subscribe to stock in a railway company "as fully as an individual," imported power to subscribe to the stock on credit, and issue its negotiable bonds in payment.[76] So that authority to a city "to borrow money for any object in its discretion," authorized it to subscribe to a railroad corporation, and to borrow money upon its negotiable bonds to pay for it.[77] It has carried its doctrines on this subject to great lengths, and has held that authority to "borrow money for any public purpose," authorized the city of Burlington to subscribe to railroad stock, and to issue its negotiable bonds to the company to be sold by it, the proceeds realized by the company to be appropriated to pay for the stock.[78] But borrowing money

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73. See *ante*, § 1527; Ashley v. Board of Supervisors, 8 C. C. A. 455, 60 Fed. 55.

74. City of Williamsport v. Commonwealth, 84 Pa. St. 500; Dorian v. City of Shreveport, 23 Fed. 287; Holmes v. City of Shreveport, 31 Fed. 113, in which case it was held that the officials of a municipal corporation empowered to issue bonds or notes as the evidence of contract price of public works, are authorized to issue bonds or notes which will be protected in the hands of a *bona fide* holder, upon the principle that express authority to an agent to buy or provide a thing for his principal's use, carries with it the implied power to execute the negotiable note of the latter for the price of the thing. Lehman v. City of San Diego, 27 C. C. A. 668, 83 Fed. 669, *contra;* City of Cadillac v. Woonsocket Inst. for Savings, 7 C. C. A. 574, 58 Fed. 935.

75. Bunch v. Fluvana Co., 86 Va. 452, 10 S. E. 532.

76. Seyhert v. City of Pittsburg, 1 Wall. 372; Commonwealth *ex rel.* Reinbath v. Pittsburg, 41 Pa. St. 278.

77. Meyer v. Muscatine, 1 Wall. 387.

78. In Rogers v. Burlington, 3 Wall. 654, Field, J. (with whom concurred Chase, C. J., and Miller and Grier, JJ.), dissented, in an opinion of rare ability. "Here," he said, "the authority is to borrow money, yet no money

to pay for stock is one thing, and hypothecating credit in the shape of bonds to be sold to pay for it is another and very different thing; and this decision stretches implication to the last attenuation. More in conformity with principle, we think, is the decision to the contrary in New York, where it was held that authority to a town to borrow money at seven per cent. and to pay it out for railroad stock at par, did not warrant it to exchange the town bonds for an equal nominal amount of stock, leaving it in the power of the railroad company to sell the bonds at a discount.[79] In numerous decisions the United States Supreme Court has now confirmed the doctrine of the text.[80]

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was borrowed, but the bonds of the city were lent. Borrowing money and lending credit are not convertible terms."

79. In Starin v. Town of Genoa, 23 N. Y. 454, Lott, J., said: "It was evidently the intention of the act that money should be raised and paid over to aid in the construction of a railroad, and no color is given to the idea or the position that the credit merely of any town should be given, through and by which money might be raised. A town might be willing to incur a debt to a limited sum, with the knowledge that the whole amount for which it was incurred was actually to be appropriated to the construction of a railroad that might be deemed conducive to its interests, but would absolutely refuse to issue their bonds, for the purpose of sale, from which much less than the amount for which they were given might be realized. If it had been intended to authorize bonds to be given for stock, there is no reason why that intention should not have been declared, as was done in the law in relation to the village of Rome, above referred to." See also Gould v. Town of Sterling, 23 N. Y. 458, and opinion of Selden, J., quoted by Field, J., dissenting, in above-quoted case. Judge Cooley, in his admirable work on Constitutional Limitations, 218, note, approves the New York view; Horton v. Town of Thompson, 71 N. Y. 513.

80. In Kelley v. Milan, 127 U. S. 129 (1887), certain negotiable bonds issued by the town of Milan, Tennessee, were held to have been issued without authority, and that a consent decree entered in a suit could not validate them. Mr. Justice Blatchford, giving the opinion of the court, said: "It is well settled that a municipal corporation, in order to exercise the power of becoming a stockholder in a railroad corporation, must have such power expressly conferred upon it by a grant from the Legislature, and that *even the power to subscribe for such stock does not carry with it the power to issue negotiable bonds in payment of the subscription* unless the power to issue such bonds is expressly or by reasonable implication conferred by statute. Such is the law as recognized by the Supreme Court of Tennessee in the case of Pulaski v. Gilmore, decided in 1880 and published in 2 Fed. 870, and in Taxpayers of Milan v. Tennessee Central Railroad, 11 Lea, 330, decided in 1883. Such is also the law as established by this court. Marsh v. Fulton County, 10 Wall. 676; Wells v. Supervisors, 102 U. S. 625; Ottawa v. Casey, 108 U. S. 110, 123; Daviess County v. Dickinson, 117 U. S. 657, 663." Continuing the court said: "The grant of authority of a municipal corporation to sub-

§ 1533. As to the sale of municipal bonds.— When they have been once issued into the market as valid subsisting securities, they may be sold for any amount by the holder, like any other chattels.[81] But in the hands of the municipality they are not, unless so made by statute, the subject of sale. Legislative authority to issue bonds for the stock of a railroad corporation, or other public improvement, does not imply authority to sell them and apply the proceeds to pay for the stock, especially if the sale be below par.[82] And

scribe for stock of a railroad company does not carry with it the authority to issue negotiable bonds to pay for the subscription, or anything more than the power to raise money by taxation to pay the amount of the subscription. If in the statute granting the power to subscribe for the stock no manner of paying the subscription is provided for, it cannot be paid by issuing negotiable bonds. The practice in Tennessee, as shown by the statute-books, has been to authorize expressly the issuing of negotiable bonds to municipal corporations to pay for subscriptions in stock in all cases where it was desired to confer upon such corporations the power to issue such bonds." See also Norton v. Dyersburg, 127 U. S. 125; Concord v. Robinson, 121 U. S. 165; Scipio v. Wright, 101 U. S. 665; Claiborne County v. Brooke, 111 U. S. 400. In Hill v. Memphis, Field, J., giving the opinion of the court, said: "Whilst a municipal corporation, authorized to subscribe for the stock of a railroad company or to incur any other obligation, may give written evidence of such subscription or obligation, it is not thereby empowered to issue negotiable paper for the amount of indebtedness incurred by the subscription or obligation. Such paper in the hands of innocent parties for value can be enforced without reference to any defense on the part of the corporation, whether existing at the time or arising subsequently. Municipal corporations are established for the purposes of local government, and in the absence of specific delegation of power cannot engage in any undertakings not directed immediately to the accomplishment of those purposes. Private corporations created for private purposes may contract debts in connection with their business and issue evidences of them in such form as may best suit their convenience. The inability of municipal corporations to issue negotiable paper for their indebtedness, however incurred, unless authority for that purpose is expressly given or necessarily implied for the execution of other express powers, has been affirmed in repeated decisions of this court." Colburn v. Chattanooga, etc., R. Co., 94 Tenn. 43, 28 S. W. 298, citing and following 111 U. S. 400.

81. Town of Danville v. Sutherlin, 20 Gratt. 555; City of Lynchburg v. Norvell, 20 Gratt. 601; Griffith v. Burden, 35 Iowa, 138. See § 750, vol. I. See recent case in Tennessee in support of text. Colburn v. Chattanooga, etc., R. Co., 94 Tenn. 43, 28 S. W. 298; Louisville, etc., Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. Rep. 817.

82. City of Atchison v. Butcher, 3 Kan. 104; Daviess County Court v. Howard, 13 Bush, 102, 111. And it has been held that where bonds of a corporation, pledged as security for this debt, were void under the provisions of the statute, because issued without its receiving 75 per cent. of their par value, no action for the surrender or cancellation thereof can be maintained

authority to issue bonds for a loan of money does not imply authority to sell the bonds below par; and such a sale would be usurious if the discount were greater than allowed by law, and render the bonds absolutely void.[83] Any one who purchases bonds, knowing that they were negotiated in a manner not authorized by law, is not a *bona fide* holder, but takes them subject to any defense existing against them;[84] and if they were usurious in their inception, even a *bona fide* holder for value and without notice, it seems, cannot recover against the corporation.[85] But a third party, selling them to him, warrants their validity, and he may recover from him the consideration paid.[86]

§ 1534. When sale is affected with usury.— The fact that the bonds acquired from a city are issued in the form of a sale, and are paid for in a depreciated medium, nominally greatly in excess of their face value, it has been held, does not relieve the transaction from the taint of usury, if in reality the real value of such depreciated medium bore to the face value of the bond a proportion which would amount to usury;[87] and it has been also held that the taint would not be removed by the fact that the bonds might be paid at maturity in the currency receivable for taxes by the State wherein they were issued.[88] But there is to our mind great force in

by the corporation, or by a stockholder in its right, without a tender of the amount due to the pledgee. Hinckley v. Pfister, 83 Wis. 64, 53 N. W. 21. "Par value" means a value equal to the face of the bonds. See Village of Fort Edward v. Fish, 156 N. Y. 363, 50 N. E. 973.

83. Town of Danville v. Sutherlin, 20 Gratt. 555; City of Lynchburg v. Norvell, 20 Gratt. 601. In the first named of the above cases, p. 580, Staples, J., said: "In every sale there must be, not only parties, but a thing to be sold. A man cannot sell his own promises to pay, because such an obligation is not the subject of sale. So long as it remains in his own possession it is payable to no one, and binds no one." See Commissioners of Craven County v. A. & N. C. R. Co., 77 N. C. 295.

84. Starin v. Town of Genoa, 23 N. Y. 440; City of Atchison v. Butcher, 3 Kan. 104; Broadway Sav. Inst. v. Town of Pelham, 83 Hun, 96, 31 N. Y. Supp. 402; Duckett v. Bank of Baltimore, 88 Md. 8, 41 Atl. 161.

85. See City of Lynchburg v. Norvell, 20 Gratt. 601.

86. See chapter XXII, on Transfer by Assignment, § 732 *et seq.*, vol. I, Young v. Cole, 3 Bing. N. C. 724. See as to when amount paid may be recovered of the corporation, § 1491*a*. For decision *contra*, see Ruohs v. Third Nat. Bank of Chattanooga, 94 Tenn. 57, 28 S. W. 303.

87. Town of Danville v. Sutherlin, 20 Gratt. 555, Staples, J., with whom Christian, J., concurred; Moncure, P., dissented; Anderson and Joynes, JJ., not sitting. See also City of Lynchburg v. Norvell, 20 Gratt. 601.

88. City of Lynchburg v. Norvell, 20 Gratt. 601, Staples, J., with whom Christian, J., concurred; Moncure, P., dissented.

the view that if the currency of payment be not gold, but such as may be in circulation at time of payment, there is no usury in the transaction, as there is no certainty that the payee will receive back his principal amount.[89]

§ 1535. Submission to popular vote.— In submitting to popular vote the question of subscription to a public improvement, the corporate authorities must proceed in conformity with the statute authorizing such vote to be taken, and not in such a manner as to confuse or confound the question presented with another.[90] If the statute requires the subscription vote to "specify the amount," it will not suffice to submit the question to the people calling on them to vote for or against an amount "not exceeding" a sum named.[91] And if it require the grand jury to specify the amount, it will not suffice for them to simply limit the amount.[92] But all such irregularities may be cured by legislative ratification.[93] And mere informalities — as, for instance, making the bonds payable "to the railroad company or bearer," where the statute provided they should be payable "to the president and directors of the railroad company, and their successors and assigns"— would be immaterial.[94]

If bonds be issued by corporate authorities before the law authorizing their issue is published and takes effect, they will be void,[95] though subject to subsequent ratification.

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89. See Bracken v. Griffin, 3 Call, 433; and Boulware v. Newton, 18 Gratt. 708, where this view is illustrated.

90. In Peoria & O. R. Co. v. County of Tazewell, 22 Ill. 156, Walker, J., said: "In the case of Fulton County v. The Wabash & Mississippi Railroad Co., 21 Ill. 338, this court held, that the law did not authorize the submission of a proposition for subscription of a gross sum to two roads, in the same submission, in such a manner that the voter had no option to vote for the one and against the other. This submission was made in that manner. It is proposed to subscribe one hundred thousand dollars, one-fourth to this and three-fourths to another road, and the voter, however much in favor of subscription to one, and opposed to the other, was compelled to vote either for or against the entire subscription."

91. State v. Saline County, 45 Mo. 242.

92. Mercer County v. Pittsburg, etc., R. Co., 27 Pa. St. 389.

93. McMillen v. County Judge, 6 Iowa, 393.

94. Woodward v. Supervisors of Calhoun County, U. S. Dist. Ct., Cent. L. J., June 18, 1875, p. 396; D'Esterre v. City of New York, 44 C. C. A. 75, 104 Fed. 605.

95. Phelps v. Alfred Bank, 13 Wis. 432; Berliner v. Town of Waterloo, 14 Wis. 378.

§ 1535a. Cases in which a majority of legal or qualified votes is necessary.— Sometimes the Constitution of a State, or the act of the Legislature, requires as a condition precedent to subscriptions, and the consequent issue of bonds by counties, cities, or towns, that "a majority (or two-thirds or some other proportion) of the legal (or qualified) voters" shall have given their assent thereto at an election. "It is insisted," said Clifford, J., in a case before the United States Supreme Court, "that the Legislature, in adopting the phrase 'a majority of the legal voters of the township,' intended to require only a majority of the legal voters of the township voting at an election, notified and held to ascertain whether the proposition to subscribe for the stock of the company should be accepted or rejected; and the court is of opinion that such is the true meaning of the enactment, as the question would necessarily be ascertained by a count of the ballot." [96] "All qualified voters," says Chief Justice Waite in another case, "who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed." [97] These views have not prevailed without dissent in the United States Supreme Court;[98] and the opposing views have much to commend them to favor.[99] In our judgment they are more consistent with popular right which should be the touchstone of construction in all matters touching the purse of the people. It has been well said: "The people, who are to pay the taxes, ought not to be subjected to that burden unless the requisite majority of the class named, that is, the qualified voters, can be induced to give their assent to it. In the one case, as in the other, absence and failure to vote is equivalent to a dissent." [1]

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96. St. Joseph Township v. Rogers, 16 Wall. 644.

97. County of Cass v. Johnston, 95 U. S. (5 Otto) 369, citing Louisville, etc., R. Co. v. County Court of Davidson, 1 Sneed, 638; Taylor v. Taylor, 10 Minn. 107; People v. Warfield, 20 Ill. 159; People v. Garner, 47 Ill. 246; People v. Weant, 48 Ill. 263. See also County of Cass v. Jordan, 95 U. S. (5 Otto) 372; Douglass v. County of Pike, 101 U. S. (11 Otto) 685.

98. See Harshman v. Bates County, 92 U. S. (2 Otto) 569, and opinion of Bradley, J., in County of Cass v. Johnson, 95 U. S. (5 Otto) 370.

99. See State v. Wenkelmeier, 35 Mo. 103; State v. Sutterfield, 45 Mo. 391.

1. Dissenting opinion of Bradley, J., in County of Cass v. Johnson, 95 U. S. (5 Otto) 371.

§ **1535b.** A constitutional prohibition, contained also in a legislative enactment, forbidding municipal officers to loan municipal credit, or donate or subscribe stock to railroad or other corporations without previous assent of two-thirds of the qualified voters, is merely prohibitory, and confers no authority when such assent is given.[2]

§ **1536.** It has been held that, if a majority of the electors of a municipal corporation vote in favor of a proposition for the corporation to subscribe to the capital stock of a railroad company, under a law directing such subscription to be made if such majority's vote is obtained, the municipal authorities, on proceedings to compel them to make such subscription, have a right to allege and show that the election was not fairly conducted, but was influenced by bribery and corruption, practiced and perpetrated by the railroad company and its employees.[3] It has been been held by the United States Supreme Court that under an Illinois statute authorizing a township subscription to a railroad company not exceeding $250,000, provided the people so voted, the power of the township was not exhausted by a subscription of a portion of the sum limited,[4] and that a consolidation of the railroad company with another, and assumption of a different name prior to the subscription, did not vitiate it.[5]

§ **1536a. Right of taxpayers to injunction.**— The taxpayers of the municipality may also enjoin the proceedings of the corporate authorities to carry out the subscription on the ground of fraud, bribery, nonfulfilment of pre-existing conditions, or other sufficient cause; but they must do so, if at all, in apt time, and before the rights of *bona fide* third parties have accrued.[6]

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2. Jarrolt v. Moberly, 103 U. S. (13 Otto) 581.

3. People v. Supervisors, 27 Cal. 655.

4. Empire v. Darlington, 101 U. S. (11 Otto) 87. See People v. Waynesville, 88 Ill. 469.

5. Empire v. Darlington, 101 U. S. (11 Otto) 87. See *ante*, § 1523*a*.

6. Butler v. Dunham, 27 Ill. 477, 478; Prettyman v. Supervisors, 19 Ill. 406; Steines v. Franklin County, 48 Mo. 176. See § 1522*a*.

SECTION III.

POWER OF A MUNICIPAL OFFICER OR AGENT TO BIND THE MUNICIPALITY; VIEWS OF THE UNITED STATES SUPREME COURT.

§ 1537. The Supreme Court of the United States has enunciated the following doctrines on this subject as applicable to corporations, private and public, which we shall divide into two series. The *first* series are as follows:

First: Where a party deals with a corporation in good faith, the transaction is not *ultra vires*, and he is unaware of any defect of authority, or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.[7]

Second: When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.[8]

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7. Merchants' Bank v. State Bank, 10 Wall. 644; Myers v. The City of Jeffersonville, 145 Ind. 431. In the last case Mr. Justice Hackney, speaking for the court, and referring to the elaborate review of the cases in the opinion, said: "The result of the authorities is, we think, that where municipal bonds have passed into the hands of *bona fide* holders, that is: holders for value without notice of mere irregularities in the exercise of existing power to execute the bonds, they hold them as other commercial paper, subject to no defense by reason of such irregularities. But where there is an absence of power to execute the bonds, they are void, and subject to defense in the hands of whomsoever they may come." Hoag v. Town of Greenwich, 133 N. Y. 152. Held, in this case, in an able opinion of Finch, J., that where commissioners appointed under an act, issued bonds of the town payable in twenty years instead of for thirty as required by the act, that the bonds were void as such; but that, as the commissioners had authority to borrow the money which the bonds were merely to secure, they by so doing bound the town to repay it, and it appearing that the parties, both borrower and tender, acted in good faith and with the intention to comply with the statute, that a promise on the part of the town to repay the loan at the time and in the manner prescribed by the statute, would be implied, and an action thereon against the town was maintainable. Town of Brewton v. Spire, 106 Ala. 229, 17 So. 606.

8. Gelpcke v. City of Dubuque, 1 Wall. 203; Moran v. Miami County, 2 Black, 725; Supervisors v. Schenck, 5 Wall. 784; The Mayor v. Lord, 9 Wall. 414; City of Lexington v. Butler, 14 Wall. 296. See also San Antonio v. Lane,

Third: That, where negotiable bonds or securities on their face import by recitals a compliance with the law under which they were issued, the purchaser is not bound to look further for evidence of compliance with the conditions annexed to the grant of power to issue them.[9]

Fourth: That, if it appears to have been the sole province of the officers who execute and issue the bonds or securities to decide whether or not there has been antecedent compliance with the regulation, condition, or qualification prescribed to their authority, their determination that there has been such compliance and

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32 Tex. 414; County of Henry v. Nicolay, 95 U. S. (5 Otto) 626; Auerbach v. Le Sueur Mill Co., 28 Minn. 291; City of Cadillac v. Savings Bank, 7 C. C. A. 574, 58 Fed. 935; Louisville, etc., Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. Rep. 817.

9. Mercer County v. Hacket, 1 Wall. 93; Commissioners of Knox County v. Aspinwall, 21 How. 545; St. Joseph Township v. Rogers, 16 Wall. 659; Pendleton County v. Amy, 13 Wall. 305; Bissell v. Jeffersonville, 24 How. 287; Moran v. Miami County, 2 Black, 722; Grand Chute v. Winegar, 15 Wall. 372; Larned v. Burlington, 4 Wall. 276, 277; Lynde v. County, 16 Wall. 6; Kennicott v. Supervisors, 16 Wall. 464; County of Warren v. Marcy, 97 U. S. (7 Otto) 96; Menasha v. Hazard, 102 U. S. (12 Otto) 81; San Antonio v. Meharty, 96 U. S. (6 Otto) 313; Township of Rock Creek v. Strong, 96 U. S. (6 Otto) 227; Commissioners v. Bolles, 94 U. S. 202; Commissioners v. January, 94 U. S. (4 Otto) 202; Pompton v. Cooper Union, 101 U. S. (11 Otto) 204; Clay County v. Society for Savings, Morrison's Transcript, vol. III, No. 3, p. 654; Sherman County v. Simons, 109 U. S. 735; Livingston County v. First Nat. Bank, 129 U. S. 102. But it has been held that such recitals will not relieve a purchaser where the law, compliance with which is recited, is unconstitutional, or otherwise invalid. Lake County v. Graham, 130 U. S. 674. A certificate of a judge of the County Court indorsed on the back of each bond, alleging compliance with the enabling statute, has been held not a recital of the bond itself, the judge being unauthorized to make such certificate. Daviess County v. Dickinson, 117 U. S. 664; Coler & Co. v. Dwight School Township, 3 N. Dak. 249, 55 N. W. 587; Flagg v. School District, 4 N. Dak. 30, 58 N. W. 499; Mayor of City of Columbus v. Dennison, 16 C. C. A. 125, 69 Fed. 58; West Plains, etc., Co. v. Sage, 16 C. C. A. 553, 69 Fed. 943; Risley v. Village of Howell, 12 C. C. A. 218, 64 Fed. 453; Wesson v. Town of Mt. Vernon, 39 C. C. A. 301, 98 Fed. 804; Rondot v. Rogers, 39 C. C. A. 462, 99 Fed. 202; Pickens Township v. Post, 41 C. C. A. 1, 99 Fed. 659; Hughes County v. Livingstone, 43 C. C. A. 541, 104 Fed. 306; Rollins v. Board of Commissioners, 26 C. C. A. 91, 80 Fed. 692; City of South St. Paul v. Lamprecht Bros., 31 C. C. A. 585, 88 Fed. 449. Where the bonds recite a wrong act as authority for their being issued, the holders are not precluded from showing that independent of such act there was power to issue the bonds. Wilkes County v. Coler, 180 U. S. 506, 21 Sup. Ct. Rep. 458.

declaration to that effect is sufficient, and cannot be impugned as against a *bona fide* holder.[10]

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10. Town of Coloma v. Eaves, 92 U. S. (2 Otto) 491; Town of Venice v. Murdock, 92 U. S. (2 Otto) 496; Town of Genoa v. Woodruff, 92 U. S. (2 Otto) 502; County of Moultrie v. Savings Bank, 92 U. S. (2 Otto) 631; Marcy v. Township of Oswego, 92 U. S. (2 Otto) 637; Walnut v. Wade, 103 U. S. (13 Otto) 683; Commissioners v. Bolles, 94 U. S. (4 Otto) 104; Buchanan v. Litchfield, 102 U. S. (12 Otto) 291; Bonham v. Needles, 103 U. S. (13 Otto) 648; Orleans v. Pratt, 99 U. S. (9 Otto) 676; Lincoln v. Iron Co., 103 U. S. (13 Otto) 413; Moultrie County v. Fairfield, Morrison's Transcript, vol. IV, No. 1, p. 152; Commissioners v. January, 94 U. S. (4 Otto) 202; St. Joseph Township v. Rogers, 16 Wall. 659, Clifford, J.; Kennicott v. Supervisors, 16 Wall. 464, Hunt, J. In Lynde v. County, 16 Wall. 13, Swayne, J., said: "It is a settled rule of law that, where a particular functionary is clothed with the duty of deciding such a question, his decision, in the absence of fraud or collusion, is final." See also Bank of Rome v. Village of Rome, 19 N. Y. 20; Commissioners of Knox County v. Nichols, 14 Ohio St. 271. In Town of Coloma v. Eaves, 92 U. S. (2 Otto) 491, Strong, J., quoting Dillon on Municipal Corporations, § 419, said: "After a review of the decisions of this court, the author remarks: 'If upon a true construction of the legislative enactment conferring the authority (viz., to issue municipal bonds upon certain conditions), the corporation, or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their determination of a matter *in pais*, which they are authorized to decide, will, in favor of a bondholder for value, bind the corporation.' This is a very cautious statement of the doctrine. It may be restated in a slightly different form. When legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them, and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal." But if the bonds are issued without authority of law, holder for value would not be protected. Smith v. Town of Greenwich, 80 Hun, 118, 30 N. Y. Supp. 56. See authorities cited in notes to § 1540; Provident Trust Co. v. Mercer County, 170 U. S. 601, 18 Sup. Ct. Rep. 788; Evansville v. Dennett, 161 U. S. 442, 16 Sup. Ct. Rep. 613, 20 C. C. A. 142, 73 Fed. 966; Cairo v. Zane, 149 U. S. 122, 13 Sup. Ct. Rep. 803; Anderson County Commissioners v. Beal, 113 U. S. 227, 5 Sup. Ct. Rep. 433; Graves v. Saline County, 161 U. S. 369, 16 Sup. Ct. Rep. 526; Andes v. Ely, 158 U. S. 312, 15 Sup. Ct. Rep. 954; Citizens' Sav. Assn. v. Perry County, 156 U. S. 692, 15 Sup. Ct. Rep. 547; Oregon v. Jennings, 119 U. S. 74, 7 Sup. Ct. Rep. 124; Insurance Co. v. Bruce, 105 U. S. 328; County of Jasper v. Ballou, 103 U. S. 745; Board of Commissioners v. Ætna Life Ins.

Fifth: That, from the mere fact that the bonds or securities are issued and subscribed to the object of their issue, the purchaser has a right to assume that the conditions precedent to the right to issue have been fulfilled,[11] and in an action on the bonds or coupons the plaintiff need not aver the performance of such conditions.[12]

Sixth: That, if the legal authority be sufficiently comprehensive, a *bona fide* holder for value has a right to presume that all precedent requirements have been complied with.[13]

Seventh: That, if there be lawful authority for the corporation to issue the bonds, the omission of formalities and ceremonies, or the existence of fraud on the part of the agents of the corporation issuing the bonds, cannot be urged against a *bona fide* holder seeking to enforce them.[14]

§ **1538. Qualifications of doctrines stated.**— But the effect of its decisions is to qualify these doctrines by a second series of propositions, as follows:

First: That where the power on the part of the corporation officers to make the contract for the corporation never existed, negotiable securities issued by them are invalid in the hands of

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Co., 32 C. C. A. 600, 90 Fed. 237; Brown v. Ingalls Township, 30 C. C. A. 27, 86 Fed. 261; City of Huron v. Second Ward Sav. Bank, 30 C. C. A. 38, 86 Fed. 272; Wesson v. Saline County, 20 C. C. A. 227, 73 Fed. 917; Syracuse, etc., Co. v. Rollins, 44 C. C. A. 277, 104 Fed. 958; Village of Kent v. Dana, 40 C. C. A. 281, 100 Fed. 56; Board of Commissioners v. Sutliff, 38 C. C. A. 167, 97 Fed. 270; Geer v. Board of Commissioners, 38 C. C. A. 250, 97 Fed. 435; Board of Commissioners v. Ætna Life Ins. Co., 32 C. C. A. 585, 90 Fed. 222; Board of Commissioners v. National Life Ins. Co., 32 C. C. A. 591, 90 Fed. 228; Gratton Township v. Chilton, 38 C. C. A. 84, 97 Fed. 145; Louisville, etc., Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. Rep. 817.

11. Commissioners of Knox County v. Aspinwall, 21 How. 544; Meyer v. Muscatine, 1 Wall. 393; Lincoln v. Iron County, 103 U. S. (13 Otto) 412. But see Buchanan v. Litchfield, 102 U. S. 278; Citizens' Sav. Assn. v. Perry County, 156 U. S. 692, 15 Sup. Ct. Rep. 547, and § 1538.

12. Lincoln v. Iron County, 103 U. S. (13 Otto) 413.

13. Meyer v. Muscatine, 1 Wall. 393; Grand Chute v. Winegar, 15 Wall. 373; Life Ins. Co. v. Board of Education, 10 C. C. A. 637, 62 Fed. 778; Pickens Township v. Post, 41 C. C. A. 1, 99 Fed. 659.

14. Kennicott v. Supervisors, 16 Wall. 465; Town of East Lincoln v. Davenport, 94 U. S. (4 Otto) 801. The omission of seals required by statute has been held not to vitiate the bonds. Town of Solon v. Williamsburg Sav. Bank, 42 N. Y. S. C. 1.

all persons, even innocent purchasers.[15] And such power must appear to exist in express terms, or by necessary implication.[16]

Second: That there can be no ratification, save by those who are capable to contract, nor of contracts, save of those which it is competent for them to perform.[17]

Third: The Supreme Court of the United States upon full consideration now holds that the mere fact that bonds are issued without any recital of the circumstances bringing them within the power granted is not in itself conclusive proof in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued.[18]

§ 1539. Illustrations of the doctrines of the United States Supreme Court; leading case of Commissioners of Knox County v. Aspinwall.— Manifesting a stern resolution to sustain the rights of *bona fide* holders of corporate securities, that tribunal has applied the first series of propositions in numerous cases. In one of them, which is generally quoted as a leading case,[19] suit was brought by a *bona fide* holder for value of coupons, attached to bonds of Knox county, Indiana, which had been given in subscription to stock of a railroad company. The board of county commissioners had been authorized by act of Assembly to take stock in the railroad, payable in county bonds, "provided a majority of the qualified voters of said county, at any annual election, shall vote for the same." The bonds recited on their face, that they were issued

15. Anthony v. County of Jasper, 101 U. S. (11 Otto) 693; Wells v. Supervisors, 102 U. S. (12 Otto) 625; Town of South Ottawa v. Perkins, 94 U. S. (4 Otto) 260; McClure v. Township of Oxford, 94 U. S. (4 Otto) 432; Marsh v. Fulton County, 10 Wall. 683. See also Wilson v. City of Shreveport, 29 La. 673; Town of Middleport v. Ætna Life Ins. Co., 82 Ill. 562; Township of East Oakland v. Skinner, 94 U. S. (4 Otto) 257; Williamson v. City of Keokuk, 44 Iowa, 88; United States Trust Co. v. Village of Mineral Ridge, 44 C. C. A. 218, 104 Fed. 851; People *ex rel.* Standifer v. Hamill, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280.

16. Wells v. Supervisors, 102 U. S. (12 Otto) 625; Coffin v. Board of Commissioners, 6 C. C. A. 288, 57 Fed. 137; Choisser v. People, 140 Ill. 21, 29 N. E. 546; Sampson v. People, 140 Ill. 466, 30 N. E. 689.

17. Marsh v. Fulton County, 10 Wall. 683; Boom v. City of Utica, 2 Barb. 105.

18. Buchanan v. Litchfield, 102 U. S. 278; Citizens' Savings Assn. v. Perry County, 156 U. S. 692, 15 Sup. Ct. Rep. 547.

19. Commissioners of Knox County v. Aspinwall, 21 How. 539. Approved in De Voss v. City of Richmond, 18 Gratt. 356, 357; Steines v. Franklin County, 48 Mo. 179; Town of South Ottawa v. Perkins, 94 U. S. (4 Otto) 260.

by order of the commissioners in pursuance of the act of Assembly providing for their issue; and the county resisted payment on the ground, that though a vote had been cast in favor of their issue, at a popular election, the bonds were invalid, because the preliminary notices for the election prescribed by statute had not been properly given. But the court declared them valid, on two grounds, and Nelson, J., said: (1) "This view would seem to be decisive against the authority, on the part of the board, to issue the bonds, were it not for a question that underlies it, and that is, who is to determine whether or not the election has been properly held? The right of the board to act in execution of the authority is placed upon the fact, that a majority of the votes had been cast in favor of the subscription; and to have acted without first ascertaining it would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. The board was one, from its organization and general duties, fit and competent to be the depository of the trust thus confided to it." (2) "Another answer," says the court, "to this ground of defense, is that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power, had been obtained, from the fact of the subscription by the board to the stock of the railroad company, and the issuing of the bonds. The bonds on their face import a compliance with the law under which they were issued. * * * The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power." Again, where bonds issued by county commissioners recited that they were issued by virtue of, and in accordance with, the act of the Legislature, and in pursuance of, and in accordance with, the vote of a majority of the qualified electors, the court said: "Behind such a recital, as we have seen, a *bona fide* holder for value paid is bound to look for nothing except legislative authority given for the issue of municipal bonds to railroad companies." [20]

20. Commissioners v. Bolles, 94 U. S. (4 Otto) 109. See also Commissioners v. January, 94 U. S. (4 Otto) 202; Livingston County v. First Nat. Bank, 129 U. S. 102. In the case of Kirsch v. Braum, 153 Ind. 247, 53 N. E. 1082, it was decided that gravel-road bonds issued under the provisions of the Act of 1877, held in form the bonds of the county, are but the evidence of the holders' right to receive from the treasurer the money received from assessments made upon lands benefited by the construction of the road, and create

§ 1540. Other cases wherein recitals in bonds were deemed conclusive.— So where the common council of Jeffersonville city were authorized to issue bonds for stock in a railroad company on the petition of three-fourths of the legal voters of the city, it was held that the city was precluded by the recital in bonds issued by the council, that such petition had been made, from showing the contrary against *bona fide* holders for value.[21] The like view was taken where authority was conferred on the council of Muscatine to borrow money upon a two-thirds majority in favor of the loan being cast at an election — but in this case it appears that such majority was cast.[22] So where a statute required the grand jury of a county to fix the amount of a county subscription to railroad stock, and on their report being filed, empowered commissioners to make the subscription in the name of the county, it was held that where bonds issued by such commissioners were sued on by a *bona fide* holder, it was not necessary for him to show that the grand jury had fixed the manner and terms of paying for the stock, and that it would be no available defense to the county to show that the grand jury had omitted to do so.[23]

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no liability against the county, and that one who purchases such bonds becomes in legal effect a party to all pending proceedings relative thereto, and is bound to take notice of the statute under which they were issued, and of the settled construction thereof, and it is incumbent upon him to see that assessments are made upon lands benefited which he can cause to be collected. City of South St. Paul v. Lamprecht Bros. Co., 31 C. C. A. 585, 88 Fed. 449.

21. Bissell v. Jeffersonville, 24 How. 287 (1860). Similar view taken in Van Hostrup v. Madison City, 1 Wall. 297 (1863); Claybrook v. Commissioners of Rockingham County, 117 N. C. 456, 23 S. E. 360. In this case it was held, that the registration list is *prima facie* evidence as to who constituted qualified voters in a municipality, notwithstanding the list was recorded in the same book in which the municipal authorities kept a record of their proceedings. And further that the purchaser of municipal bonds is not required, when looking into the validity of an election on the issue of bonds for a subscription by a municipality to the stock of a railroad company, to go further than to find from the certificate of the registrar that a majority of the qualified voters of the municipality had voted for the subscription. See also Bank v. Board of Commissioners, etc., 116 N. C. 339, 21 S. E. 410; Evansville, City of, v. Dennett, 161 U. S. 434, 16 Sup. Ct. Rep. 613; Ashley v. Board of Supervisors, 8 C. C. A. 455, 60 Fed. 55; Hughes County v. Livingston, 43 C. C. A. 541, 104 Fed. 306.

22. Meyer v. City of Muscatine, 1 Wall. 393 (1863).

23. Woods v. Lawrence County, 1 Black, 386, approved in Grand Chute v. Winegar, 15 Wall. 372 (1872). See to like effect Commissioners of Knox

§ **1541.** In another case, where the action was on coupons payable to bearer, belonging to bonds issued by commissioners of Mercer county, it appeared that commissioners were empowered to subscribe stock to a railroad company, and issued the bonds upon the following "restrictions, limitations, and conditions, and in no other manner or way whatever." "1. After and not before the amount of such subscription shall have been designated, advised, and recommended by a grand jury of the county. 2. Said bonds shall in no case be sold by the railroad company at less than par. 3. Acceptance of the act should be deemed acceptance of another fixing the gauges of railroads in the county of Erie." The county resisted payment on the ground that although the grand jury had made a certain recommendation, it was not such a recommendation as the law required, and that they had been sold below par. The bonds recited on their face that they were issued under authority of the act, and the court sustained their validity, Grier, J., saying: "We have decided that where the bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further. The decision of the board of commissioners may not be conclusive in a direct proceeding to inquire into the

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County v. Nichols, 14 Ohio St. 260. The Supreme Court of New York in the case of Broadway Sav. Inst. v. Town of Pelham, 83 Hun, 96, 31 N. Y. Supp. 402, commenting upon the leading case of Commissioners of Knox County v. Aspinwall, 21 How. 541, and other Supreme Court cases, says: "In these cases it was decided that the facts which a municipal corporation issuing bonds was not permitted to question, in the face of a recital in the bond of their existence, were those connected with, or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine whether the bonds were issued. * * * We know of no authority in that court to the effect that a municipal corporation is not permitted to assert and prove against a *bona fide* holder of those bonds the fact that they were not authorized by any legislative authority." * * * "In numerous cases the Supreme Court of the United States has held that mere informalities or irregularities in fulfilment of a condition precedent to a grant of power to an agent, or in the exercise of that power, when granted, would not render the bonds invalid in the hands of an innocent holder; but no case has gone to the extent of upholding the bonds when there was a total want of power in the agent who issued them. The rule applied by that court is limited to instances in which the officer issuing the bonds is also permitted by the statute to determine whether a fact, made a condition precedent to the exercising of his power, exists. In such a case his recital is a decision and binds the municipality."

facts before the rights and interests of other parties had attached; but after the authority had been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question." And he added, "Although we doubt not the facts stated as to the atrocious frauds which have been practiced in some counties, in issuing and obtaining these bonds, we cannot agree to overrule our own decisions, and change the law to suit hard cases. The epidemic insanity of the people, the folly of county officers, the knavery of railroad 'speculators,' are pleas which might have just weight in an application to restrain the issue or negotiation of these bonds, but cannot prevail to authorize their repudiation after they have been negotiated and have come into the possession of *bona fide* holders." [24]

§ **1542.** Again, upon a *mandamus* against the city of Davenport, to compel a tax levy to pay a judgment on negotiable bonds, the court held the judgment conclusive as to their validity; but, in answer to the argument of counsel that they were issued without the prerequisite popular vote, the court declared that, as against an innocent purchaser, the city was estopped to deny compliance with the statute.[25] In another case, where the city of Lexington, Kentucky, was authorized to subscribe to a railroad on the condition of a majority vote, it appeared that the vote had been cast, but the city had embodied the condition in the proposition submitted that $1,000,000 should be first subscribed by other parties before its officers should subscribe to the stock or execute the bonds. The city refused to subscribe, but was directed by *mandamus* from an inferior court to do so. It then appealed, and the Court of Appeals of Kentucky reversed the decision; but meanwhile the bonds were issued, signed by the mayor and clerk, reciting due compliance with the act of Assembly, and came into the hands of a *bona fide* holder. And the court sustained their validity on the like grounds, as in the preceding case cited.[26] In another case, in an action brought on cer-

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24. Mercer County v. Hackett, 1 Wall. 96 (1863), approved in Grand Chute v. Winegar, 15 Wall. 372 (1872).

25. Mayor v. Lord, 9 Wall. 414 (1869); City of South St. Paul v. Lamprecht Bros., 31 C. C. A. 585, 88 Fed. 449.

26. City of Lexington v. Butler, 14 Wall. 296 (1871). Judge Dillon says, in his Treatise on Municipal Corporations, vol. I, § 442*a*, p. 518 (2d ed.): "The substance of the decision of the United States Supreme Court in this

tain coupons of bonds of the town of Coloma, there was a recital on the bonds that they were issued in accordance with a vote of the electors of said township of Coloma, signed by a supervisor and town clerk, and recovery was resisted mainly upon the alleged ground of a want of power in the officers of the town to issue the bonds, because the legal voters of the town had not been notified to vote upon the question of the subscription for which the bonds were issued. It was held that the recital estopped the town from the defense offered to be made.[27] Again, where the law under consideration provided that the amount of bonds sold by any township should not be above such a sum as would require a levy of more than one per cent. per annum on the taxable property of the township to pay the interest, and objection was made that the issue of the bonds in controversy was in excess of this amount, the court said that the extrinsic facts were referred to the inquiry and determination of the board of county commissioners, and were determined before the bonds came into the plaintiff's hands; and that "he was, therefore, not bound when he purchased, to look beyond the act of the Legislature, and the recitals which the bonds contained."[28]

§ **1543.** So it has been held that it was no defense against *bona fide* holders of railroad bonds that the mortgage given to secure them was executed out of the State, instead of in it, as should have been the case.[29] So that, where there had been a popular

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case would seem to be that a *bona fide* purchaser of the bonds had a right to presume that the condition annexed by the city as to the $1,000,000 of other subscriptions had been complied with, and thus viewed, the judgment of the court rests upon grounds whose soundness cannot admit of question. It is not an authority upon its essential facts in favor of the proposition that, if the bonds had been issued without any vote, or attempt at a vote, they would have been binding in the absence of estoppel other than by recitals or other ground of liability." But see *ante*, § 538.

27. Town of Coloma v. Eaves, 92 U. S. (2 Otto) 484. See *ante*, § 1537 and note. But see Broadway Sav. Inst. v. Town of Pelham, 83 Hun, 96, 31 N. Y. Supp. 402; Wesson v. Town of Mt. Vernon, 39 C. C. A. 301, 98 Fed. 804; Rondot v. Rogers Township, 39 C. C. A. 462, 99 Fed. 202; Pickens Township v. Post, 41 C. C. A. 1, 99 Fed. 659; Hughes County v. Livingston, 43 C. C. A. 541, 104 Fed. 306.

28. Marcy v. Township of Oswego, 92 U. S. (2 Otto) 641. See also Humboldt Township v. Long, 92 U. S. (2 Otto) 645. But see Mosher v. Ind. School District, 44 Iowa, 122; City of South St. Paul v. Lamprecht Bros., 31 C. C. A. 585, 88 Fed. 449.

29. Galveston R. Co. v. Cowdrey, 11 Wall. 478 (1870).

vote in favor of a county subscription, the county could not resist payment of bonds issued in pursuance thereof, on the ground that the election had been ordered by the County Court instead of by the board of supervisors, as provided by law.[30] So that, where the town of Grand Chute had been authorized to subscribe not exceeding $10,000 to a plankroad company, in such amounts "as may be declared by the board of directors of said company necessary to the completion of said road at the time of such subscription," it could not resist payment of bonds issued by the supervisors, on the ground that the directors had not declared the amounts necessary, the bonds importing on their face compliance with the act.[31] So that bonds signed by a *de facto* judicial officer with the seal of the court could not be impeached in the hands of an innocent holder by showing that the officer did not have title *de jure* to his office at the time he officiated; nor could it be shown against such holder that the company to whose stock the bonds were subscribed was not organized within the time specified in its charter.[32] Where municipal authorities were empowered by statute to issue bonds bearing interest at a specified rate, it was held that their validity was not affected by the fact that the authorities came within the power conferred, and provided for a lower rate of interest.[33]

The provisions of a city charter that all bonds issued by the city "shall specify for what purpose they were issued" is not satisfied by a declaration on the face of the bonds that they are issued by virtue of an ordinance the date of which is given but not its title or its contents.[34]

But recitals in bonds that they are issued "in pursuance of an act of the Legislature of the State and of the city council of the city passed in pursuance thereof" do not put a purchaser of the bonds on inquiry as to the terms of the city ordinance.[35]

§ **1543a.** Where the Constitution of a State prohibits the counties from contracting debts except in a certain limited proportion to the rates on taxable property, the United States Supreme Court has held that recitals in the bonds made by the board of

30. Supervisors v. Schenck, 5 Wall. 773.
31. Grand Chute v. Winegar, 15 Wall. 356 (1872).
32. Ralls County v. Douglass, 4 Morrison's Transcript, No. 1, p. 102.
33. Omaha Nat. Bank v. City of Omaha, 15 Nebr. 333.
34. Barnett v. Denison, 145 U. S. 135, 12 Sup. Ct. Rep. 819.
35. Evansville, City of, v. Dennett, 165 U. S. 434, 16 Sup. Ct. Rep. 613.

commissioners were conclusive in favor of *bona fide* holders of the bonds, even though they were issued in excess of the limit prescribed by the Constitution.[36]

§ 1544. Cases in United States Supreme Court qualifying the general doctrines before stated.— Illustrating the *second* series of propositions: It appeared that the Legislature of Illinois had authorized a county subscription to be made to any railroad corporation of the State, provided that a majority of the qualified voters of the county should vote for the same, and required that the notices calling for the election should specify the company in which stock was proposed to be subscribed. The powers of the county were only to be exercised by the board of supervisors, or by resolution by them adopted. The voters of the county authorized a subscription to the "Mississippi and Wabash R. R. Company," and to the "Petersburgh and Springfield Company," and the supervisors authorized their clerk to issue the bonds to the first-named corporation. The clerk of the County Court, acting as their clerk, issued bonds to "The Central Division of the Mississippi and Wabash R. R. Company," which was a different corporation from the original company. By various acts the supervisors recognized the validity of these bonds by allowing interest on them, levying a tax to meet it, and appointing agents to represent the stock received by the county for the bonds in the corporate meetings, and also paid two of the bonds in full. The Supreme Court held the bonds invalid, on the ground that the supervisors, having had no authority to issue the bonds to the corporation, because the condition precedent of a popular vote had not been fulfilled, could not, therefore, by any act ratify the subscription when made by their clerk.[37] In another case, where the Missouri

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36. Gunnison County v. Rollins, 173 U. S. 255, 19 Sup. Ct. Rep. 390. See also Bush v. Litchfield, 102 U. S. 278; Orleans v. Platt, 99 U. S. 676; Northern Bank v. Porter Township, 110 U. S. 608, 4 Sup. Ct. Rep. 254; Dixon Co. v. Field, 111 U. S. 83, 4 Sup. Ct. Rep. 315; Lake County v. Graham, 130 U. S. 674, 9 Sup. Ct. Rep. 654.

37. Marsh v. Fulton County, 10 Wall. 683 (1870), Field, J., delivering the unanimous opinion, saying: "But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact, we do not perceive how it could affect the liability of the county of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might, for such reason, be taken without special inquiry into their validity. It is a case where the power to contract never existed — where the

statute declared that before a municipal bond thereafter issued should obtain validity or be negotiated, it should be presented to

instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of Floyd Acceptances. In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the court says: 'In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterward; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued. It is also contended that if the bonds in suit were issued without authority, their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification even by the supervisors. But the answer to them all is, that the power of ratification did not lie with the supervisors. A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified. The supervisors possessed no authority to make the subscription or issue the bonds in the first instance without the previous sanction of the qualified voters of the county. The supervisors, in that particular, were the mere agents of the county. They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization. It would be absurd to say that they could, without such vote, by simple expressions of approval, or in some other indirect way, give validity to acts when they were directly, in terms, prohibited by statute from doing those acts until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition. We do not mean to intimate that liabilities may not be incurred by counties independent of the statute. Undoubtedly they may be. The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. But this is a very different thing from enforcing an obligation attempted to be created in one way, when the statute declares that it shall only be created in another and different way." See also Bissell v. City of Kankakee, 64 Ill. 249; McClure v. Township of Oxford, 94 U. S. (4 Otto) 432; German Sav. Bank v. Franklin County, 128 U. S. 526; Purdy v. Lansing, 128 U. S. 557.

the State Auditor, who should register it, and certify by indorsement that all the conditions of the laws and of the contract under which it was authorized to be issued have been complied with, the Supreme Court of the United States held that unless the bonds were so indorsed, the holder could not maintain an action upon them; and, further, that no antedating of the bonds, so as to give them the appearance of having been executed before the statutory requirement went into effect, could cure the infirmity.[38] The fact that the act under which bonds are issued is erroneously referred to in their recital, will not render them void.[39] Where bonds were issued under a Colorado statute, in excess of the constitutional limitation, but reciting upon their faces full compliance with the requirements of the statute, it was held that the county was not estopped to allege that the bonds were issued in violation of the provisions of the Constitution.[40]

§ **1544a. Power of townships.**— A township has no inherent power to contract debts, and issue coupon bonds, and a statute declaring it "lawful for the agent of any corporate body" to subscribe to a railroad will not create such a power in such a municipal organization. Such a provision, it has been held, manifestly referred to private corporations.[41]

SECTION IV.

HOW INVALIDITY OF THE BOND IS CURED BY ACQUIESCENCE OR RATIFICATION OF THE MUNICIPALITY.

§ **1545.** There are four ways, according to the decisions of the United States Supreme Court and of some of the State courts, in which a municipal corporation may estop itself from objecting to the validity of corporate securities:

(1) By its members failing to interfere and enjoin their issue when they are about to be executed, and thereby acquiescing.[42]

38. Anthony v. County of Jasper, 101 U. S. (11 Otto) 693. The case of Town of Weganwega v. Ayling, 99 U. S. (9 Otto) 112, is distinguished.

39. Commissioners, etc. v. January, 94 U. S. (4 Otto) 202.

40. Lake County v. Graham, 130 U. S. 674. In New Providence v. Halsey, 117 U. S. 339, it was held that the mere act of commissioners in issuing county bonds was equivalent to averring that the issue was within the prescribed limit.

41. Township of East Oakland v. Skinner, 94 U. S. (4 Otto) 257.

42. Supervisors v. Schenck, 5 Wall. 581. In Kentucky it has been held that parties are estopped from denying the constitutionality of a statute by

(2) By their submitting to taxation to pay them.[43]

(3) By their voting for or submitting to the payment of principal or interest by the corporate officers.[44]

(4) By receiving and keeping the proceeds or benefits of them.[45]

§ 1546. Where county bonds had been issued for railroad stock, but their validity was objected to, because the election, at which the popular vote was in their favor, had been ordered by the wrong authority; but taxes had been levied and interest paid on them for nine years, the court said, per Clifford, J.:

"Preliminary proceedings looking to such a subscription by a municipal corporation may often be enjoined for defects or irregularities before the contract is perfected, in cases where the corporation will be held to be forever concluded, if they remain silent and suffer the shares to be purchased, the bonds to be issued, and the securities to be exchanged. Nothing of this kind was attempted in this case, and the defendants have never rescinded, or attempted to rescind, the contract; and have never returned, or offered to return, the evidences of their ownership of the shares in the stock of the company, but have annually acknowledged the validity of the bonds, by voting taxes for the payment of the accruing interest, and have actually paid the same to the amount of six thousand dollars."

And the principle is stated to be, that "where the officers of

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participating in procuring its passage, acquiescing or approving of it, or by receiving benefits under it; although others may impeach its validity. Ferguson v. Landram, 5 Bush, 231.

43. State v. Van Horne, 7 Ohio St. 331; Shoemaker v. Goshen Township, 14 Ohio St. 587.

44. Supervisors v. Schenck, 5 Wall. 581. To same effect, see Mercer County v. Hubbard, 45 Ill. 142; Keithsburg v. Frick, 34 Ill. 421, Breese, J.; Shoemaker v. Goshen Township, 14 Ohio St. 587; Hannibal, etc., R. Co. v. Marion County, 36 Mo. 295; County of Ray v. Vansycle, 96 U. S. (6 Otto) 687; Clay County v. Society for Savings, Morrison's Transcript, vol. III, No. 3, p. 654.

45. Supervisors v. Schenck, 5 Wall. 581; Pendleton County v. Amy, 13 Wall. 305. To same effect, see State v. Trustees of Union Township, 8 Ohio St. 403; State v. Van Horne, 7 Ohio St. 331; Barrett v. County Court, 44 Mo. 199. See also County of Ray v. Vansycle, 96 U. S. (6 Otto) 687. But as to insufficiency of payment of interest as an estoppel, see Daviess County v. Dickinson, 117 U. S. 665; Marsh v. Fulton County, 10 Wall. 676; City of Gladstone v. Throop, 18 C. C. A. 61, 71 Fed. 341; Mayor, etc., of City of Columbus v. Dennison, 16 C. C. A. 125, 69 Fed. 58.

the corporation openly exercise powers affecting the interests of third persons, which presupposes a delegated authority for the purpose, and other corporate acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed." [46]

§ **1547.** So where a county received, and retained for seventeen years, stock in a railroad company, the court said, it thereby estopped itself from asserting that it was issued by officers in disregard of conditions precedent to their authority.[47] And the

46. Supervisors v. Schenck, 5 Wall. 781.

47. In Pendleton County v. Amy, 14 Wall. 305, 306, Strong, J., said: "Without legislative authority a municipal corporation, like a county, may not subscribe to the capital stock of a railroad company, and bind itself to pay its subscription, or issue its bonds in payment; and if it does, the purchaser of such bonds is affected by the want of authority to make them. But it does not follow from this that, when the Legislature has given its sanction to the issue of bonds, provided that before their issue certain things shall be done by the officers or the people of the county, the bonds can always be avoided in the hands of an innocent purchaser, by proof that the county officers or the people have not done, or have insufficiently done, the things which the Legislature required to be done, before the authority to subscribe or to issue bonds should be exercised. A purchaser is not always bound to look further than to discover that the power has been conferred, even though it be coupled with conditions precedent. If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote has been taken as directed by law, and what the vote was. When, therefore, they make a subscription, and issue county bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attached to the exercise of the power has been fulfilled. To issue the bonds without the fulfilment of the precedent conditions would be a misdemeanor; and it is to be presumed that public officers act rightly. We do not say this is a conclusive presumption in all cases; but it has more than once been decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled. The estoppel in these cases was either by recitals in the bonds that the conditions precedent had been complied with, or by the fact that the county had subsequently levied taxes to pay interest on the bonds. In the present case, it does not appear in the pleadings whether or not the bonds contained any such recitals, nor whether the officers of the county had levied taxes to pay interest on them, or whether any interest has been paid. These grounds of estoppel do not exist. But if such acts and such recitals are sufficient to protect *bona fide* purchasers against an attempt to set up noncompliance with the condition attached to the grant of power to issue the bonds, it is not easy to see why the pleadings do not show an estoppel in this case. The county received in exchange for the bonds a certificate

doctrines here stated have been adopted in other cases.[48] But these doctrines are subject to this general limitation, or qualification: that in order to be capable of ratification, the bonds must be such as come within the constitutionally conferred powers of the municipality issuing them; and if the powers assumed to be conferred by the Legislature were not such as it had the right to confer; for instance, if they were to be exercised in aid of a private instead of a public object, the bonds given to carry them out would be totally void and incapable of ratification by payment of interest by the municipality participating in stockholders' meetings upon the stock acquired by them, or even by a vote of the majority of the suffragans.[49]

§ **1548.** In Ohio, where the taxpayers of a township made no objection to the validity of a subscription to a railroad corporation until three or four years had elapsed thereafter, and during that period submitted to taxation and the payment of interest on the bonds issued under it, it was held that they could not then object to the validity of the bonds which had passed into the hands of *bona fide* holders.[50] So in Missouri, where a county voted for

for the stock of the railroad company, which it held about seventeen years before the present suit was brought, and which it still holds. Having exchanged the bonds for the stock, can it retain the proceeds of the exchange, and assert against a purchaser of the bonds for value, that though the Legislature empowered it to make them, and put them upon the market, upon certain conditions, they were issued in disregard of the conditions? We think they cannot, and, therefore, that the third plea cannot be sustained." Mayor, etc., of City of Columbus v. Dennison, 16 C. C. A. 125, 69 Fed. 58.

48. Rogers v. Burlington, 3 Wall. 667; Meyer v. Muscatine, 1 Wall. 392; Commissioners v. January, 94 U. S. (4 Otto) 206.

49. Weismer v. Village of Douglas, 4 Hun, 202.

50. In State v. Van Horne, 7 Ohio St. 331, Swan, J., said: "If the location of the road should have been first made, any taxpayer of the township, for himself and all others interested, could, at any time before the issuing or negotiation of the bonds, have intervened and enjoined their issue as unauthorized, on account of the road not having been located. They, however, either intentionally or from neglect to assert their legal rights, and without protest or interference, suffered the election to take place, their public agents, the trustees, to subscribe for stock, to issue the bonds and receive the proceeds. They also afterward, and for the period of three or four years, paid the interest by taxation, and thus gave credit to the bonds of the township. They now desire to retain the money of the original bondholders, refuse to pay interest, deny their obligations to pay back the principal, disaffirm the acts of their public agents, who, under the forms of law and by their direct instigation through the ballot-box, issued and negotiated these bonds. They had

twelve years on stock subscribed for in a railroad company, it was held it could not object to the validity of bonds issued therefor.[51] So in Kansas, where the failure of a railroad company to complete a specified number of miles of its work, within a given

an opportunity, before innocent third persons could be injured or committed to the acts of their public agents, to enjoin their proceedings, and protect themselves; they did not seek that protection; but now, when they have received all the fruits of the contracts of their agents from third persons who have acted upon their recognition of the authority of their agents, they ask the privilege of denying this recognition, and thus escape from their obligations. It is too late for them to do so, as against innocent third persons. They are concluded, not simply by the acts of their public agents, but by their own. It is true, that when public officers exceed the powers vested in them by general laws, their acts are no longer official, but void; and this principle would be applicable to the case before us, if the trustees had derived their sole authority to make the contract under consideration from the law, without any interposition, sanction, or authority from the taxpayers of the township. But, in the case before us, the trustees derived their authority to subscribe for the stock of the railroad, and to issue the bonds, specifically, from their constituency, the taxpayers of the township. The trustees, unless authorized by the taxpayers, derived no authority to act from the laws under consideration. In fact, the whole transaction under the legislation was for the purpose of consummating an agreement, having all the substantial elements of a private contract, between the taxpayers as principals, who by vote made the trustees their agents to contract for them, on one side, and the railroad and bondholders on the other. The rules of law applied to individuals, and founded upon the clearest principles of justice and sound morals, should be equally applicable to these parties. The taxpayers, as principals, and by their votes, in the forms of law, set their agents in motion, professed to clothe them with special authority to make a special contract with third persons for their benefit; by voting, instigated those agents to make the subscription and issue the bonds; and thus induced, on the faith of this recognition, innocent third persons to part with their money and receive, in lieu thereof, these bonds. If the trustees of the township and the taxpayers supposed, until very recently, as they probably did, that the subsequent permanent establishment and location of the railroad through the township was sufficient to authorize the issuing of the bonds, whether that location was made before or after the election, it is equally just to presume that the bondholders, who parted with their money, entertained the same belief. The one was certainly as much bound to know as the other; and if both were mistaken, no principle of law or justice would demand that the taxpayers should retain the fruits of the mistake, and, at the same time, repudiate those very acts of their own which misled the bondholders, and induced them to part with their money; in truth, blowing hot to get the bondholders' money, and blowing cold to rid themselves of the obligation to refund it."

51. Barrett v. County Court, 44 Mo. 201; Hannibal, etc., R. Co. v. Marion County, 36 Mo. 294; Steines v. Franklin County, 48 Mo. 185.

time, was set up to defeat bonds issued in aid of it, by commissioners of a county who waived the matter of time, the bonds were held valid, the public having had notice and acquiescing, and interest having been paid for two years.[52] Where a county in Illinois subscribed to stock in a railroad company, and agreed to extend the time for completing the road from that originally fixed, to a particular date, and before that date, by its proper officers, declared the road completed to its satisfaction, delivered its bonds, and received the stock subscribed for, the Supreme Court of the United States held that its action constituted a waiver and estoppel, which prevented it from raising the objection that the contract was not performed in time.[53]

§ **1549.** An examination of the authorities which have been cited shows that the doctrines which they announce have met with very general acceptation, and that equitable estoppel is applied very freely to the enforcement of municipal obligations. It would seem to us that it should appear in all cases where it is appealed to, to silence any citizen of the municipality in his plea that the security was illegally issued, that he had a fair opportunity to know the facts, and had wittingly neglected to assert his rights. In other words, his acquiescence or ratification should be made, under all the circumstances, essential to the validity of the ratification by a principal of the act of his agent, as elsewhere expounded.[54] Clearly no ratification could validate an unconstitutional act.[55]

SECTION V.

CORRECT PRINCIPLES AS TO THE LIABILITY OF MUNICIPAL CORPORATIONS UPON NEGOTIABLE BONDS.

§ **1550.** The principles respecting the liability of municipal corporations, which seem to us to be sustained by precedent and by reason, are these:

(1) That mere informalities or irregularities in the fulfilment of a condition precedent to a grant of power to an agent or officer,

52. Leavenworth, etc., R. Co. v. Commissioners of Douglas County, 18 Kan. 170.

53. County of Randolph v. Post, 93 U. S. (3 Otto) 502.

54. See chapter X, section V, § 316 *et seq.*, vol. I.

55. Sherrard v. Lafayette County., U. S. Dist. Ct., Dillon, J., Cent. L. J., May 28, 1875, p. 347. See *ante*, § 1547.

or in the exercise of that power when granted by the agent or officer, are immaterial.[56]

(2) That if a person is only to become the agent or officer of a municipal corporation, to do certain acts when a condition precedent has been fulfilled, such condition must be fulfilled in all substantial and material respects before such acts on his part will be binding on the corporation.[57]

(3) That no assumption or declaration by him that such condition has been fulfilled will have any effect when, in fact, it has not been fulfilled.[58]

(4) That if, however, the agent or officer is fully empowered to do certain acts by the corporation, but his instructions are not to exercise that power save in certain contingencies, the corporation will be bound, though he violate such instructions, unless the fact that the contingency has not transpired be a matter of public record.[59]

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56. This principle is universally admitted, and upon it some of the decisions of the United States Supreme Court are maintainable. Mercer County v. Hubbard, 45 Ill. 142; Smead v. Trustees Union Township, 8 Ohio St. 394; Steines v. Franklin County, 48 Mo. 179; Town of East Lincoln v. Davenport, 94 U. S. (4 Otto) 801; Meyer v. Brown, 65 Cal. 583; Town of Darlington v. Atlantic Trust Co., 16 C. C. A. 28, 68 Fed. 849; City of Gladstone v. Throop, 18 C. C. A. 61, 71 Fed. 341, 344; D'Esterre v. City of New York, 44 C. C. A. 75, 104 Fed. 605.

57. In Lewis v. Commissioners of Bourbon County, Kan. (1873), Cent. L. J., Jan. 8, 1874, Brewer, J., said: "Issuing bonds without a vote is no more *ultra vires* than issuing them against a vote of the majority." In Cooley on Constitutional Limitations, 215, it is said: 'While mere irregularities of action, not going to the essentials of the power, would prevent parties who had acted in reliance upon the securities enforcing them, yet as the doings of these corporations are matters of public record, and they have no general power to issue negotiable securities, any one who becomes holder of such securities, even though they be negotiable in form, will take them with constructive notice of any want of power in the corporation to issue them, and cannot enforce them when their issue was unauthorized."

58. Gould v. Town of Sterling, 23 N. Y. 463; Clark v. Des Moines, 19 Iowa, 201; Treadwell v. Commissioners, 11 Ohio St. 183; Veeder v. Lima, 19 Wis. 298; Wallace v. Mayor of San Jose, 29 Cal. 188; Cooley on Constitutional Limitations, 196. But see Bank of Rome v. Rome, 19 N. Y. 24.

59. In such cases the officer stands on the footing of an agent who violates private instructions. The determination of a condition subsequent to an agency is very different from the determination of a condition precedent, for unless the condition precedent be fulfilled, the party is still a stranger, not an agent. City of Lexington v. Butler, 14 Wall. 296. See *infra*, § 1552; Cooley on Constitutional Limitations, 218, note. In De Voss v. City of Richmond, 18

(5) And (as it seems from the authorities) if it be the sole province of the officer or agent to ascertain whether or not the condition precedent to his authority has been fulfilled, or power is vested in him to exercise his own discretion, his decision becomes sole arbiter of the act, and cannot be reviewed or disputed.[60]

(6) That if the instrument refers on its face to a statutory power, every holder is made chargeable thereby with notice of such statute and its limitations.[61]

(7) That if the right of the officer or agent to bind the corporation is a matter which may be ascertained by an inspection of public records, the holder of any instrument issued by him is

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Gratt. 338, it appeared that the city council directed its officers to issue a bond to the receiver of the Confederate States court, in lieu of one that had been confiscated, and provided in its resolution that in the books of its auditor it should be entered, and upon the face of the bond it should be shown that it was issued instead of the confiscated bond. The auditor issued a new bond, which did not contain upon its face the required statement, and it was passed to a *bona fide* holder for value and without notice. It was held that the city was bound upon it, although the Confederacy having fallen, it was bound also to pay the original bond which had been confiscated to its true owner. Joynes, J., said: "There was nothing to excite the holder's suspicion, or to put him upon inquiry. All that can be said is, that he might have ascertained the facts, if he had gone to the auditor's office and traced the bond back to its source. But that is not enough to charge him with constructive notice of what he might have ascertained, in the absence of anything to put him on inquiry." It will be seen, on examining the text of the case, that the power of the city to borrow money was very broad. The gist of the particular case has been considered to be simply that the purchaser of the bond was not obliged to take notice of the entries in the auditor's books, because they were private records, "to which the public had no access." [See article in Southern Law Review, vol. I, p. 23, Jan., 1872, by Chancellor Cooper, of Tennessee.] If they had been public records, the implication is that the purchaser would have been bound to take notice of them.

60. Commissioners of Knox County v. Nichols, 14 Ohio St. 260; Bank of Rome v. Rome, 19 N. Y. 24; Commissioners of Knox County v. Aspinwall, 21 How. 539, Nelson, J.; Lynde v. County, 16 Wall. 13; St. Joseph Township v. Rogers, 16 Wall. 659; Kennicott v. Supervisors, 16 Wall. 464; Pompton v. Cooper Union, 101 U. S. (11 Otto) 204.

61. Fisk v. City of Kenosha, 26 Wis. 29; City of Aurora v. West, 22 Ind. 89; Louisiana State Bank v. Orleans Nav. Co., 3 La. Ann. 295; McClure v. Township of Oxford, 94 U. S. (4 Otto) 429; Silliman v. Fredericksburg, etc., R. Co., 27 Gratt. 119; Sutro v. Dunn, 74 Cal. 595; National Bank of the Republic v. City of St. Joseph, 31 Fed. 216; City of Uvalde v. Spier, 33 C. C. A. 501, 91 Fed. 594.

chargeable with notice of all facts which appear on such records,[62] and those records cannot be disputed as against a *bona fide* purchaser of bonds issued pursuant to their import.[63]

(8) That the powers of municipal corporations, which are special governmental agencies, and of their officers, who are their special agents, are to be strictly construed.[64]

(9) That if the municipality had power to issue the bonds and that power has been properly exercised and the bonds are regular on their face, it is immaterial to what use the proceeds were applied if the purchaser has acted in good faith.[65]

§ **1551. Illustrations.**— Conforming to the doctrines of the text, it has been decided that where an election was made a condition precedent to the right of a county to issue bonds — and no election was held — the bonds issued were void.[66] So where it was provided "that no subscription or purchase of stock should be made, or bonds issued by any county or city, unless a majority of the qualified voters of the county or city shall vote for the same," it was held that bonds issued without an election, or where the election was called by the wrong authority, were absolutely void in whosesoever hands they might fall, and were not validated by the levy of taxes, and the payment of interest thereon.[67] So where the common council were empowered by the Legislature to create a debt only when "there should be sufficient moneys to meet the same after paying the expenses of the

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62. Bissell v. City of Kankakee, 64 Ill. 249; Clark v. Des Moines, 19 Iowa, 201; De Voss v. Richmond, 18 Gratt. 338; Gould v. Sterling, 23 N. Y. 463; Dunesburg v. Jenkins, 40 Barb. 579; Veeder v. Lima, 19 Wis. 298; Backman v. Charlestown, 42 N. H. 125; Lewis v. Commissioners of Bourbon County, Kan. (Cent. L. J., Jan. 8, 1874); Cooley on Constitutional Limitations, 215.

63. Harter v. Kernochan, 103 U. S. (13 Otto) 563; Louisville v. Savings Bank, 104 U. S. 469; Sutro v. Rhodes, 92 Cal. 117, 28 Pac. 98.

64. Veeder v. Lima, 19 Wis. 291; Treadwell v. Commissioners, etc., 11 Ohio St. 190.

65. Clifton Forge v. Allegheny Bank, 92 Va. 283, 23 S. E. 284; Clifton Forge v. Brush Electric Co., 92 Va. 289, 23 S. E. 288.

66. Steines v. Franklin County, 48 Mo. 167; Flagg v. Palmyra, 33 Mo. 40, is qualified and explained; Bolles v. Perry County, 34 C. C. A. 478, 92 Fed. 479.

67. Marshall County v. Cook, 38 Ill. 44. See Town of Eagle v. Kohn, 84 Ill. 292, where it is held that if conditions precedent be subsequently complied with, bonds issued are valid.

government, and all other demands legally due," it was held that unless such conditions were actually fulfilled, the contract of the council to pay a certain amount in future was void.[68] So where county commissioners were authorized to borrow money, issue bonds, and to subscribe to a railroad company running through or in the county, it was held in an action on the bonds it was a valid defense to show that the railroad was so located as not to touch the county.[69] So where a county had authority to issue bonds provided that sanction was given at a previous election upon thirty days' notice, it was held that although there was an election, the issue of the bonds might be enjoined because due notice was not given.[70] So if the election be held before the act of the Legislature authorizing it takes effect, it has been held premature, and the bonds issued under the act void;[71] and so if the vote be taken merely voluntarily, and not in conformity with the statute.[72]

§ **1552. New York decisions.**— In New York, where a town was authorized to borrow money to subscribe for stock in a railroad corporation, provided the written assent of the resident taxpayers were obtained, it was held that bonds issued without such condition being fulfilled would be void; that it was incumbent on the holder to show that such condition was fulfilled; and that the statement of the town officers that it was fulfilled, operated no estoppel against the town, their own authority being dependent

68. In Wallace v. Mayor of San Jose, 29 Cal. 188, the court said: "The common council were the agents of the corporation, and their authority was special and their power distinctly circumscribed. The corporation could not become bound by the contract unless it was made by the mayor and council in the exercise of the power delegated by the act of incorporation, and within its limits. In dealing with these officers the plaintiff was bound to know the extent of their power, and to see that the condition, on which alone it could arise and subsist, had existence. The fact that these officers assumed to make the contract, and thus bind the corporation, did not create the presumption that they possessed the power which they attempted to exercise, for no officer can acquire power or jurisdiction by the mere assertion of it." Coffin v. Board of Commissioners, 6 C. C. A. 288, 57 Fed. 137.

69. Treadwell v. Commissioners, 11 Ohio St. 183.

70. Harding v. Rockford, etc., R. Co., 65 Ill. 90. See Dillon on Corporations, § 108, p. 229, vol. I. See also Portland, etc., R. Co. v. Hartford, 58 Me. 23.

71. State of Arkansas v. Little Rock, etc., R. Co., 31 Ark. 701.

72. Barnes v. Town of Lacon, 84 Ill. 461.

on its fulfilment.[73] The two cases in which these views are ex-

73. Starin v. Town of Genoa, 23 N. Y. 440; Gould v. Sterling, 23 N. Y. 456. In the latter case, p. 463, Selden, J., said: "The estoppel contended for is supposed to result from that rule of the law of principal and agent in accordance with which it is held that, where a power is conferred, if the agent does an act which is apparently within the terms of the power, the principal is bound by the representation of the agent as to the existence of any extrinsic facts essential to the proper exercise of the power, where such facts from their nature rest peculiarly within the knowledge of the agent. This is the doctrine asserted in the case of Farmers & Mechanics' Bank v. Butchers & Drovers' Bank, 16 N. Y. 125. No representation of the agent as to the fact of his agency, or as to the extent of his power, is of any force to charge the principal. But, it being shown by other evidence that the agency existed, and that the act done was within the general scope of the power, the principal is bound by the representation of the agent as to any essential facts known to the agent, but which the party dealing with him had no certain means of ascertaining." "The reason upon which this rule is founded is that given by Lord Holt, in Hern v. Nichols, 1 Salk. 289, viz.: that, where one of two innocent parties must suffer through the misconduct of another, it is reasonable that he who has employed the delinquent party, and thus held him out to the world as worthy of confidence, should be the loser. This reason can, of course, only apply to a case where the principal has himself employed the agent, and voluntarily conferred upon him power to do the act. This clearly is not such a case. The agents here were designated, not by the town, but by the Legislature; and no power whatever was conferred by the town unless the assent of the taxpayers was obtained. Any representation, therefore, by the supervisor and commissioners in respect to such assent would be a representation as to the very existence of their power. Such representations, as we have seen, are never binding upon the principal. It is obvious, therefore, that the doctrine of the case of The Farmers & Mechanics' Bank v. The Butchers & Drovers' Bank has no application to the present case." "It is also inapplicable for another reason. Knowledge of the facts in regard to the assent of the taxpayers was in no manner peculiar to the supervisor and commissioners, but was equally accessible to the parties receiving the bonds. The statute, of which they were bound, of course, to take notice, apprised them that the bonds could not be legally issued until the requisite assent was obtained, and also that the assent, when obtained, would be placed upon the files of the county. The case is not, therefore, at all like that of the Butchers & Drovers' Bank, where the extrinsic fact related to the state of the accounts of the bank with one of its customers, which could only be known to the teller and other officers of the bank. Here the parties who received the bonds had the means of ascertaining, and were bound to inquire as to the existence of the facts upon which, as they knew, the validity of the bonds depended." "The negotiability of the bonds in no manner aids the plaintiff. It is true they are negotiable, and have in this respect most, if not all, the attributes of commercial paper. But one who takes a negotiable promissory note or bill of exchange purporting to be made by an agent is bound to inquire as the power of the agent. Where the agent is appointed and the power conferred, but the right to exercise the power has been made to

pressed admirably expound the law of the subject, and have been quoted with deserved approval in other cases.[74]

§ 1553. When certificate of public officer is deemed conclusive.— But if the certificate of the municipal officers or agents were made by statute conclusive evidence of the facts stated therein, and were required by statute to be filed, as a matter of public record, it seems that it would then operate as conclusive evidence, in any suit upon a bond or other security issued in conformity with it, as to the facts which it verifies. In such a case the municipality and all its citizens are given notice by the statute that such certificates when filed will be taken as conclusive evidence against them. And it becomes accordingly their duty to watch for its appearance, and to take steps to prevent the issue of the securities based upon it. If they remain quiescent they are estopped, after the securities have been issued, and the rights of *bona fide* holders have accrued, from making objection.[75]

§ 1554. Various cases as to the validity of bonds.— In Ohio, where it was provided that the county commissioners should not deliver the bonds subscribed "until a sufficient sum shall be pro-

depend upon the existence of facts, of which the agent may naturally be supposed to be in an especial manner cognizant, the *bona fide* holder is protected, because he is presumed to have taken the paper upon the faith of the representation of the agent as to those facts. The mere act of executing the note or bill amounts, of itself, in such a case, to a representation by the agent to every person who may take the paper that the requisite facts exist. But the holder has no such protection in regard to the existence of the power itself. In that respect the subsequent *bona fide* holder is in no better situation than the payee, except in so far as the latter would appear of necessity to have had cognizance of facts which the other cannot be presumed to have known." The Supreme Court of the United States dissents from the views taken in New York. See Town of Venice v. Murdock, 92 U. S. (2 Otto) 496; Town of Genoa v. Woodruff, 92 U. S. (2 Otto) 502, and *ante*, § 1537, and note. But the United States Supreme Court recognizes the New York decisions as settling the law of that State. Scipio v. Wright, 101 U. S. (11 Otto) 665; Thompson v. Perrine, 103 U. S. (13 Otto) 806; Broadway Sav. Inst. v. Town of Pelham, 83 Hun, 96, 31 N. Y. Supp. 402.

74. Veeder v. Lima, 19 Wis. 280; Duanesburg v. Jenkins, 40 Barb. 579; The People v. Mead, 24 N. Y. 115, 36 N. Y. 229; Lewis v. Commissioners of Bourbon County (Kan.), Cent. L. J., Jan. 8, 1874.

75. Bank of Rome v. Village of Rome, 19 N. Y. 23 (1859); Veeder v. Lima, 19 Wis. 299. See Commissioners of Knox County v. Aspinwall, 21 How. 539; Huedekoper v. Buchanan County (U. S. C. C.), Cent. L. J., April 9, 1874; Bank v. Board of Commissioners, 116 N. C. 339, 21 S. E. 410; Claybrook v. Board of Commissioners, 117 N. C. 456, 23 S. E. 360.

vided by other subscriptions or otherwise, to insure a continuous railroad connection from Mt. Vernon to Pittsburg," it was held that whether or not such sum was provided, was a matter left entirely to the judgment of the commissioners to determine; and that having issued the bonds it was absurd to suppose that their legality could turn upon a subsequent inquiry into that question.[76]

§ 1555. In Wisconsin it appeared that the supervisors of a town were authorized to subscribe to a railroad company, but the question was first to be submitted to popular vote upon written application of ten or more electors, and after certain prescribed notice. The affidavit of the supervisors of the posting of notice was to be deposited and recorded, with the application aforesaid, in the office of the town clerk, and they or certified copies were to be received in courts of the State as conclusive evidence of the facts stated. In an action on bonds issued, which recited upon their face that the voters of the town had authorized the subscription, it further appeared that notice was not given, nor the election held in conformity with law, nor was the application and the affidavit above mentioned on record as provided. It was held that the absence from the office of the town clerk of these evidences of the validity of the bonds, put all holders upon inquiry; and that the town was not bound upon the bonds. And the principle was declared that "when the appointment and limitation of the agent's authority is duly recorded, a party dealing with him must be deemed to have constructive notice of such limitation.[77]

In Louisiana, where suit was brought against the city of New Orleans upon its indorsement of a negotiable bond, it was held that the words, "in conformity with resolutions of the council of said municipality, bearing date the 29th July and 5th August last," written in the body of the bond, charged all parties with notice of the authority granted by such resolutions; and as the bond was indorsed in excess of such authority, it was void.[78] In New York a case arose in which it appeared that a railroad company issued bonds designated as "consolidated first mortgage gold bonds," referring to the mortgage which showed that they were intended for certain purposes, and it was held that the quoted

76. Commissioners of Knox County v. Nichols, 14 Ohio St. 271.

77. Veeder v. Town of Lima, 19 Wis. 291; Backman v. Charlestown, 42 N. H. 125.

78. Louisiana State Bank v. Orleans Nav. Co., 3 La. Ann. 297.

words put a purchaser on inquiry as to the statements of the mortgage.[79] An overissue of bonds has been held void as to the excess, but valid up to and within the prescribed amount; those first delivered being held the valid ones.[80]

§ **1555a. Statutory course must be pursued.**—Where a statute points out a particular course to be pursued, it must be followed; and if the statute authorize levy of a special tax to liquidate a debt, it will not be construed to authorize issue of interest-bearing obligations.[81] But substantial compliance with the statute is all that is needful.[82] If the Legislature authorize a municipal corporation to borrow money and pay it over to a railroad company in subscription to its stock, it has been held, and, as we think, correctly, that this will not authorize the municipality to exchange its bonds with the railroad company for its stock,[83] although such bonds would be valid in the hands of a *bona fide* holder without notice.[84]

Where no demand for interest on a bond has been made for fifteen years, or any claim preferred respecting it, and in addition the obligee's name did not appear on the books of the county alleged to have issued it, and the holder did not prove how he got it, the right to recover was denied.[85]

§ **1555b.** An interesting case arose in Illinois, where a municipal corporation, without express authority to do so, issued bonds simply as a donation to the Douglas Linen Company. They were sued on by a *bona fide* holder for value. The Supreme Court of that State held that the city of Kankakee, the defendant municipality, was not bound, Scott, J., saying: "The authority of a municipal corporation to issue bonds is derived from public laws, and the avenues to information in regard to the law and ordinances of such corporation being open to public inspection, the

79. Cuylas v. N. Y. & S. R. Co., 10 Hun, 295.

80. Daviess County v. Dickinson, 117 U. S. 657; Sutro v. Pettit, 74 Cal. 332; Sutro v. Rhodes, 92 Cal. 117, 28 Pac. 98.

81. County of Hardin v. McFarlan, 82 Ill. 138.

82. People v. Holden, 82 Ill. 93; Town of Darlington v. Atlantic Trust Co., 16 C. C. A. 28, 68 Fed. 849.

83. Starin v. Town of Genoa, 23 N. Y. 439; Gould v. Town of Sterling, 23 N. Y. 456; People v. Mead, 24 N. Y. 114. See Scipio v. Wright, 101 U. S. (11 Otto) 665, and *ante*, § 1552, and note.

84. People v. Mead, 24 N. Y. 114.

85. Bunch v. Fluvanna County, 86 Va. 452, 10 S. E. 532.

holder of such securities will be presumed to have examined them, and to have known whether the corporation had the requisite power to issue the bonds. He has no such opportunity in regard to private corporations. Their by-laws are not open to inspection by those who deal in securities issued by them, and hence the reason for the distinction that has been taken. The holder of the bonds involved in this action had every opportunity to know whether the city had any lawful right to issue them, for the reason that its authority, if any existed, was to be found in public statutes, and if they did not in fact examine, as it was their privilege to do before buying, they will be presumed to have done so, and to have known that they were issued without authority of law, and, therefore, void in the hands of any holder, either with or without notice." [86]

Where a county has issued bonds in excess of authority, the holder cannot by tendering them to be canceled invest a court of equity with jurisdiction to ascertain the amount of such excess and to declare the residue of such bonds valid and enforce payment thereof.[87]

SECTION VI.

LEGISLATIVE CONTROL OVER MUNICIPAL OBLIGATIONS.

§ 1556. In the first place: may the Legislature compel a municipal corporation to discharge an indebtedness which it did not contract? — The affirmative of this proposition is sustained by numerous cases which assert the legislative authority to exist in its right to apportion, assess, and levy taxes for the purposes of government. Their theory is this: taxation exacts money or services from individuals as and for their respective shares of contribution to any public burden. Private property taken for public use under the right of eminent domain, is not taken as the owner's contributive share of a public burden, but as so much beyond and above that share, and, therefore, cannot be taken without just compensation. It belongs to the Legislature to apportion the taxes necessary to defray a public expenditure, amongst those who derive benefit from it; and if a public improvement benefit a particular locality, that locality, whether incorporated or not, may

86. Bissell v. City of Kankakee, 64 Ill. 249.

87. Hedges v. Dixon County, 150 U. S. 182, 14 S. Ct. 71; Sutro v. Rhodes, 92 Cal. 117, 28 Pac. 98.

be made to bear the burden of paying for it.[88] Thus, in Illinois, it has been held that the Legislature may appoint a board of commissioners and authorize them to levy a tax upon all taxable property in a certain precinct, "for the purpose of maintaining the bridge across Rock river, at Rockford, and to defray the debt incurred in its erection and repair."[89] Caton, J., said: "It will hardly be denied that the Legislature has a right to impose a local tax upon a city or town, a precinct or county, for some local improvement, as the erection of a bridge or the repair of a road. In doing this, to be sure, it cannot say that one man shall pay all and the others none, or that one shall pay one dollar and another ten, for the tax must still be uniform, and upon the value of the property which each one has, so that the burden presses alike upon the whole community. But the Legislature must necessarily have the right to say how large that community thus subject to the tax shall be, whether a city or one of its wards, or a precinct, a county, or the whole State. If the Legislature had the right to impose this tax to build a bridge, it would be equally lawful to purchase one, or to pay for one already constructed for the public accommodation." So it has been held in New York, that where certain citizens of Utica had executed a bond to the State for $38,615, to defray the extra expenses of terminating the Chenango canal at that place, the Legislature might impose a tax on the city of Utica to pay it.[90] So in Pennsylvania, that the Legislature may compel a municipal corporation to build a bridge over a stream, or may itself appoint agents of its own to build it, and to borrw money for that purpose, payable by the corporation.[91] (But in a previous case, the right of the Legislature to require a township to refund money voluntarily paid by a bounty association was denied.)[92] There are numerous other cases holding that the Legislature may, under its taxing power, require municipalities to pay debts which in its judgment are morally charge-

88. Langhorne v. Robinson, 20 Gratt. 661; People v. Lawrence, 41 N. Y. 137, 36 Barb. 177; Blanding v. Burr, 13 Cal. 343. See County Judge v. Shelby R. Co., 5 Bush, 225.

89. Shaw v. Dennis, 5 Gilm. 416.

90. Thomas v. Leland, 24 Wend. 65 (1840). (Judge Cooley thinks this case extreme. Cooley on Constitutional Limitations, 380, note). Approved in Philadelphia v. Field, 58 Pa. St. 320.

91. Philadelphia v. Field, 58 Pa. St. 320 (1868), Thompson, C. J., and Sharswood, J., dissenting.

92. Tyson v. School Directors, 51 Pa. St. 21 (1865), Thompson, C. J.

able upon them.[93] But it has been held that the Legislature cannot compel a municipal corporation to make a contract, or to assume a contract already made.[94]

§ 1557. In the second place: can the Legislature authorize the officers of a municipal corporation to contract a corporate debt without a popular vote in its favor? — There are many cases which declare[95] and determine[96] that the Legislature possesses this power. "The Legislature of a State," says Davis, J., delivering the opinion of the United States Supreme Court, "unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. And this authority can be conferred in such a manner that the objects can be attained either with or without the sanction of the popular vote."[97] It has also been held that the Legislature may confer authority to levy a tax upon the people and property of a municipal corporation for a public purpose, without a popular vote, upon school or other commissioners appointed

93. Guilford v. Supervisors of Chenango County, 13 N. Y. 143; Blanding v. Burr, 13 Cal. 343; Brewster v. Syracuse, 19 N. Y. 116; Lycoming v. Union, 15 Pa. St. 166.

94. Hasbrouck v. Milwaukee, 13 Wis. 38, explained in Mills v. Charleston, 29 Wis. 37. In Town of Queensbury v. Culver, 19 Wall. 91, Strong, J., said: "It may be that a mandatory statute requiring a municipal corporation to subscribe for stock in a railroad company, or to contribute to the construction of the railroad of such a company, is not a legitimate exercise of legislative power and that it is not even an act of legislation. This was decided by the Court of Appeals of New York in the case of People *ex rel.* v. Batchellor, 8 Alb. L. J. 120." In People v. Batchellor, reported in 53 N. Y. 128 (1873), it was held that municipal corporations may be compelled to enter into contracts for an exclusively public purpose, but not into those partially or wholly of a private nature.

95. Thompson v. Lee County, 3 Wall. 327–330; Aurora City v. West, 22 Ind. 89; St. Joseph Township v. Rogers, 16 Wall. 664.

96. First Municipality v. Orleans Theatre Co., 2 Rob. (La.) 209; Thompson v. Perrine, 103 U. S. (13 Otto) 812; People v. Mitchell, 35 N. Y. 551; Williams v. Duanesburgh, 66 N. Y. 129; Keithsburg v. Frick, 34 Ill. 405. In Marshall v. Silliman, 64 Ill. 218, the Supreme Court of Illinois held that the Legislature could confer the power on corporate authorities of a town, but that the supervisor and town clerk were not such authorities in the meaning of the Constitution of that State. See Roberts v. Bolles, 101 U. S. (11 Otto) 126.

97. Thomson v. Lee County, 3 Wall. 330 (1865).

for that purpose;[98] upon the County Court, though it be not elected by the people;[99] upon a common council;[1] or upon any local authorities or individuals that the Legislature may select.[2]

98. Bull v. Read, 13 Gratt. 78; Shaw v. Dennis, 5 Gilm. 416; People v. Lawrence, 41 N. Y. 137; Langhorne v. Robinson, 20 Gratt. 666.

99. Case of Levy, 5 Call, 139; Harrison County Justices v. Holland, 3 Gratt. 247; Langhorne & Scott v. Robinson, 20 Gratt. 661. See Foster v. Callaway County (U. S. C. C.), Cent. L. J., May 28, 1874, p. 263.

1. Langhorne v. Robinson, 20 Gratt. 661.

2. In Shaw v. Dennis, 5 Gilm. 416; Langhorne v. Robinson, 20 Gratt. 664, Joynes, J., delivering the opinion of the court (in which Moncure, P., Christian and Anderson, JJ., concurred; Staples, J., dissenting), wherein he said: "The Legislature is vested by the Constitution with all legislative power, except so far as the exercise of any such power is prohibited or restrained by that Constitution, or by the Constitution of the United States. It may authorize the authorities of a county or city to impose a tax for a purpose of special interest to their people, though it is likewise of such general and public interest as to authorize a tax on the people of the whole State. Goddin v. Crump, 8 Leigh, 120. A power which it might thus delegate it might exercise itself. The whole power of taxation belonged, under the Constitution, to the Legislature; a city or county had none, except such as the Legislature might choose to give it. From considerations of policy and convenience, the power of local taxation has usually been conferred upon those municipal bodies or their officers. Where the power of laying a tax has been delegated to such local authorities, they may, in strictness of language, be said to be 'representatives' of the people, by whom the tax is imposed within the language of the Bill of Rights, provided they are eligible by the people. And yet, in a legal sense, the tax in any such case is imposed by the representatives of the people in the Legislature, the power, which belonged to them alone under the Constitution, being exercised *pro hac vice* by those to whom they have seen fit to delegate it. The tax being thus imposed by the power and authority of the Legislature alone, it follows that it might as well be delegated to local authorities who do not represent the people, as having been elected by them; that it might be delegated to the County Court, whose members, under the Constitution of 1776 and 1830, were not elected by the people or responsible to them in any way. Case of Levy, 5 Call, 139; Harrison County Justices v. Holland, 3 Gratt. 247. So the power might be delegated to the school commissioners of a particular district, who are not the general municipal authorities of the county. Bull *et al.* v. Read, etc., 13 Gratt. 78. When the power to impose a tax is thus delegated to local authorities, they do not exercise their power under the authority which belongs to them as local officers. They exercise only the special authority delegated to them by the Legislature in the particular case and for the particular purpose. On principle, I can imagine no reason why the power might not as well be delegated to any other person, in the discretion of the Legislature. The members of the Legislature are the representatives of the people referred to in the Bill of Rights, section 6. Otherwise the cases cited from 5 Call and 3 Gratt. were not well decided.

§ **1558.** The foregoing decisions rest upon the power of the Legislature to distribute the burdens of taxation amongst those to be, in its judgment, benefited by it. But it may be urged with great force, that while the Legislature may exercise this power in apportioning taxes, to be collected and paid as taxes, it cannot go further and authorize the officers or agents of a municipal corporation to bind it by negotiable bonds or other contracts without a popular vote. The Legislature is the representative body of the State. It may contract for the State in its sovereign character. But it does not follow that it may contract for a lesser portion of the people than the whole community, or confer that power upon others without the consent of a majority of the people of the lesser community. And if the question as to legislative power were opened *de novo* this is the view which it would seem to us should be adopted by the courts; as it is that which we humbly think sound judgment and safe policy enjoins. If the Legislature may authorize a commissioner or other person selected by it, to bind a community included in a mile square, or other geographical space, it follows that it might only include the estate of a single individual as the subject of the burden, and fix upon the owner alone a contracted liability which he himself has no power to limit or prevent. And such an act, which may amount to actual confiscation, does not seem to us to come within the sphere of legislation at all. Still, it is replied that the Legislature is the representative of the people as a whole, and in all their constituent parts; that the evil inherent in the injudicious exercise of the legislative power is no argument against the existence of the power; and the decided cases do not, as a general rule, observe or apply the distinction between the power to levy a tax, and the power to create a liability by contract, which is above made.[3]

§ **1559.** It will not be presumed that a Legislature conferring authority on a municipal corporation to subscribe to a public

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Such, too, is the plain meaning of the language. And it seems plain from the language that this provision of the Bill of Rights was not intended as a restraint upon the Legislature in exercising the power of taxation, but was only intended to affirm, in general terms, a fundamental principle of free government."

3. See opinion of Joynes, J., in Langhorne v. Scott, 20 Gratt. 661. See also opinion of Kingman, C. J., in Commissioners of Shawnee County v. Carter, 2 Kan. 134, quoted *infra*, § 1563.

work, intended it to be exercised without a precedent popular vote, where it does not plainly appear; and if the statute authorizing the subscription provide that the County Court "may," for information, cause an election to be held to ascertain the sense of the taxpayers on the subject, "may" will be construed as "shall," in so far as to require a vote to be taken as a condition precedent to the validity of the subscription, and bonds issued in pursuance of it.[4]

§ 1560. In the third place: may the Legislature validate municipal securities invalid when issued? — Many interesting cases have arisen involving the power of legislative bodies to pass curative acts confirming and declaring valid the securities of municipal corporations which were, when issued, not binding upon them, because of defect of authority, or irregularity in the steps taken. There is no doubt, we think, that it has been decided in a number of cases, that where there has been a popular vote in favor of subscriptions to public purposes, and bonds have been issued in order to effectuate the popular will, but were wanting in validity, because of noncompliance with statutory law, or defect of authority in the corporation to make the subscription, the Legislature may ratify and confirm them. Its sanction to the subscription, or to the form of proceeding, being the only element lacking to its validity, it may be supplied retrospectively, and having all the effect of a ratification, it operates the same as a previous authority.[5]

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4. Leavenworth, etc., R. Co. v. County Court, 42 Miss. 175; Steines v. Franklin County, 48 Miss. 169. See also St. Louis v. Alexander, 23 Miss. 483; Bell v. Farmville R. Co., 91 Va. 107, 20 S. E. 942.

5. Knapp v. Grant, 27 Wis. 151; Bass v. Columbus, 30 Ga. 848; McMillen v. County Judge, 6 Iowa, 393. But see State of Iowa v. County of Wapello, 13 Iowa, 388; Steines v. Franklin County, 48 Miss. 187, 188; Barton County v. Walker, 47 Miss. 202; Hannibal, etc., R. Co. v. Marion County, 36 Miss. 294; Campbell v. Kenosha, 5 Wall. 194; City v. Lamson, 9 Wall. 477; Thomson v. Lee County, 3 Wall. 331; Gelpcke v. Dubuque, 1 Wall. 229; St. Joseph Township v. Rogers, 16 Wall. 663; Dows v. Town of Elmwood, 34 Fed. 114. See also Schenley v. Commonwealth, 36 Pa. St. 29; Cooley on Constitutional Limitations, 370, 381. In Beloit v. Morgan, 7 Wall. 619, it appeared that the Legislature of Wisconsin created the city of Beloit, carving it out of territory formerly constituting the town of Beloit, and in the city charter provided that: "All principal and interest upon all bonds which have heretofore been issued by the town of Beloit for railroad stock and other purposes, when the same or any part thereof shall fall due, shall be paid by the city and town of Beloit, in the same proportion as if said town and city were not dissolved."

It is also settled that if by mistake, carelessness, or other causes, conditions precedent to municipal authority have not been complied with, as for instance, irregularity in the order of the court directing an election, want of legal notice in the election, held, irregularities in the election or in the meetings of supervisors who appointed commissioners to make subscription — the Legislature can cure all such defects by its act and make the securities as valid as if all conditions had been complied with.[6]

§ **1561.** In conformity with this doctrine it has been held in Wisconsin, that where a city bond was executed without legislative authority, merely because the act authorizing its issue had not been published at the time so as to take effect, but there had been a popular vote in favor of the issue of the bond, the Legislature might, with consent of the city authorities, ratify the issue, and give validity to the bond.[7] On the same principle it was held in Illinois, that where a school tax had been voted by the people of a school district, but it was invalid under the law, because it was not certified to the county clerk on the day designated by law, the Legislature had power to pass an act remedying the defect and validating the tax, while it yet remained uncollected.[8] So it has been held by the United States Supreme Court, that a Legislature may pass a curative act validating bonds issued by municipal corporation, where the defect consisted in the fact that the submission of the question as to whether or not they should be issued, was under the wrong act;[9] and where the vote was taken upon the wrong day, and there were informalities in respect to keeping the records and filing the certificates of election;[10] and where there were other circumstances of irregularity.[11]

This provision was held by the court to invalidate all bonds which had been irregularly issued by the town of Beloit, and to cure all such irregularities. Rogers v. Keokuk, 154 U. S. 546, 14 S. Ct. 1162, appendix. See City of Uvalde v. Spier, 33 C. C. A. 501, 91 Fed. 594.

6. Bell v. Farmville R. Co., 91 Va. 107, 20 S. E. 942; Supervisors v. Randolph, 89 Va. 614, 16 S. E. 722; Redd v. Supervisors, 31 Gratt. 695.

7. Knapp v. Grant, 27 Wis. 147.

8. Cowgill v. Long, 15 Ill. 203.

9. In Campbell v. City of Kenosha, 5 Wall. 194, the court said: "This is not in terms a curative act, but it has that effect by fair implication."

10. St. Joseph Township v. Rogers, 16 Wall. 663.

11. Thomson v. Lee County, 3 Wall. 327. But where, by reason of a change in the Constitution of a State, its Legislature has no constitutional authority

§ **1562.** It has also been held that the Legislature may validate securities issued without a popular vote. Thus, where the council of municipality No. 1 issued bonds to a theater company, as a subscription thereto, without legislative authority, and without a popular vote, an act validating them was sustained.[12] The United States Supreme Court has said, Fields, J. giving its unanimous opinion: "A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration recovered by the corporation is not a retroactive law — no more so than an appropriation act providing for the payment of a preceding claim;" and such an act of the Legislature of Louisiana, imposing upon a city the payment of such a claim, evidenced by coupon bonds, was sustained.[13] And acts of legislation dispensing with precedent conditions to the validity of municipal bonds, and curing irregularities in their issue, are considered constitutional and legal by that tribunal.[14]

§ **1563.** On the contrary, it has been held that an act of the Legislature which declared valid and binding bonds which had been issued by county officers on account of the county courthouse, and which bonds were not enforceable against the county because differing in form and substance from the warrants authorized by pre-existing statute, was in excess of legislative authority and void, it being thought that it was a judicial rather than a legislative act.[15] "Courts," said Kingman, J., "are

to authorize a municipal corporation to issue negotiable bonds, it cannot validate an issue of bonds by such a corporation, made before the change in the Constitution when the Legislature had such power. Katzenberger v. Aberdeen, 121 U. S. 172.

12. First Municipality v. Orleans Theatre Co., 2 Rob. (La.) 209.

13. New Orleans v. Clark, 95 U. S. (5 Otto) 645. See Rogers v. Keokuk, 154 U. S. 546, 14 S. Ct. 1162, appendix.

14. Thompson v. Perrine, 103 U. S. (13 Otto) 813, disapproving Horton v. Town of Thompson, 71 N. Y. 513.

15. In Commissioners of Shawnee County v. Carter, 2 Kan. 134, 135, Kingman, J., said: "The act differs from those retrospective laws, which are frequently passed, supplying defects and curing informalities in the proceedings of officers and tribunals acting within the scope of their authority. The county commissioners were not acting within the scope of their authority in issuing these bonds. They did not conform to the law only in an irregular way, but they broke down the barriers which the law had raised in a very regular way, and their acts in the premises were void, not for want of any formality or irregularity or mistake as to time or otherwise, but for want of

estopped from an inquiry into the facts by the act itself." So it has been held in Wisconsin, that the Legislature had no right to declare valid a contract of the common council of Milwaukee, made in excess of authority, without assent of the city,[16] though, as explained in a subsequent case, the Legislature may cause a retrospective tax to be levied on a municipal corporation for a public purpose.[17] These cases seem to us to strike the true line of demarcation of legislative power.

§ **1564. In the fourth place: may the Legislature authorize municipal officers to ratify invalid securities without a popular vote?** — Where there has been a popular vote in favor of a subscription to a public work, and the securities have been issued by an unauthorized officer or agent, the Legislature has power to confer upon the officer or agent who was empowered to issue them, the power to ratify them, and thus effectuate the popular will.[18] So

power under the law." "The defendant had his rights. The law pointed them out. He was entitled (if to anything) to his warrants, and must bide his time for their payment under the limited power of taxation conferred on the board. He preferred bonds with a higher rate of interest, trusting to the healing power of subsequent legislation. He had as much right and power to bind the county in the execution of these bonds as the board had. If he had made these bonds, the Legislature would have had as much power to make them valid by an act declaring them binding upon the county as it had in the present case. Let such a power be once recognized, and within what bounds will the exercise of it be limited? The Legislature undertook to make a law for this case, affecting and changing rights and imposing burdens contrary to previously established law, so that the act, if valid, has all the force of a judgment, though in violation of the principles upon which judgments are rendered. If the act is a law, there is no evading it, even could it be proven that none of the work had been done, or that it had been previously paid for, or that the contract had been procured by fraudulent collusion between the officers making it and the contractor. Courts are estopped from an inquiry into facts by the act itself, if it have any force in this case. We cite these results from the act, not as having any existence in this case, but to show the consequences which would result from upholding the power of a Legislature to exercise such authority." See Mosher v. Indiana School District, 44 Iowa, 122.

16. Hasbrouck v. Milwaukee, 13 Wis. 38.

17. Mills v. Charleston, 29 Wis. 37. See also Ginn v. Weissenberg, 57 Pa. St. 433; Musselman v. Logansport, 29 Ind. 533.

18. Hannibal, etc., R. Co. v. Marion County, 36 Mo. 294; Barton County v. Walker, 47 Mo. 202; Steine v. Franklin County, 48 Mo. 187, 188. In Hannibal, etc., R. Co. v. Marion County, 36 Mo. 294, it appeared that doubts existed as to the validity of certain county securities, because, as alleged, they were issued by an agent of the County Court instead of by the County Court itself, as the statute required; and the Legislature passed a curative act.

it has been held that the Legislature may authorize a city council to ratify securities which it was empowered to issue upon the petition of three-fourths of the legal voters.[19]

Wagner, J., said: "But if any doubts were entertained of their validity, by the sixth section of the amended charter, it is enacted that 'subscription shall be held valid and binding upon such counties,' etc., 'if approved of hereafter by the said County Court.' Now, as we have heretofore seen, the County Court did, after the passage of this act, approve of the subscription, and ratify it so far as they had power by virtue of and in accordance with said act. But it is contended that the act is afflicted with a constitutional infirmity, and that it is necessarily inoperative as a confirmatory act, because, if the proceedings of the court and its agents were void previous to the passage of the act, by want of authority, they could not be rendered effectual for any purpose by means of legislation. Although individuals may not have the power to make good *ab initio* that which was originally void by subsequent deed or acts of confirmation, yet that principle has but a slight, if any, application to the case. The act of the Legislature does not purport to confirm, ratify, and make unqualifiedly valid the proceedings of the County Court by its own terms; it does not act *ex proprio vigore*, but delegates authority to those who had prior to that time subscribed for stock to approve of and confirm the same. It left the matter entirely optional with the County Court, as the representative and agent of the county, to accept or reject the proffered remedy. They elected to ratify and affirm the subscription, and by that act they gave just the same effect to the contract to subscribe the stock, and to all the proceedings had by the County Court in reference to it, as if they had had full authority in the first instance. Nor has the county any just cause of complaint from this conclusion, as it is obvious that the contract was entered into in good faith, and with the firm belief that ample power for the act existed; and the only effect of the legislative act, and the approval by the court, was to execute and fully carry out precisely what was intended, but which they found was not accomplished by a defect in their authority. The notes were made by the justices in a public capacity and in the line of their official duty; the contract inured to the benefit of the county, and the county was bound by the obligation thereby created. Hodgson v. Dexter, 1 Cranch, 345; Tutt v. Hobbs, 17 Mo. 486. Upon a full view of the case, it appears that both parties acted with honesty and good faith; the county made the subscription to plaintiff's railroad, and received certificates of stock for said subscription, like all other shareholders; that for nine years it had been regularly represented at the meetings of the stockholders and of the board of directors, and that during that period of time the interest accruing on the stock notes has been regularly and punctually paid. It appears also that many of these stock notes, or obligations, have passed into the hands of *bona fide* indorsers and innocent purchasers; their rights ought not to be impaired without good and substantial reasons."

19. In Bissel v. Jeffersonville, 24 How. 295, Clifford, J., said: "Mistakes and irregularities in the proceedings of municipal corporations are of frequent occurrence, and the State Legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract,

In all these cases mere irregularities were corrected by the curative acts. It is obvious that the question whether or not the Legislature may go beyond this, and empower officers to ratify instruments utterly lacking in elements of validity, is the same as that heretofore discussed, to wit, whether it might authorize such officers to issue such instruments without a popular vote. For, of course, the Legislature could only confer retrospective power upon those who could receive a prospective power.[20]

§ 1565. In the fifth place: may the Legislature abolish the right of the municipality to plead the defense of illegality to its contract? — This is another form in which the question of the right of the Legislature to validate invalid securities arises, and it may be regarded as a settled principle of the jurisprudence of the United States that the Legislature possesses this power. Thus, suppose a municipal corporation issues a negotiable bond, and disposes of it in a usurious transaction, which renders it void *ab initio,* and in all hands, and that the Legislature afterward repeals the right of the corporation to plead usury as a defense. In such a case the corporation has given its consent, and declared its intent and will to be bound by the bond. The body of the contract has been created by its own act, and it lacks life only by reason of the legislative prohibition and refusal to recognize it; and when the Legislature subsequently abolishes the right to plead usury, it simply withdraws the impediment of its prohibition, concurs in the pre-existing assent of the corporation to the contract, recognizes its act, and breathes life into it. These views have been held to apply to municipal contracts,[21] as well as to those of private corporations and individuals,[22] there being, as is conceived, no distinction as to the character of the parties to whom they are applicable. There can be no valid objection to the

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or injuriously affect the rights of third persons, are generally regarded as unobjectionable, and certainly are within the competency of the legislative authority."

20. See *ante*, §§ 1557, 1558 *et seq.*

21. Town of Danville v. Pace, 25 Gratt. 1; Cooley on Constitutional Limitations, 378.

22. Lewis v. McElvain, 16 Ohio, 347; Trustees v. McCaughy, 2 Ohio (N. S.) 155; Johnson v. Bentley, 16 Ohio, 97; Syracuse Bank v. Davis, 16 Barb. 188; Curtis v. Leavitt, 17 Barb. 309, 15 N. Y. 9; Parmelee v. Lawrence, 48 Ill. 331; Goshen v. Stonington, 4 Conn. 209; Woodruff v. Scruggs, 27 Ark. 26; Andrews v. Russell, 7 Black, 474; Bangher v. Nelson, 9 Gill, 299.

doctrine on the ground that it impairs vested rights, for a party "has no vested right to do wrong."[23]

Nor can it be objected that it impairs the obligation of a contract, for it is in furtherance of the enforcement of contracts, and of equity and good morals.[24]

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23. Satterlee v. Mathewson, 16 Serg. & R. 191, Duncan, J.; Town of Danville v. Pace, 25 Gratt. 15, Staples, J.; Foster v. Essex Bank, 16 Mass. 245, Parker, C. J.; Cooley on Constitutional Limitations, 378.

24. Lewis v. McElvain, 16 Ohio, 347; Cooley on Constitutional Limitations, 374.

CHAPTER XLIX.

CHECKS.

SECTION I.

WHAT IS A CHECK?

§ **1566.** A check is (1) a draft or order (2) upon a bank or banking-house, (3) purporting to be drawn upon a deposit of funds (4) for the payment at all events of a certain sum of money, (5) to a certain person therein named, or to him or his order, or to bearer, and (6) payable instantly on demand. This definition has been approvingly quoted.[1]

Any instrument fulfilling the above description may, we think, be safely denominated a bank check, and the definition given is sustained by many authorities, though not in the language of the text. Writers upon negotiable instruments have differed in their definitions of this species of commercial paper, some falling short of giving all its distinguishing qualities, and some ascribing to it qualities which it is not absolutely necessary that it should possess. And there is none which can be safely relied on as a guide in answering the question: Is this paper a check?[2]

1. Blair & Hoge v. Wilson, 28 Gratt. 170 (1877), Burks, J.; Ridgely Bank v. Patton, 109 Ill. 484; Harrison v. Nicollet Nat. Bank, 41 Minn. 489, citing the text; Oyster & Fish Co. v. Bank, 51 Ohio St. 106, 36 N. E. 833, 46 Am. St. Rep. 560, quoting with approval the definition contained in the text; Exchange Bank v. Sutton Bank, 78 Md. 577, 28 Atl. 563, citing text; Kavanaugh v. Bank, 59 Mo. App. 540, citing text.

2. We cite the definitions and descriptions of checks which the text-writers give. Their insufficiency will be readily observed by the attentive professional reader: "A check is a brief draft or order on a bank or banking-house, directing it to pay a certain sum of money," says Parsons, vol. II, Notes and Bills, 57. "A check drawn on a bank is a bill of exchange payable on demand." Edwards on Bills, 396. "A check on a banker is, in legal effect, an inland bill of exchange drawn on a banker, payable to bearer on demand." Byles on Bills (Sharswood's ed.) [*13], 84. "A check is a written order or request addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay on presentment to another person, or to him or bearer, or to him or order, a certain

§ **1567. In the first place, a check is a draft or order.**— A bill is also a draft or order; and it is often said that a check is, in legal effect, a bill of exchange drawn on a bank or banking-house, with some peculiarities.[3] In some cases it is called a bill payable on demand,[4] and in others an inland bill, or in the nature of an inland bill, payable on demand;[5] and the expression that a check is "like a bill" has been criticised on the ground that "*nihil simile est idem,*" whereas "checks are bills, or rather bill is the genus, and check is a species."[6] In form a check is a bill on a banking-house (payable on demand, as we conceive); and it is perfectly correct to say that it is a bill with some peculiarities, or a species of a bill. Sir G. Jessel, Master of the Rolls, calls it "a bill of exchange payable at a banker's."[7] But this is not a definition. It comes within the general designation of a bill so far that a statute authorizing the protest of inland bills would include inland checks;[8] but it is erroneous to ascribe to a check a necessary inland character. A draft drawn in one State, on a bank in another, is nevertheless a check; and, in point of fact, checks are

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sum of money specified in the instrument." Story on Promissory Notes, § 487. Chitty's definition is substantially the same as Story's. Chitty on Bills (13th Am. ed.) [*511], 578.

3. Billgerry v. Branch, 19 Gratt. 418; Matter of Brown, 2 Story, 502; Cruger v. Armstrong, 3 Johns. Cas. 5; Bœhm v. Sterling, 7 T. R. 423; Keene v. Beard, 8 C. B. (N. S.) 372 (98 Eng. C. L.); Blair & Hoge v. Wilson, 28 Gratt. 170 (1877). "It is sometimes inaccurately described," says Burks, J., "as a bill of exchange payable on demand," or "as in legal effect an inland bill of exchange drawn on a banker payable to bearer on demand. While it has many of the properties of bills, it has several peculiar characteristics." Bull v. Bank of Kasson, 123 U. S. 105, in which case it was held that a bank check is a bill of exchange within the meaning of the act of March 3, 1875, and its amendments, defining the jurisdiction of the Federal courts in certain cases. For the purposes of the great technical accuracy required in criminal pleadings, a description of a check, or common order for money, in an indictment, as a "bill of exchange," has been held sufficient. People v. Kemp (Mich.), 43 N. W. 439. Also, where described as "an order for the payment of money." State v. Crawford, 13 La. Ann. 300; Garretson v. Bank, 47 Fed. 867.

4. Harker v. Anderson, 21 Wend. 372; Edwards on Bills, 396.

5. Byles on Bills (Sharswood's ed.) [*13], 84; Keene v. Beard, 8 C. B. (N. S.) 373; Merchants' Bank v. Spicer, 6 Wend. 445; Cruger v. Armstrong, 3 Johns. Cas. 8; Purcell v. Allemong, 22 Gratt. 742, Anderson, J.

6. Matter of Brown, 2 Story, 502.

7. Hopkinson v. Forster, L. R., 18 Eq. Cas. 74 (1874).

8. Moses v. Franklin Bank, 34 Md. 574.

very much used in the United States in transmitting money from one State to another.[9]

§ 1568. Secondly, it is absolutely necessary that the draft, in order to be a check, should be drawn upon a bank or banker.— Upon this point the authorities are agreed.[10] A bill may also be drawn upon a banker;[11] and, therefore, while it is necessary that a check should be so drawn, that alone does not distinguish it. It does not seem necessary that the drawee, when an individual, should be described as a banker; and an order addressed simply to "Messrs. A. & B.," has been held a check, it being proved that they were bankers.[12] Between the original parties, the payee knowing them to be bankers, such an order might be regarded as a check with reason, although we think it would be better to require that the instrument should not be so considered, unless its face showed that it was drawn on a banking-house. But when transferred to a *bona fide* holder without notice, it is clear that it should be regarded as a bill, if it would operate any advantage to him to do so.

9. Planters' Bank v. Kesee, 7 Heisk. 200 (1871); Herring v. Kesee, Southern Law Rev., Oct., 1872, 613; Roberts v. Austin, 26 Iowa, 315; 2 Parsons on Notes and Bills, 59; Merchants' Nat. Bank v. Ritzinger, 118 Ill. 484; Hays v. Bank, 75 Mo. App. 211.

10. Hawley v. Jette, 10 Oreg. 31, 45 Am. Rep. 129; Northwestern Coal Co. v. Bowman, 69 Iowa, 152, citing the text. See Definitions, *ante*, § 1566, note; Espy v. Bank of Cincinnati, 18 Wall. 620; Bowen v. Newell, 8 N. Y. 195; Deener v. Brown, 1 McArth. 350. In Morrison v. Bailey, 5 Ohio St. 13, this point seems to have escaped notice.

11. In Georgia Nat. Bank v. Henderson, 46 Ga. 495 (1872), Warner, C. J., said: "A chartered bank is an artificial person, and a bill of exchange may as well be drawn upon and made payable to an artificial person as to a natural person; the three days of grace are allowed as well on bills drawn upon and payable to artificial persons as to natural persons. There is no distinction as to the time when a bill of exchange becomes due between one drawn upon and payable at a bank, and one payable to a natural person; both become due on the last day of grace, unless, under our Code, the bill is payable at a bank on sight or on demand. Why should there ever have been any difference as to the allowance of days of grace between a bill drawn upon and payable to a chartered bank and one drawn upon and payable to a natural person? The truth is, the same principles of commercial law apply to both, so far as the allowance of days of grace are concerned; and did, when this bill of exchange was placed in the defendant's hands for collection, except checks drawn on a bank payable at sight or on demand." See cases cited in notes.

12. Planters' Bank v. Kesee, 7 Heisk. 200 (1871); Herring v. Kesee, Southern Law Rev., Oct., 1872, p. 613.

§ 1569. Thirdly: A check purports to be drawn upon a deposit.— It is frequently said that a check is drawn upon a deposit in the banker's hands;[13] and the fact that it is so drawn has been held necessary to constitute the draft a check.[14] But this cannot be the true criterion. It is not the fact that the order is actually drawn on a deposit, but the fact that it purports to be so drawn, which constitutes it a check; and it is more accurate to say that it is upon its face a draft upon a deposit.[15] To hold otherwise would authorize the construction of a written contract by the light of an extraneous fact of which the holder had no notice. If there were no deposit, it would be a fraudulent check — but a check, nevertheless — and we cannot conceive of a wider departure from principle than to hold that the fraud varied the nature of the instrument itself.

§ 1570. Fourthly: A check must be for the payment at all events of a certain sum of money.— In this respect it does not differ from other negotiable instruments; and though, perhaps, it might still be termed a check although not payable in money, by which is meant the legal tender currency of the country, it would certainly not be negotiable if expressed to be payable "in bank bills" or "in currency,"[16] or if it lacked words of negotiability,[17] or were deficient in any of the characteristics in respect to certainty in fact and time of payment and party to whom payment is to be made.[18]

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13. Morrison v. Bailey, 5 Ohio St. 13, where it is said: "A check is drawn on an existing fund." In Espy v. Bank of Cincinnati, 18 Wall. 620, Miller, J., said: "A check is drawn against funds on deposit with the banker."

14. In Planters' Bank v. Kesee, 7 Heisk. 200, Nicholson, J., said: "As it is drawn upon a deposit in bank, it falls directly within that class of bills of exchange known in the commercial world as checks." In Herring v. Kesee, McFarland, J., referring to Brown v. Lusk, 4 Yerg. 210, said in that case "the drawer had no funds in the bank upon which to draw, and this was probably the distinguishing feature." See Southern Law Rev., Oct., 1872, article on Checks; State v. McCormick, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341.

15. See Champion v. Gordon, 70 Pa. St. 476; Deener v. Brown, 1 McArth. 350; Newman v. Kaufman, 28 La. Ann. 865.

16. Bank of Mobile v. Brunn, 42 Ala. 108; Little v. Phœnix Bank, 2 Hill (N. Y.), 425.

17. Partridge v. Bank of England, 9 Q. B. 396.

18. In Bull v. Kasson, 123 U. S. 112, the check was payable in "current funds," and was held negotiable. See § 57.

The Supreme Court of the United States considers a check payable "in current funds" negotiable.[19]

§ 1571. Fifthly: A check may be made payable to a certain person therein named, or to him or his order, or to him or bearer, or simply to bearer, in like manner as a bill of exchange, and may be transferred by indorsement or assignment, as the case may be, in like manner and to the like effect as a bill of exchange. Certainty as to the payee is as requisite in a check as in a bill of exchange, and if no payee be named or indicated, it will be fatally defective.[20] Therefore an order drawn "Pay to the order of on sight" is not a check, but would indicate that the drawer meant to draw a check, but left out the payee's name, and omitted any expression to show that it should be paid to bearer.[21] But a blank space may be left for the payee's name, which would indicate authority to any *bona fide* holder to insert his name as payee.[22] And checks may be drawn payable to an impersonal payee, as "to the order of bills payable," or to the order of a certain number, or with some such phrase, to indicate the intention to express that negotiability which only exists in connection with the word "order," or "bearer." Such a check cannot be indorsed in the usual way by any party to it, and is construed to be payable to bearer.[23] The bank, it is conceived, would be entitled to a reasonable time to ascertain the genuineness of the indorser's signature before paying a check drawn payable to a certain person or order.[24]

§ 1571a. Check may be payable to bearer.— There is no common-law obligation, according to the English authorities, upon a bank to pay checks other than those payable to bearer, it being

19. Woodruff v. Mississippi, 162 U. S. 302, 16 Sup. Ct. Rep. 820.

20. Billgerry v. Branch, 19 Gratt. 418; Matter of Brown, 2 Story, 502; Cruger v. Armstrong, 3 Johns. Cas. 5; Elting v. Brinkerhoff, 2 Hall, 459; Munn v. Burch, 25 Ill. 35; Story on Notes, § 488. In First Nat. Bank v. Harris, 108 Mass. 514, it was held that a national bank has authority to buy checks on other banks, whether they be payable to bearer or order.

21. McIntosh v. Lytle, 23 Minn. 336. See vol. I, § 99 *et seq.*

22. McIntosh v. Lytle, 23 Minn. 336.

23. McIntosh v. Lytle, 23 Minn. 336; Willets v. Phœnix Bank, 2 Duer, 121; Mechanics' Bank v. Stratton, 2 Keyes, 365.

24. Robarts v. Tucker, 4 Eng. L. & Eq. 236; § 1618; Eichner v. Bowery Bank, 24 App. Div. 63, 48 N. Y. Supp. 978, held, that in suit by drawer against bank for damages for refusing to pay a check, a failure to allege that payee had duly indorsed it, was fatal on demurrer.

considered that the bank has a right to require that it should not run the risk of mistaking the signature of the party to whose order it is payable, and thus becoming responsible in the event of its turning out to be a forgery;[25] and this has led some text-writers and judges to declare that a check must be payable to bearer.[26] It is certainly not deemed requisite to its character and validity as a check that it should be so payable. And now the custom of banks to pay checks drawn payable to order is so universally and notoriously recognized and followed, that it would doubtless be regarded as binding on the bank in all cases where nothing is said on the subject.[27] As to the law in the United States it has been properly said that the opposite doctrine "is unsupported either by reason or authority." [28]

In England, an instrument in form a check, but payable to order, was for a long time by statute made an inland bill, and required to be stamped as such, Parliament requiring that all checks should be made payable to "bearer" or to "A. or bearer." But by more recent enactment, checks payable to order have been legalized as checks; but the same enactment has provided that: "Any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof, and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any indorser thereof." [29] An indorsement on a check payable to order, purporting to be made by the agent of the payee, has been held to come within the statute, and a payment of it by the bank to be good.[30]

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25. Bellamy v. Majoribanks, 8 Eng. L. & Eq. 519.

26. Byles on Bills (Sharswood's ed.) [*13], 84; Chitty on Bills (13th Am. ed.) [*511], 578; Woodruff v. Merchants' Bank, 25 Wend. 672.

27. Morse on Banking, 306; McIntosh v. Lytle, 23 Minn. 336; Bowen v. Newell, 8 N. Y. 190.

28. Dodge v. National Exchange Bank, 30 Ohio St. 8.

29. 16 & 17 Vict., chap. 59, § 19; 2 Parsons on Notes and Bills, 596; Morse on Banking, 306.

30. Charles v. Blackwell, L. R., 2 Com. Pl. Div. 151 (1877), 20 Moak's Eng. Rep. 426.

§ **1572. Sixthly: A check is payable instantly on demand.**— This is, as we conceive, the touchstone by which a check is tested.[31] Usually, no time of payment is expressed upon its face, but all commercial instruments in which no time of payment is expressed are understood to be, and impliedly are, payable on demand; and when so payable by implication, or in express terms, they are payable instantly, without the allowance of grace, which pertains to those payable on a particular day.[32] The whole theory and use of a check points to its immediate payability as its distinguishing feature, and its name imports it. A person deposits money with his bank or banker, where it is subject at any time to his order. By an order he appropriates so much of it to another person, and the bank or banker, in consideration of its temporary use of the money, agrees to pay it in whole, or in parcels, to the depositor's order when demanded.[33] But he does not agree to

31. Harrison v. Nicollet Nat. Bank, 41 Minn. 488, citing the text; Merchants' Nat. Bank v. Ritzinger, 118 Ill. 486, citing the text; Bowen v. Newell, 5 Sandf. 326, 2 Duer, 584, 8 N. Y. 190, 13 N. Y. 290; Woodruff v. Merchants' Bank, 25 Wend. 673; Henderson v. Pope, 39 Ga. 361; Georgia Nat. Bank v. Henderson, 46 Ga. 496; Bradley v. Delaplaine, 5 Harr. 305; Ivory v. Bank of Missouri, 36 Mo. 475, 88 Am. Dec. 150; Work v. Tatman, 2 Houst. 304; Hawley v. Jette, 10 Oreg. 31; Northwestern Coal Co. v. Bowman, 69 Iowa, 152; Riverside Bank v. Land Co., 34 App. Div. 359, 54 N. Y. Supp. 266.

32. See Days of Grace, chapter XX, vol. I, § 617; Morse on Banking, 242. In the case of Merchants' Bank v. State Bank, 10 Wall. 647, the Supreme Court of the United States says: "Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper, and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum, payable in money. In both cases there is a drawer, drawee, and payee. Without acceptance no action can be maintained by the holder upon either, against the drawee. The chief points of difference are that (1) a check is always drawn on a bank or banker. (2) No days of grace are allowed. (3) The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. (4) It is not due until payment is demanded, and the Statute of Limitations runs only from that time. (5) It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. (6) It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such case would be a fraud." See Blair & Hoge v. Wilson, 28 Gratt. 170; Deener v. Brown, 1 McArth. 350.

33. The contract of a bank with a depositor is that it will pay his checks upon the deposited fund, and if the checks are properly drawn, it is bound to pay them. Goodwin v. American Nat. Bank, 48 Conn. 550; Mt. Sterling Nat. Bank v. Green, 99 Ky. 262, 35 S. W. 911; Merchants & Planters' Bank v. Meyer, 56 Ark. 499, 20 S. W. 406.

contract to pay at a future day by acceptance, and the depositor cannot require it.

§ 1573. Whether or not a draft on a bank payable at a future day is a check? — If a draft upon a bank or banker be dated on a certain day, say the first of December, and be payable on a future day named, say the tenth of December, it has been considered by some authorities to be a check payable on the precise day named, without grace; and the high authority of Story and Sharswood sustains this view.[34] Such an instrument payable at so many

34. Matter of Brown, 2 Story, 502. The draft was as follows:

"Granite Bank, $703.50. "Boston, April 18th, 1841.

"Pay to Curtis & Co., 18th May, or bearer, seven hundred three dollars and fifty cents.

"To cashier. EPHRAIM BROWN."

In Champion v. Gordon, 70 Pa. St. 472 (1872), the draft was as follows:

"Philadelphia, Nov. 22d, 1869.

"The Commonwealth National Bank pay to H. Yerkes or order one hundred and fifty (December 3d, 1869) dollars. JOHN B. CHAMPION."

In Champion v. Gordon, 70 Pa. St. 475 (1872), Sharswood, J., said: "The ordinary commercial form of a bill of exchange payable at a future day is at so many days' or months' notice after date or sight. An order so drawn, whether upon a banker or any other person, ought to be regarded as a bill, with all the privileges and liabilities which by the law merchant are incident to a bill. The drawer, by adopting this usual form, must be held so to intend. So if an order be drawn on a merchant or other person not a banker, with whom the drawer keeps money on deposit subject to draft, payable at a future day named, there exists no reason why the same rule should not apply. But there is a good reason why there should be a difference between an order so drawn upon a banker, which certainly must be presumed to be by a person who keeps money on deposit with such banker, subject to draft, and an order on a merchant or other person. If such an order, drawn upon a bank payable at a future day named in it, must be considered as an inland bill of exchange, and not a check, then the payee or holder has the right to present it at once for acceptance, protest it at once for nonacceptance, and sue the drawer immediately. Should it be accepted, however, the funds of the drawer in the bank would necessarily be thereby tied up until the day of payment. All the objects of directing payment at a future day would thus be frustrated. What the drawer undertakes is, that on a day named he will have the amount of the check to his credit in the bank. In the meantime he wants the full and free use of his entire deposit. It is not denied that a post-dated check cannot be presented for acceptance. That is by implication payable on a future day. Why, then, is a check expressly so made payable to stand on different ground? In the case before us, an ordinary printed form of a bank check was evidently used, and the day of presentment written in one of the blanks. This is the most convenient form, for it calls the attention of the cashier or paying teller to the fact, which he would be

days after sight,[35] and at so many days after date,[36] has also been deemed a check payable at the expiration of the number of days named, without grace. There is more reason for considering a draft payable on a precise day named a check than for so considering it when payable at a certain time after sight, or after date. For it is not usual to frame bills of exchange payable on a precise day, while "after date" and "after sight" are phrases of constant use in drawing them.

Nor can we perceive any commercial utility in regarding it as a check. If the drawer wishes to give the draft payable in future the characteristics of a check, he can do so by post-dating it; and then it could not be presented for acceptance, because it would not be operative until the day of its post-date arrived.[37] Or, if he desired it to have the effect of a bill, and yet not have grace, he could express "without grace" on its face;[38] and if he did not wish to have it presented for acceptance, he could express it in like manner "without acceptance."[39] Thus the various uses and objects of the different instruments could be subserved; but otherwise they become confused and difficult to attain.

§ 1574. **Draft on bank not payable immediately is a bill of exchange.**— But every draft upon a bank or banker which is not payable immediately, possesses, as we think, all the qualities of a bill of exchange; and the preponderance of authority sustains

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likely to overlook if it were expressed only by the date. Nothing, I am told, is more common than such mistakes in the payment of post-dated checks, and depositors often thus find their accounts overdrawn, very much to their embarrassment. If we determine that an order like that before us is not presentable for acceptance before maturity, we settle the question. It is a check, and not a bill of exchange." In Bowen v. Newell, 5 Sandf. 326, the court held that an order on a bank payable at a future day was a check, and not entitled to grace. This decision was followed in the same case reported in 5 Duer, 584. But in 8 N. Y. 190, the contrary view was taken. And finally in 13 N. Y. 290 (the case having been four times litigated), the court came to the conclusion that by the principles of the law merchant the instrument was entitled to grace, but permitted local usage to control to the contrary.

35. Herring v. Kesee, Southern Law Rev., Oct., 1872, article on Checks. The order was upon a firm not described as bankers, and payable ten days after sight. It was accepted by the drawees and held a check. Way v. Towle, 155 Mass. 374, 29 N. E. 506, 31 Am. St. Rep. 552.

36. Westminster Bank v. Wheaton, 4 R. I. 30. Instrument payable "ninety days after date" was deemed a check.

37. See *post*, § 1578, and section IV. **38.** See chapter XX, § 633, vol. I.

39. See chapter XVII, § 454, and chapter XVIII, § 481, vol. I.

this view, whether the instrument be payable on a precise day named or at so many days after date or sight.[40]

In Missouri the paper in question was dated 12th October, 1860, was addressed to "The Southern Bank of St. Louis," and ran: "Pay to M. C. Jackson & Co., or order, five hundred dollars, on 22d October." The bank receiving the draft for collection presented it on October 22d, and payment being refused, it was held liable for negligence for not presenting it on the 25th, allowing grace. The court said: "This bill is neither payable at sight nor on demand, but on a day certain; and it was, therefore, entitled to grace, and it was negligence to present it before grace had expired."[41]

So in Georgia the following instrument was held to be a bill of exchange entitled to grace, and not a check: "Atlanta, Georgia, August 4th, 1866. Georgia National Bank of Atlanta, Georgia. Ninety days after date, pay to F. R. Bell, or order, one thousand dollars. (Signed) Massey & Herty."[42] And the like view has been taken in Ohio,[43] California,[44] and other States.

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40. In Harrison v. Nicollet Nat. Bank, 41 Minn. 488, the paper was dated March 27, 1888, and payable on April 14th. Mitchell, J., giving the opinion, said: "The two principal authorities holding such an instrument a check are *In re* Brown, 2 Story, 502, and Champion v. Gordon, 70 Pa. St. 474. Both of these are entitled to great weight, but they stand almost alone; the Supreme Court of Rhode Island (Westminster Bank v. Wheaton, 4 R. I. 30), and perhaps of Tennessee, being, so far as we know, the only ones which have adopted the same views. All other courts which have passed upon the question, as well as the text-writers, have almost uniformly laid it down that such an instrument is a bill of exchange, and that an essential characteristic of a check is that it is payable on demand. This was finally settled after great conflict of opinion in New York, the great commercial State of the Union, in the case of Bowen v. Newell (several times before the courts, 5 Sandf. 326, 2 Duer, 584, 8 N. Y. 190, and 13 N. Y. 290), 64 Am. Dec. 550."

41. Ivory v. Bank of the State, 36 Mo. 475.

42. Henderson v. Pope, 39 Ga. 361, reaffirmed in Georgia Nat. Bank v. Henderson, 46 Ga. 496 (1872).

43. In Morrison v. Bailey, 5 Ohio St. 13, the instrument was dated June 30th, and was payable "on the 13th July." It was held not a check, but a bill entitled to grace. In a later case the question was held to turn on the intention of the parties. Andrew v. Blackley, 11 Ohio St. 89.

44. In Minturn v. Fisher, 4 Cal. 36 (1854), the instrument was dated "San Francisco, June 9th, 1853," and was addressed to P. B. & Co., bankers, requesting them to pay $3,890.18 "on the fifteenth (15th) inst." It was held a bill, and not a check, and entitled to grace, and demand on the 15th was premature. Work v. Tatman, 2 Houst. 304; Bradley v. Harrington, 5 Harr. 305; 2 Parsons on Notes and Bills, 68, 69.

§ **1575. Checks not entitled to grace.**— It follows, as matter of course, from what has been already said, that a check is not entitled to grace. The very idea of the instrument is its immediate payability. And the question which is often discussed, whether or not a check drawn payable at a future day is entitled to grace, in itself confounds the distinction between a check and a bill. For if payable at a future day, it is not a check, but a bill, and as such entitled to grace, like any other bill payable in the future.[45]

§ **1576. Effect of usage.**— Whether or not the usage of banks in any particular place, and of business men to regard drafts on banks payable at a future day after date as checks, and not entitled to grace, is admissible in evidence to control the general law merchant, is a question upon which the authorities are divided. Some cases hold such evidence inadmissible;[46] but others take the ground that the common understanding of the business community ought to be carried out, and admit such evidence to effectuate it.[47]

SECTION II.

FORMAL PARTS AND VARIETIES OF CHECKS — BUSINESS AND MEMORANDUM CHECKS.

§ **1577. As to the date: A check should be dated.**— It may bear its actual date, or be ante-dated or post-dated. "But it would seem," says Morse in his excellent treatise, "that if a check is not dated at all, and contains no statement of a date when it is

45. In Morse on Banking, 243, it is said: "Often an instrument, in its form substantially like a check, is made payable at a day subsequent to that both of its date and of its issue, either by naming such a date in the body of the instrument, or by making it payable so many days after date. In such cases it is often a question whether or not grace is to be allowed. But though this is the question, it does not take the form of whether or not grace is to be allowed on such a check, but whether or not such an instrument is a check at all. For if it is a check, that simple fact is conclusive of the fact that it is payable immediately on demand on the day named, without grace. A check is and must always be so payable. But if it be not a check, then it will probably have the customary grace of the place where it is made payable, and will be called a bill of exchange." See 2 Parsons on Notes and Bills, 68, 69.

46. Morrison v. Bailey, 5 Ohio St. 13; Minturn v. Fisher, 4 Cal. 35.

47. Bowen v. Newell, 13 N. Y. 290; Champion v. Gordon, 70 Pa. St. 476 (1872); Morse on Banking, 247.

to be paid, it is never payable."[48] There is no adjudication to this effect. And while it may be that a bank would be warranted in refusing to pay an undated check (and this is doubtful), it would not be unreasonable for it to assume a contemporaneous date, and to pay it accordingly.

§ **1578. Check may be post-dated, or ante-dated.**— It makes no difference (independent of any statutory regulation) whether a check be post-dated or ante-dated, and it is still payable according to its express terms.[49] The drawing of post-dated checks is an every-day occurrence in the commercial cities; and the uniform understanding of parties is that when the check is post-dated — say as of the 14th of January, when actually drawn on the 1st — that it is payable on the day it purports to be, without any days of grace, even though it be negotiated beforehand.[50]

If the check be post-dated so that it falls due on Sunday, that is, bears date as of a coming Sunday, payment cannot be demanded until the Monday afterward; and if the bank pay it before that Monday it acts at its peril.[51]

§ **1579. As to the language of the check.**— There must, of course, be words expressing an order that the bank shall pay the amount. They need be in no particular form. And sometimes they are accompanied with the words "for value received," or a statement of the consideration. This slight addition is immaterial.[52]

§ **1580. As to the sum payable.**— The sum should be distinctly and carefully expressed in figures and in words to avoid any question. But either words or figures are sufficient. The amount should be named in the currency of the country (in the

48. Morse on Banking, 238.

49. Crawford v. West Side Bank, 100 N. Y. 56, citing the text; Andrews v. Blachly, 11 Ohio St. 89; McFall v. Murray, 4 Kan. App. 554, 45 Pac. 1100; Burns v. Kahn, 47 Mo. App. 215, citing text.

50. Taylor v. Sip, 1 Vroom, 284; Mohawk Bank v. Broderick, 10 Wend. 304, 13 Wend. 133; Matter of Brown, 2 Story, 502; Salter v. Burt, 20 Wend. 205; Gough v. Staats, 13 Wend. 549. Independent of the Stamp Act, the rule is likewise in England. Story on Promissory Notes, 490; Whister v. Foster, 32 L. J. C. P. 161, 14 C. B. (N. S.) 238 (108 Eng. C. L.); Austin v. Bunyard, 34 L. J. 217; Allen v. Keeves, 1 East, 435. In England the Stamp Act has led to much controversy as to post-dated checks, which it is unnecessary to discuss here. See 2 Parsons on Notes and Bills, 69, 71; Byles on Bills [*15], 87 *et seq.*, and numerous cases referred to.

51. Salter v. Burt, 20 Wend. 205.

52. Wells v. Brigham, 6 Cush. 6.

United States simply in dollars); and the bank might properly refuse payment of a check expressed in sovereigns, francs, or any other foreign currency.[53] In the United States the mark "$" is alone sufficient to express "dollars,"[54] as in England "£ s. d." expresses pounds, shillings, and pence.[55] And it has been held that the figures "37.89," divided by a period as indicated, and without even the dollar mark, "$," were sufficient to raise the inference that dollars was intended.[56]

Where the marginal figures differ from the written words, the words should be attended to and not the figures. And a change of the figures, so as to conform them to the words, made by the holder, without the knowledge or consent of the drawer, has been held not a material alteration or forgery, as the figures served only as an index, for convenience of reference, and constituted no part of the bill.[57]

§ **1581. As to the address.**— The name of the bank on which the check is drawn is usually printed in large characters on the top of the check, and frequently in the lower left-hand corner are the words "To the cashier," or "To the cashier of ——."[58] It has never been decided, that we are aware of, whether or not these latter words are necessary. And it has been said to be "very doubtful," with the intimation that it is decidedly safer to consider the address "to the cashier" as essential.[59] But very many checks have only the name of the bank upon it. It is the bank to whom it is really addressed, and which is to pay it, and we cannot see that more is needful.

§ **1582. As to delivery.**— A check, like any other instrument, must be issued before it is binding; and it is considered as issued as soon as it is in the hands of any party who can demand its payment.[60] If it be lost or stolen before being issued, the thief

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53. Rastell v. Draper, Yelv. 80, Moore, 775, Cro. Jac. 88; Morse on Banking, 236; Grant on Banking, 16.

54. Corgan v. Frew, 39 Ill. 31.

55. Kearney v. King, 2 B. & Ald. 301.

56. Northrop v. Sanborn, 22 Vt. 433.

57. Smith v. Smith, 1 R. I. 398. See *ante*, chapter III, § 86, vol. I, note, citing Rex v. Elliot, 2 East P. C. See also *ante*, § 76, and vol. II, § 1499*a*.

58. Matter of Brown, 2 Story, 502; Allen v. Sea Fire, etc., Ins. Co., 9 M., G. & S. 573; Ellison v. Collingridge, 9 M., G. & S. 570.

59. Morse on Banking, 238.

60. Grant on Banking, 14; Morse on Banking, 239.

or finder cannot enforce it against the drawer. But, nevertheless, if presented at the bank and payable to bearer, the bank would be protected in paying it. And a *bona fide* holder without notice that it had never been issued, would be protected to the full extent, as would the holder of any other negotiable instrument.

§ **1583. Memorandum checks.**— There is a class of checks which has recently sprung up in our commercial communities, of a peculiar character, and known as memorandum checks. In their form they do not differ from ordinary checks, and as to third parties who are holders *bona fide* for a valuable consideration, without notice, they are affected with all the legal rights and consequences of ordinary checks.[61] "They are in fact and in law," says Mr. Morse, "equivalent to the drawer's promise to pay for value received. The holder may sue upon them as upon a promissory note, and by reason of their peculiar character he is not held to present them at the bank for payment, prior to bringing his suit against the maker."[62]

§ **1584. The difference in form between the ordinary and the memorandum check** is, that the latter usually has the insertion of the word "mem.," which is used to indicate the understanding between the immediate parties.[63] Sometimes the name of the bank is canceled;[64] but whether the word "mem." constitutes the only mark on its face, or the bank's name be canceled in addition, the effect of the memorandum check is to create an absolute contract of the maker to pay the *bona fide* holder, unconditionally, and not upon the condition of presentment at the bank, nonpayment and notice, the formalities being regarded as waived.[65]

In a Massachusetts case, the paper sued on was in form as follows:

"Market *North* Bank, Memo:

"1000 dolls.— cts. BOSTON, Aug. 27, 1833.

"Pay to payable, Friday, 30 inst. or bearer, one thousand dollars, $\frac{1000}{100}$

"To the Cashier. BENJ. FREEMAN."

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61. Language of Story on Promissory Notes, § 490.

62. Morse on Banking, 313; Franklin Bank v. Freeman, 16 Pick. 535; Cushing v. Gore, 15 Mass. 69.

63. Dykers v. Leather Bank, 11 Paige, 612; Franklin Bank v. Freeman, 16 Pick. 535.

64. Ball v. Allen, 15 Mass. 433; Ellis v. Wheeler, 3 Pick. 18.

65. Franklin Bank v. Freeman, 16 Pick. 535; Dykers v. Leather Bank, 11 Paige, 612.

The word "North" had two lines run through it. The court said: "A memorandum check is a contract, by which the maker engages to pay the *bona fide* holder absolutely, and not upon a condition to pay if the bank upon which it be drawn should not pay upon presentation at maturity, and if due notice of the presentation and nonpayment should be given. The word 'memorandum,' written or printed upon the check, describes the nature of the contract with precision."[66]

According to the Massachusetts cases, the erasure of the name of the bank destroys the presumption of consideration which attaches to an ordinary check;[67] but proof of value given, and *bona fides,* authorizes a recovery against the drawer of a regular memorandum check in which the name of the bank is canceled.[68]

A check in the ordinary form cannot be shown by parol evidence to be a memorandum check, and not intended for presentment, and so excusing the holder from presenting before he charged the drawer,[69] nor can the drawer of such a check show that he was not to be responsible.[70]

§ **1585.** In Morse on Banking, 313, it is said: "The fact that the word 'memorandum' or the abbreviation 'memo.' is written on a check is sufficient in law to render it a memorandum check. But the bank is not bound to pay any attention to these words, or to recognize any contract as implied by them between the maker and payee which gives the check any peculiar character. If such a check is presented for payment, and the drawer has to his credit sufficient funds to meet it, the bank must honor it precisely like any other ordinary check. If the agreement or understanding between the drawer and payee is, that it shall not be presented for payment, any remedy of the drawer for the breach is solely against the payee. If the check is once drawn and delivered, the drawer's reliance that it will not be presented at the bank can rest only upon the good faith of the holder. He cannot drag in the bank as a partner in the arrangement, neither

66. Franklin Bank v. Freeman, 16 Pick. 535. The paper being payable at a future day, seems to have been a bill rather than a check. But this point was not adverted to, nor did it seem essential. See *ante,* § 1573, and § 161 *et seq.,* vol. I.

67. Ball v. Allen, 15 Mass. 433.

68. Ellis v. Wheeler, 3 Pick. 18.

69. Kelley v. Brown, 4 Gray, 108.

70. American Emigrant Co. v. Clark, 47 Iowa, 672.

alter the duty of the bank to pay his drafts out of his deposit. This is a rule of law. Usage, or the customary understanding of business men to the contrary, cannot operate to change it."

§ **1585a. Cross checks.**— In England there is a well-known usage, which has become the subject of legislation, for the drawer or holder of a check to cross it with the name of a banker, the effect of which was, before the statute which now exists, a direction of the drawee bank to pay the check to no one but a banker; or rather according to the cases, with only a caution or warning to the drawees that care must be used in paying it to any one else. The check remained payable to bearer, and its negotiability was not restrained.[71] The statute of 19 & 20 Vict., c. 25, recites that its object is to provide that drawers or holders of drafts, payable to bearer or order on demand, may be enabled effectually to direct the payment of the same only to or through some banker. It then enacts that the crossing shall have the force of a direction to the bankers upon whom the check is drawn, that it is to be paid to or through some banker, and the same shall be payable only to or through some banker. This statute was held not to restrain the negotiability of the check.[72] Another statute, 21 & 22 Vict., c. 79, enacts this more at large. It says the crossing shall be deemed a material part of the check, and provides against obliteration of the crossing. But this statute has been also held not to restrain the negotiability of the check, and its effect explained by the Court of Appeals.[73] The

71. Bellamy v. Majoribanks, 7 Exch. 389, 21 L. J. Exch. 70; Carlon v. Ireland, 5 El. & Bl. 765, 25 L. J. Q. B. 113; Simmons v. Taylor, 2 C. B. (N. S.) 528, 4 C. B. (N. S.) 463, 27 L. J. C. P. 45, 248; Commercial Nat. Bank v. First Nat. Bank, 118 N. C. 783, 24 S. E. 524, 54 Am. St. Rep. 753, citing the text.

72. Simmons v. Taylor, *supra*.

73. Smith v. Union Bank, L. R., 1 Q. B. Div. (1875), affirming same case, L. R., 10 Q. B. 291: "It is asked," said Lord Cairns, delivering the opinion of the Queen's Bench Division of the Court of Appeal, "what is the effect of the statute in enabling the payee to cross a check? We think the answer is easy. It imposes caution, at least, on the bankers. But further, by its express words, it alters the mandate, and the customer, the drawer, is entitled to object to being charged with it if paid contrary to his altered direction. This must often operate for the benefit of the payee or holder who had crossed the check. Further, if, in addition to the check being crossed, the signature of the payee was forged, he would retain his property as pointed out by Mr. Justice Blackburn, and could recover it from the banker notwithstanding 16 & 17 Vict., chap. 59, § 19, which protects a banker paying on a forged indorsement."

English usage is not practiced, that we are aware of, in the United States.

§ **1585b.** In Louisiana, where a check was indorsed by a party as "surety," it was considered that the party so indorsing it must have known that it was not designed for use in the usual manner; and that no other object could be well imagined for requiring a surety on a check, than that it should be held for a time, or until funds should be provided. And, therefore, that the surety would not be released by failure to demand payment in reasonable time.[74] We suggest that it is quite imaginable that the party taking the check might have questioned the existence of funds to meet it, and, therefore, have required a surety.

SECTION III.

PRESENTMENT AND NOTICE, AND PROTEST OF CHECKS.

§ **1586.** It is the general rule, in respect to checks, that the holder has no recourse upon the drawer until the check has been presented to the bank, and payment refused; and such presentment and refusal are essential preliminaries to an action against him. And the same rules which are established in relation to the necessity of presentment and notice, in order to charge the drawer and indorsers of bills of exchange in general, apply as well to checks.[75] The fact that the check is presumed to be

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74. Newman v. Kaufman, 28 La. Ann. 865.

75. Purcell v. Allemong, 22 Gratt. 742 (1872); Judd v. Smith, 3 Hun, 190; Conkling v. Gandall, 1 Keyes, 228; Middletown Bank v. Morris, 28 Barb. 616; Cruger v. Armstrong, 3 Johns. Cas. 79; Murray v. Judah, 6 Cow. 484; Harker v. Anderson, 21 Wend. 372; Merchants' Bank v. Spicer, 6 Wend. 445; Franklin v. Vanderpool, 1 Hall, 80; Levy v. Peters, 9 Serg. & R. 125; Conroy v. Warren, 3 Johns. Cas. 259; Edwards v. Moses, 2 Nott & McC. 433; Sherman v. Comstock, 2 McLean, 10; Daniel v. Kyle, 5 Ga. 245; Humphreys v. Bicknell, 2 Litt. 298; Ford v. McClung, 5 W. Va. 156; Edwards on Bills, 396; Clark v. Bank, 2 MacA. 249; Pollard v. Bowen, 57 Ind. 234; Farwell v. Curtis, 7 Biss. 160; Parker v. Reddick, 65 Miss. 246; Compton v. Gillman, 19 W. Va. 316, citing the text; Crosswell v. Association, 51 S. C. 469, 29 S. E. 236. A check in favor of a third person signed by the trustee as agent and presented by the payee is a sufficient demand for the repayment of the deposit, and upon refusal to pay, the trustee's right of action becomes complete, and the Statute of Limitations does not commence to run in favor of the bank until demand and refusal. See Munnerlyn v. Augusta Sav. Bank, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159; Herider v. Phœnix Loan Assn., 82 Mo. App. 427.

drawn against deposited funds makes it of even greater importance than in the case of a bill, that a check should be presented, and that the drawer should be notified of nonpayment, in order that he may speedily inquire into the causes of refusal, and be placed in a position to secure his funds which were deposited in the bank.[76]

§ 1587. Distinction between bills and checks as to consequence of delay or neglect.— But there is an important distinction as to the extent of the legal consequence of neglect and delay in presentment and notice, between bills and checks. It is true that the indorsers of such instruments stand on the same footing in reference to the effect of delay, or failure in making presentment, or giving notice. They are absolutely and entirely discharged, if presentment be not made within a reasonable time, and due notice given.[77] But the drawer of a bill stands upon a different footing from the drawer of a check. In the case of a bill of exchange, negligence, in respect to presentment or notice, absolutely discharges the drawer. But the drawer of a check is regarded as the principal debtor, and the check purports to be made upon a fund deposited to meet it. And the negligence of the holder in not making due presentment, or not giving him notice of dishonor, does not absolutely discharge him from liability unless he has suffered some loss or injury from such negligence, and then only to the extent of such loss or injury. He is at most entitled only to such presentment and notice as will save

76. Purcell v. Allemong, 22 Gratt. 742; Eichelberger v. Finley, 7 Harr. & J. 381; Merchants' Bank v. State Bank, 10 Wall. 657; True v. Thomas, 16 Me. 36; Hoyt v. Seeley, 18 Conn. 353; Matter of Brown, 2 Story, 502; Moody v. Mark, 43 Miss. 210; Linville v. Welch, 29 Miss. 203; Franklin v. Vanderpool, 1 Hall, 78; Foster v. Paulk, 41 Me. 425; Humphreys v. Bicknell, 2 Litt. 296; Pack v. Thomas, 13 Smedes & M. 11; Case v. Morris, 31 Pa. St. 100; 2 Parsons on Notes and Bills, 71; Gifford v. Hardell, 88 Wis. 538, 60 N. W. 1064, 43 Am. St. Rep. 925, citing text; Anderson v. Rodgers, 53 Kan. 542, 36 Pac. 1067.

77. In Merchants' Bank v. Spicer, 6 Wend. 445, Marcy, J., said: "As the defendant is sued as an indorser, the plaintiffs must establish a due presentment for payment, and notice of nonpayment to the defendant, before he can be made chargeable for the amount of this check." Little v. Phœnix Bank, 2 Hill (N. Y.), 429; Murray v. Judah, 6 Cow. 490; Humphreys v. Bicknell, 2 Litt. 298; Daniel v. Kyle, 1 Kelly, 304; Harbeck v. Craft, 4 Duer, 129; Gifford v. Hardell, 88 Wis. 538, 60 N. W. 1064, 43 Am. St. Rep. 925, citing text; Comer v. Dufour, 95 Ga. 376, 22 S. E. 543, 51 Am. St. Rep. 89.

him from loss.[78] Were it otherwise the drawer would profit by a neglect which could do him no injury.[79] If all of the funds be lost by neglect or delay, the holder of the check suffers of

78. Purcell v. Allemong, 22 Gratt. 743; Bell v. Alexander, 21 Gratt. 1; Stewart v. Smith, 17 Ohio St. 82; Emery v. Hobson, 62 Me. 587; Taylor v. Slip, 1 Vroom, 284; Murray v. Judah, 6 Cow. 490; Conroy v. Warren, 3 Johns. Cas. 259; Mohawk Bank v. Broderick, 10 Wend. 309; Little v. Phœnix Bank, 2 Hill, 425; Planters' Bank v. Kesee, 7 Heisk. 200; Pack v. Thomas, 13 Smedes & M. 11; Daniel v. Kyle, 1 Kelly, 304; Stewart v. Smith, 17 Ohio St. 82; Morrison v. Bailey, 5 Ohio St. 13; Cox v. Boone, 8 W. Va. 500; Cork v. Bacon, 45 Wis. 192; Scott v. Meeker, 20 Hun, 163; Howes v. Austin, 35 Ill. 396; Lawrence v. Schmidt, 35 Ill. 440; Willets v. Paine, 43 Ill. 432; Heartt v. Rhodes, 66 Ill. 351; Stevens v. Park, 73 Ill. 387; St. John v. Homans, 8 Mo. 382; Morrison v. McCartney, 30 Mo. 183; Gregg v. George, 16 Kan. 546. In Lovett v. Cornwell, 6 Wend. 369, it was held that where an injunction from chancery, under the act to prevent fraudulent bankruptcies by incorporated companies, was served upon a bank half an hour after it opened for business, by which its operations were suspended, that the holder of a check, received after banking hours on the preceding day, was not bound to show a presentment of the check for payment, to entitle him to recover upon the original consideration, although it appeared that the drawer had sufficient funds in the bank to pay the check, and that it would have been paid had it been presented before the service of the injunction. Matter of Brown, 2 Story, 502; Searle v. Norton, 2 Moody & R. 401; Alexander v. Burchfield, 7 M. & G. 1067; Laws v. Rand, 3 C. B. (N. S.) 442; Keene v. Beard, 8 C. B. (N. S.) 380 (90 Eng. C. L.); Robinson v. Hawksford, 9 Q. B. 52; Blair & Hoge v. Wilson, 28 Gratt. 171; Clark v. National Metropolitan Bank, 2 MacA. 249; Deener v. Brown, 1 MacA. 350; Griffin v. Kemp, 46 Ind. 172; Bull v. Bank of Kasson, 123 U. S. 105; Parker v. Reddick, 65 Miss. 246, citing the text; Compton v. Gilman, 19 W. Va. 317, citing the text; Kirkpatrick v. Puryear, 93 Tenn. 409, 24 S. W. 1130, text cited and approved; Greenwich Ins. Co. v. Oregon Improvement Co., 76 Hun, 195, 27 N. Y. Supp. 794; Carroll v. Sweet, 128 N. Y. 19, 27 N. E. 763; Exchange Bank v. Sutton Bank, 78 Md. 577, 28 Atl. 563, citing text; Merritt v. Gate City Nat. Bank, 100 Ga. 147, 27 S. E. 979; Industrial Trust Co. v. Weakley, 103 Ala. 458, 15 So. 854, citing text; Lowenstein & Bros. v. Bresler, 109 Ala. 326, 19 So. 860; Morris v. Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11, citing text; McCain v. Lowther, 35 W. Va. 297, 13 S. E. 1003; Nebraska Nat. Bank v. Logan, 35 Nebr. 182, 52 N. W. 808; Long Bros. v. Eckert, 73 Mo. App. 445.

79. Hoyt v. Seeley, 18 Conn. 360, Waite, J. In Kinyon v. Stanton, 44 Wis. 479, the holder entirely failed to present the check, and eight days after its date the bank failed. But previously to its failure the drawer withdrew his funds. Held, he was still bound. Angaletos v. The Meridian Nat. Bank of Indiana, 4 Ind. App. 573, 31 N. E. 368.

course a total loss.[80] It is not sufficient to show a probability of injury,— it must be proved.[81]

§ 1588. Burden of proof as to injury to the drawer.— If, however, suit be brought against the drawer, and there has not been due presentment and notice, the burden of proof is upon the plaintiff to show that the drawer has suffered no injury — injury being *prima facie* presumed.[82] But when it is shown that the drawer had no funds, or withdrew them, this presumption of injury is rebutted, and he is chargeable without presentment or notice.[83] But while it is true that the burden of proof is upon the plaintiff to show that no loss or injury resulted to the drawer when he seeks to excuse the nonpresentment of the check, yet where the suit is brought on the pre-existing debt for which the check was given, it has been held that the defendant who pleads payment must not only show delivery to and acceptance of the check by the plaintiff, but also that through the plaintiff's laches, loss or injury has accrued.[84]

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80. In Smith v. Jones, 2 Bush, 103, the check was dated April 12, 1862, and was not presented until the 13th of January, 1863, at the Citizens' Bank of Louisiana, at New Orleans, on which it was drawn. The city had in the meantime been captured by the Federal forces, and the funds on which the check was drawn had become worthless. Robertson, J., said: "Unlike a bill of exchange, a check does not require 'due diligence,' and apparent laches in presenting it for payment does not exonerate the drawer, unless by unreasonable delay he has suffered loss, and then he is entitled to relief *pro tanto*. But the evidence authorizes the deduction, that for nearly a month after the date of the appellee's check, the appellants, if only reasonably provident and diligent, might have presented the check and recovered the amount of it. And it is evident that when, nine months after its date, the check was presented for payment, the property of the appellants was almost worthless, and could not be drawn from the bank, or exchanged or circulated within the Federal lines, consistently with national policy or law." It was held, therefore, that there could be no recovery on the check.

81. Syracuse, etc., R. Co. v. Collins, 57 N. Y. 641.

82. Ford v. McClung, 5 W. Va. 166 (1872); Little v. Phœnix Bank, 2 Hill, 425; Daniel v. Kyle, 1 Kelly, 304; Harbeck v. Craft, 4 Duer, 122. See Conroy v. Warren, 3 Johns. Cas. 259; 2 Parsons on Notes and Bills, 71; Hamlin v. Simpson, 105 Iowa, 125, 74 N. W. 906; Watt v. Gans & Co., 114 Ala. 264, 21 So. 1011, 62 Am. St. Rep. 99, citing text.

83. Eichelberger v. Finley, 7 Harr. & J. 381; Healy v. Gilman, 1 Bosw. 235; Shaffer v. Maddox, 9 Nebr. 205; Kinyon v. Stanton, 44 Wis. 479; Culver v. Marks, 23 N. E. 1086; 2 Parsons on Notes and Bills, 71. See chapter XXXI, on Excuses for Want of Presentment and Notice, § 1073, p. 118 *et seq.*

84. Syracuse, etc., R. Co. v. Collins, 3 Lans. 29; Long Bros. v. Eckert, 73 Mo. App. 445, text cited.

§ **1589. If bank remains solvent check-drawer is bound.**— It follows from the principles already stated, that if the bank on which the check is drawn remains solvent and able to pay, the drawer will remain bound after presentment and refusal of payment, although many months, or even years, have elapsed since the check was drawn.[85] And when the holder sues upon the check, and proves the presentment to the bank, and due notice of dishonor to the drawer, it will devolve upon the latter to show that the bank had become insolvent, and unable to pay, after the check was drawn and before presentment was made, in order to defeat a recovery.[86] A check may be barred by Statute of Limitations whether the drawer kept his funds in the bank or not.[87]

§ **1590. Within what time check must be presented.**— A failure of the bank or banker who is drawee of the check, and who held on deposit a fund to meet it, which is thereby lost, presents the usual, if not the only, case in which delay of the holder in making presentment, or giving notice of dishonor, devolves loss upon him. But it is by no means an infrequent case, and, therefore, important to be considered. If at the time the check was delivered to the payee, the bank was solvent, and held funds of the drawer sufficient to meet it, it would be a fraud for the drawer, after giving a check upon them, to withdraw the amount which should pay it; and as he could not rightfully withdraw the amount, it would be unjust to require that, however long the checkholder might permit it to remain, it should be at the drawer's risk. The law has, therefore, declared that it must be presented within reasonable time; at the expiration of which such risk terminates as to the drawer, and becomes the risk of the holder if he permits the deposit to remain in bank. And if in the meantime the bank in which the check is drawn fails, the loss must fall upon the holder.[88]

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85. Bell v. Alexander, 21 Gratt. 6; Emery v. Hobson, 62 Me. 578; Byles on Bills (Sharswood's ed.) [*20], 93.

86. Stewart v. Smith, 17 Ohio St. 85, 86.

87. Brust v. Barrett, 17 Hun, 409. See 82 NY 400 Brush v Barrett

88. Cork v. Bacon, 45 Wis. 192; *ante*, § 1587, and notes; Bull v. Kasson, 123 U. S. 105. As to time of presentment, bills payable on demand and sight drafts stand on the same footing with checks. Dyas v. Hanson, 14 Mo. App. 363; Marburg v. Brinkman, 23 Mo. App. 513; Donlon v. Davidson, 7 App. Div. 461, 39 N. Y. Supp. 1020; Povall v. Dansville Cigar Mfg. Co., 59 Hun, 70, 12 N. Y. Supp. 653; Grange v. Reigh *et al.*, 93 Wis. 552, 67 N. W. 1130, citing and approving text; Carroll v. Sweet, 128 N. Y. 19, 27 N. E. 763. In this case it was held that presentment in due time, as fixed by the law merchants,

Such reasonable time has been definitely fixed by the decisions as follows:

(1) First, as between the drawer and payee.— Where the payee to whom the check is delivered by the drawer, receives it in the same place where the bank on which it is drawn is located, he may preserve recourse against the drawer, by presenting it for payment at any time before the close of banking hours on the next day (by which is meant the next secular day, for if he receive it on Saturday, he has until the close of banking hours on Monday to present it);[89] and if in the meantime the bank fails, the loss will be the drawer's.[90] "The rule to be adopted," said Lord

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was a condition upon performance, of which the liability of the defendant as indorser depended, and this delay was not excused, although the drawer of the check had no funds or was insolvent, or because presentment would have been unavailing as a means of procuring payment. Martin v. Home Bank, 30 App. Div. 498, 52 N. Y. Supp. 464, citing text; Anderson v. Gill, 79 Md. 312, 29 Atl. 527, 47 Am. St. Rep. 402, citing and approving text; Tomlin v. Thornton, 99 Ga. 585, 27 S. E. 147, quoting and approving text; Industrial Trust Co. v. Weakley, 103 Ala. 458, 15 So. 854, 49 Am. St. Rep. 45; Watt v. Gans & Co., 114 Ala. 264, 21 So. 1011, 62 Am. St. Rep. 99; First Nat. Bank v. Miller, 37 Nebr. 500, 55 N. W. 1064, 40 Am. St. Rep. 499; Gage Hotel Co. v. Union Nat. Bank, 171 Ill. 531, 49 N. E. 420, 63 Am. St. Rep. 270.

89. Mead v. Caswell, 9 Mod. 60; O'Brien v. Smith, 1 Black (U. S. Sup. Ct.), 99, where it was held that a check received on Saturday might be presented any time during banking hours on Monday. Cox v. Boone, 8 W. Va. 500; Kershaw v. Ladd, 34 Oreg. 375, 56 Pac. 402, citing text; Tomlin v. Thornton, 99 Ga. 585, 27 S. E. 147, quoting and approving text; Hamlin v. Simpson, 105 Iowa 125, 74 N. W. 906; Farmers' Nat. Bank v. Dreyfus, 82 Mo. App. 399, citing text; Hamilton v. Lumber Co., 95 Mich. 437, 54 N. W. 903.

90. Syracuse, etc., R. Co. v. Collins, 3 Lans. 29, 57 N. Y. 641; Smith v. Miller, 6 Rob. (N. Y.) 157, 43 N. Y. 171 (1870), 52 N. Y. 546 (1873); Kelty v. Bank, 52 Barb. 328; Nunnemaker v. Lanier, 48 Barb. 234; Merchants' Bank v. Spicer, 6 Wend. 443; Cawein v. Browinski, 6 Bush, 457; Shrieve v. Dukham, 1 Litt. 192; Beckford v. First Nat. Bank, 42 Ill. 238; Morrison v. Bailey, 5 Ohio St. 13; Simpson v. Pacific, etc., Ins. Co., 44 Cal. 139; Himmelman v. Hotaling, 40 Cal. 111; Ritchie v. Bradshaw, 5 Cal. 228; Veazie Bank v. Winn, 40 Me. 60; Bailey v. Bodenham, 16 C. B. (N. S.) 288, 111 Eng. C. L.; Boddington v. Schlencker, 4 B. & Ald. 752; Robson v. Bennett, 2 Taunt. 410; Rickford v. Ridge, 2 Campb. 537; Blair & Hoge v. Wilson, 28 Gratt. 171. See Clark v. National Metropolitan Bank, 2 MacA. 249; Andrews v. German Nat. Bank, 9 Heisk. 211; Story on Notes, § 493; Story on Bills, §§ 470, 471; Thompson on Bills (Wilson's ed.), 119, Roscoe, 9, 158; Holmes v. Roe, 62 Mich. 199; Wear v. Lee, 87 Mo. 359, citing the text; Anderson v. Gill, 79 Md. 312, 29 Atl. 527, 47 Am. St. Rep. 402, citing and approving text; Tomlin v. Thornton, 99 Ga. 585, 27 S. E. 147, quoting and approving text.

Ellenborough, in a leading case, "must be a rule of convenience; and it seems to me to be convenient and reasonable that checks received in the course of one day should be presented the next. Is this practice consistent with the law merchant? It cannot alter it. Banks would be kept in continual fever if they were obliged to send out a check the moment it was paid in." [91] The allowance of a day to present the check does not extend to an agent who receives one for a debt of his principal. He must present it *instanter*.[92] Nor does it extend to one, who, having received a draft in payment of a debt, surrenders it to the drawee and receives the latter's check therefor; in which case immediate presentment of the check for payment is required, as in the case of an agent.[93]

§ **1591.** If the bank, in the same place where the check was drawn, should stop payment after the commencement of business hours on the day following, it will be no defense to the drawer that the check would have been paid if presented at an early hour of the day; and it seems that the stoppage of payment by the bank before the close of business hours on that day would be a full excuse for want of presentment altogether, as the holder has been guilty of no negligence at the time of stoppage, and from his subsequent delay no loss could accrue to the drawer.[94]

§ **1592. Where the payee receives the check from the drawer in a place distant** from the place where the bank on which it is drawn is located, it will be sufficient for him to forward it by the post to some person at the latter place on the next secular day after it is received; and then it will be sufficient for the person to whom it is thus forwarded to present it for payment on the day after it has

91. Rickford v. Ridge, 2 Campb. 537. Lord Mansfield, in the case of Tindal v. Brown, 1 T. R. 168, states that in the previous case of Metcalf v. Douglas, "the jury struggled so hard in spite of the opinion of the court to narrow the rule, that they held, you must, in certain cases, demand payment of a banker's draft within an hour." The law of England is now well settled to be as stated in the text. Bank v. Alexander, 84 N. C. 30; Industrial Trust Co. v. Weakley, 103 Ala. 458, 15 So. 854, 49 Am. St. Rep. 45, citing text.

92. Smith v. Miller, 43 N. Y. 171; Farwell v. Curtis, 7 Biss. 165; First Nat. Bank v. Fourth Nat. Bank, 17 Hun, 332; Morris v. Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11.

93. Fernald v. Bush, 131 Mass. 591.

94. Syracuse R. Co. v. Collins, 3 Lans. 29; Grange v. Reigh *et al.*, 93 Wis. 552, 67 N. W. 1130, citing and approving text; Comer v. Dufour, 95 Ga. 376, 22 S. E. 543, 51 Am. St. Rep. 89, citing text.

reached him by due course of mail.[95] This period, which is requisite for the convenient presentment of the check by diligent means, must have been contemplated by the drawer, and he remains absolutely liable, although the bank might fail pending its duration. Where the party receiving the check resides in the county at some distance from the post-office, the rule of diligence may not be so exacting as in commercial centers.[96] Where a check was forwarded by mail by the bank with which the payee deposited it for collection in due course of mail, and it was lost, and the collecting bank did not discover the loss until the sixteenth day thereafter, it was held chargeable with negligence in not sooner discovering the loss, and liable for the amount.[97]

§ 1593. But while the drawer will not be discharged where the check is drawn on a bank in the same place if presentment be made on the next day, yet, if presentment for payment be actually made on the very day the check is drawn, and payment tendered, the holder cannot then change his mind and leave the funds at the drawer's risk until the next day. He is allowed until the next day as matter of convenience and accommodation to him; and while he need not hurry to make presentment the same day, having once done so, he has fixed the money at his own risk. This was illustrated in a recent California case, where a check was drawn on a bank in Sacramento City about nine o'clock in the

95. Middletown Bank v. Morris, 28 Barb. 616; Smith v. Jones, 20 Wend. 192; Moule v. Brown, 4 Bing. (N. C.) 266; Hare v. Henty, 30 L. J. C. P. 302; Rickford v. Ridge, 2 Campb. 537; Bond v. Warden, 1 Collyer, 583; Holmes v. Roe, 62 Mich. 199; Griffin v. Kemp, 46 Ind. 176; Story on Notes, § 493; Byles on Bills (Sharswood's ed.) [*20], 94; Watt v. Gans & Co., 114 Ala. 264, 21 So. 1011, 62 Am. St. Rep. 99, citing text; Loyd v. Osborne, 92 Wis. 90, 65 N. W. 859, citing text; Martin v. Home Bank, 160 N. Y. 190, 54 N. E. 717, citing text; Martin v. Home Bank, 30 App. Div. 498, 52 N. Y. Supp. 464, citing text; First Nat. Bank v. Buckhannon Bank, 80 Md. 475, 31 Atl. 302; Anderson v. Rodgers, 53 Kan. 542, 36 Pac. 1067.

96. See Cox v. Boone, 8 W. Va. 500, where party four miles from post-office received check on a Wheeling bank on account of a debt. He did not forward by next mail, which left at 7:30 A. M. next day; or by mail next thereafter, which left two days later, and before it was forwarded, bank failed. Held, drawer of check was still liable. But this case is very questionable. Hamlin v. Simpson, 105 Iowa, 125, 74 N. W. 906. Compare National Bank v. Logan, 35 Nebr. 182, 52 N. W. 808.

97. Shipsey v. Bowery Nat. Bank, 59 N. Y. 485; Kershaw v. Ladd, 34 Oreg. 375, 56 Pac. 402, citing text; Herider v. Phœnix Loan Co., 82 Mo. App. 427.

morning, and immediately thereafter the check was presented and payment tendered, but declined. At two o'clock the same day the holder called again and demanded payment, but the bank had then suspended; and it was held that the drawer could not be bound.[98]

§ 1594. **(2) Second, as between the indorser and indorsee of a check,** the same rules which regulate diligence as between the drawer and the payee apply — the indorser being regarded as a

98. In Simpson v. Pacific, etc., Ins. Co., 44 Cal. 143, Crockett, J., said: "On these facts the question to be solved is, whether the holder of a bank check drawn against a sufficient fund, who presents it for payment within the proper time, and to whom payment is then tendered by the bank, but who declines to accept the money at that time, preferring to retain the check temporarily, can hold the drawer of the check by again presenting it for payment at a later hour of the same day, when payment is refused and due notice of dishonor given. The question is novel and not free from difficulty; but we shall be materially aided in its solution by first ascertaining with accuracy what are the elements which constitute a presentation for payment in its legal sense. The presenting of a check for payment implies that the holder of it desires, and is ready and willing to accept payment. It would be a contradiction in terms to say that the holder of a check presented it for payment, intending and averring at the time that he would not accept payment. If he should present it for the sole purpose of ascertaining whether the signature was genuine, or whether the drawer had funds to his credit, or merely for the purpose of being identified as the person entitled to payment, not intending then to present it for payment, it is clear that this would not constitute a demand of payment, which, in its very nature, imports a willingness on the part of the holder to accept the money at that time. But if the check is presented for payment, with the present intention in the mind of the holder to accept the money if tendered, this must be deemed to be a demand of payment for all purposes affecting the rights of the drawer, even though the holder should afterward change his purpose and decline to accept the money when tendered by the bank. Having once demanded payment in due form and within the proper time, and the bank being then and there ready and willing and offering to pay the check, the holder is not at liberty after this to retract or waive his demand and decline to accept payment without thereby releasing the drawer from further liability on the check. If the holder declines to accept payment when it is tendered on a proper demand, the liability of the drawer ceases, for the reason that his undertaking was that the check would be paid when payment should be first demanded in due form and within the proper time; but he does not undertake that it will be paid on a second demand, when payment has been tendered and refused on a prior demand made in due form and within the proper time." Anderson v. Gill, 79 Md. 312, 29 Atl. 527, 47 Am. St. Rep. 402, citing and approving text; Comer v. Dufour, 95 Ga. 376, 22 S. E. 543, 51 Am. St. Rep. 89, citing text.

new drawer, and the indorsee as a new payee;[99] and what is diligence as between them has been already stated.

§ **1595. (3) But, in the third place, as between the indorsee or assignee and the drawer,** it does not follow from what has been said, that every indorsee or assignee has the same period from the time he received it, within which to present the check, as against the drawer; and that the drawer would still be liable in all events, if the last holder presented it within a day, or forwarded it by the next mail after he himself received it. On the contrary, the period within which the check must be presented, in order to make the drawer's liability absolute, is itself absolute. And no transfer or series of transfers can prolong the risk of the drawer beyond it. Though each party is allowed the same period, as between himself and his immediate predecessor, that the payee had as between himself and the drawer, yet no transferee can stand on any better footing than his transferrer in respect to the time within which the check must be presented, in order to render the drawer's and previous indorsers' liabilities absolute, in the event of a failure of the bank.[1] And this rule is clearly founded upon just principles, for the drawer cannot rightfully withdraw the deposit, and as it has passed beyond his control, it would be wrong to hold that it should remain indefinitely at his risk because it suited the convenience of others to transfer instead of presenting the checks.[2] And a check, unlike a bill of exchange, which need not be drawn upon a deposit, is generally designed for immediate payment, and not for circulation.[3]

§ **1595a. Banker's drafts.**— The draft of one bank on another payable on demand (and without designation of time all paper

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99. Mohawk Bank v. Broderick, 10 Wend. 304, 13 Wend. 133; Martin v. Home Bank, 30 App. Div. 498, 52 N. Y. Supp. 464, citing text; First Nat. Bank v. Miller, 37 Nebr. 500, 55 N. W. 1064, 40 Am. St. Rep. 499.

1. St. John v. Homans, 8 Mo. 382; Foster v. Paulk, 41 Me. 425; Reid v. Reid, 11 Tex. 585; Lilley v. Miller, 3 Nott & McC. 257; Brown v. Lusk, 4 Yerg. 210; Taylor v. Young, 3 Watts, 343; Harker v. Anderson, 21 Wend. 372; Cruger v. Armstrong, 3 Johns. Cas. 5; Story on Notes, §§ 495, 496; Gifford v. Hardell, 88 Wis. 538, 60 N. W. 1064, 43 Am. St. Rep. 725, citing text; Farmers' Nat. Bank v. Dreyfus, 82 Mo. App. 399, citing text.

2. Boehm v. Sterling, 7 T. R. 423; Story on Notes, § 496; Byles on Bills (Sharswood's ed.) [*20, 21], 95.

3. Down v. Halling, 4 B. & C. 333.

is so payable), is distinctively termed a "banker's draft."[4] The practical distinction between an instrument so drawn, and an ordinary bill of exchange drawn by an individual is, that the former, according to the usages and customs of commerce, is expected by the drawer, who derives a profit therefrom as banker or broker, to be put into circulation for a limited period, so that immediate presentment thereof is not required to bind the drawer.[5]

§ **1596. Excuses for failure or delay in making presentment for payment or giving notice of dishonor.**— There may, however, exist sufficient excuse, on the part of the holder, for delay or failure in making presentment, or giving notice. Thus, if the drawer had no funds in the bank at the time of drawing the check, or subsequently withdrew them, he commits a fraud upon the payee, and can suffer no loss or damage from the holder's delay or failure in respect to presentment and notice. He is, therefore, liable without presentment or notice, and may be sued immediately.[6] And so when the drawer directs the bank not to pay the check, the same rule applies.[7] And when the bank or banker has been restrained from paying out money by order of court, or from transacting business, the necessity of presentment and notice is dispensed with.[8]

The indorser of a check stands upon a different footing from that of the drawer. He cannot be presumed to know, as the drawer must know, the state of the latter's account with the bank; and,

4. Bull v. Bank of Kasson, 123 U. S. 105; Marhourg v. Brinkman, 23 Mo. App. 513.

5. Bull v. Bank of Kasson, 123 U. S. 105; Marbourg v. Brinkman, 23 Mo. App. 513; Story on Bills, §§ 472, 473. See *ante*, vol. I, §§ 469, 472, notes.

6. Bell v. Alexander, 21 Gratt. 6; Fletcher v. Pierson, 69 Ind. 281; Brush v. Barrett, 82 N. Y. 401; Kinyon v. Stanton, 44 Wis. 569; Hoyt v. Seeley, 18 Conn. 353; Cushing v. Gore, 15 Mass. 59; True v. Thomas, 16 Me. 36; Norris v. Despard, 38 Md. 491; Eichelberger v. Finley, 7 Harr. & J. 381; Conroy v. Warren, 3 Johns. Cas. 259; Murray v. Judah, 6 Cow. 484; Commercial Bank v. Hughes, 17 Wend. 94; Franklin v. Vanderpool, 1 Hall, 78; Healy v. Gilman, 1 Bosw. 235; Matter of Brown, 2 Story, 502; Valk v. Simmons, 4 Mason, 113; Blankenship v. Rogers, 10 Ind. 333; Lilley v. Miller, 2 Nott & McC. 257; Coyle v. Smith, 1 E. D. Smith, 300; Kemble v. Mills, 1 M. & G. 757, 2 Scott N. R. 121, 9 Dowl. 446. See *ante*, § 1073 *et seq.;* City Nat. Bank v. Burns, 68 Ala. 267, 44 Am. Rep. 144, citing the text; Beauregard v. Knowlton, 156 Mass. 395, 31 N. E. 389; Offutt v. Rucker, 2 Ind. App. 350, 27 N. E. 589.

7. Jack v. Darrin, 3 E. D. Smith, 557; Purchase v. Mattison, 6 Duer, 587: Whaley v. Houston, 12 La. Ann. 585; Woodin v. Frayze, 38 N. Y. S. C. 190.

8. Lovett v. Cornwall, 6 Wend. 367.

although the drawer without funds will be absolutely bound, the indorser of his check will not be so bound, unless it be affirmatively shown that he knew the fact that there were no funds to meet it, and thus participates in the wrong committed upon the holder.[9] If the holder of a check presents it when he knows there are no funds to meet it, he participates in the drawer's fraud, and though the amount be passed to his credit the bank will not be bound.[10]

If the holder of the check becomes unable to present it within the requisite time, by reason of the removal of the bank and the disturbed condition of the country, he should give notice of the fact to the drawer, and offer to return the check; and if he fails to do so, the drawer is not liable.[11] And though the holder of the check is himself physically disabled, so that he cannot proceed in person to present the check for payment, yet if he might have sent it by mail, he will not be excused for nonpresentment.[12]

If the bank has removed from the place upon which the check is drawn, and the check be returned to the drawer or his agent, the debt for which it was given remains due.[13] Other circumstances (such as those which excuse delay in presentment of an ordinary bill) may excuse delay in presenting the check. The necessity of procuring the indorsement of a school board, which had to be convened, and which requires time, was held sufficient to excuse delay of a week in a recent Pennsylvania case.[14]

§ 1597. Partial deficiency of deposit is excuse for want of demand and notice.— It not infrequently happens that the drawer has only a portion of the amount in bank necessary to pay his check, and the question then arises whether the deficiency of his deposit is an excuse for want of presentment and notice. We should unhesitatingly say that the drawer of an over-check is bound without demand or notice. A check is intended to be the representative of cash. It is the business of the drawer to know the state of his accounts with his bank, and whether through fraud

9. Humphreys v. Bicknell, 2 Litt. 300; Carroll v. Sweet, 128 N. Y. 19, 27 N. E. 763.

10. Peterson v. Union Nat. Bank, 52 Pa. St. 207; Martin v. Morgan, 3 Moore, 645; Thompson on Bills, 270.

11. Purcell v. Allemong, 22 Gratt. 739.

12. Ibid.

13. Larue v. Cloud, 22 Gratt. 513.

14. Muncy Borough School Dist. v. Commonwealth, 84 Pa. St. 471; Armstrong v. Brolaski, 46 Fed. 903, citing text.

or carelessness he makes the representation that he has cash to meet it, as he does by the act of drawing it, it would only put a premium upon looseness in commercial transactions to permit him to shield himself behind the plea of want of presentment or notice. It is he who is chargeable with the duty of notice as to his own funds, and he perpetrates a legal fraud when he undertakes to transfer and assign to another that which he does not possess. It will be readily seen that the difference between checks and bills of exchange induces this relaxation of the strict rules as to presentment and notice in respect to the former. The check purports to be drawn upon an actual deposit, and it is only when there is a deposit that the drawer has a right to expect that it will be honored; the officers of the bank would commit a wrong upon the stockholders to honor it without funds; while, in the case of a bill of exchange, it is frequently drawn upon consignments, expectation of funds, or accommodation arrangements, which the drawer may reasonably confide in.

In a Maryland case, where there were two checks drawn, one for $1,450 and one for $1,500, both were dated March 26th. At that date the balance to the drawer's credit was $500, on the next day $400, and for several days afterward from $200 to $400. The checks were presented June 3d, and in May the bank had appropriated the balance on hand to a debt due it by the drawer. The drawer was held bound to the holder without notice of nonpayment. And Dorsey, J., after referring to the cases on bills of exchange, said: "But it is conceived that, waiving all exceptions to the soundness of these decisions, they bear no application to the case now under consideration. They were made on transactions between individual correspondents who may have had a mutual confidence and credit, and were perfectly competent to honor each other's bills, drawn either with or without effects. Not so as to officers of the public banking institutions in this State. With them the customers of the bank have no accommodation credit, and without a gross violation of their trust they can honor no check or draft upon them beyond the amount of deposits standing to the credit of him by whom such check or draft be drawn." [15]

§ **1598. Waivers of demand and notice.**— Neglect or delay in respect to presentment and notice may be waived by the drawer of a

15. Eichelberger v. Finley, 7 Harr. & J. 381, 387.

check in like manner as the drawer of a bill of exchange.[16] Or the drawer may extend the time for presentment by any agreement, express or implied, the understanding of the parties at the time the check was drawn entering into the contract.[17]

In no case can the period within which it will be sufficient for the check to be presented by the principal holder, be prolonged by its being placed in the hands of a banker or other agent for collection.[18]

§ **1599. Whether check may be presented by mail.**— The bank undoubtedly has a right to an actual presentment of the check, and this is generally made by the holder or his agent at the counter of the bank.

It seems that sending a check by post to the drawee bank, with a demand of payment, is a good presentment. In such a case, Erle, C. J., said: "I do not mean to affirm that this was a good presentment. I incline to think it was. But unless the money was remitted by return of post, the absence of an answer should have been considered as a dishonor, and notice of such dishonor should have been given promptly."[19] This method of presentment is doubtful, and it has been recently said: "In these days, when such facilities are furnished by express companies for presentation at distant places, there is no reason for adopting a less direct or effective mode to accomplish the object."[20] Where the check is sent to the drawee bank by mail for collection and return, the holder makes the drawee his agent and must bear any loss arising after the time when the check could have been presented by express or other usual method.[21]

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16. See chapter on Excuses for Want of Presentment and Notice; *ante*, § 1059 *et seq.*, and *post*, § 1634*a*.

17. Woodruff v. Plant, 41 Conn. 344; Gray v. Anderson, 99 Iowa, 342, 68 N. W. 790, 61 Am. St. Rep. 243, citing the text.

18. Moule v. Brown, 4 Bing. N. C. 266 (33 Eng. C. L.); Morse on Banking, 324; Byles on Bills (Sharswood's ed.) [*20]. See *ante*, § 1595.

19. Bailey v. Bodenham, 16 C. B. J. Scott (N. S.) (111 Eng. C. L.), 294 (1864). See Morse on Banking, 334. See also Heywood v. Pickering, L. R., 9 Q. B. 428; Prideaux v. Criddle, L. R., 4 Q. B. 428; Hare v. Henty, L. R., 10 Q. B. 65; Shipsey v. Bowery Nat. Bank, 59 N. Y. 62. But bank may waive the actual presentment of the check. See Delahunty v. Central Nat. Bank, 37 App. Div. 434, 56 N. Y. Supp. 39; Kershaw v. Ladd, 34 Oreg. 375, 56 Pac. 402, citing text.

20. Farwell v. Curtis, 7 Biss. 162 (1876), Hopkins, J.

21. Farwell v. Curtis, 7 Biss. 162. As to liability of collecting agent who presents a check by mail instead of transmitting it to a subagent for that purpose, see *ante*, vol. I, § 328*a*.

§ 1600. The protest of checks.— While checks have not all the incidents of bills of exchange, they may be yet included in that term when applied to the steps to be taken in case of dishonor. The same reasons that would authorize the protest of an inland bill of exchange for nonpayment, would authorize the protest of a check, the payment of which had been refused on presentment. And, therefore, where a statute provides for a protest of inland bills and promissory notes, a check would be embraced within the description of paper denominated inland bills of exchange, and might be protested in like manner.[22] And if drawn in one State upon another, a protest would, doubtless, be necessary in order to charge an indorser, the check being in that event a species of foreign bill.[23] It has been said in a well-known case, that a check "is not protestable, or, in other words, protest is not requisite to hold either the drawer or an indorser."[24] But the remark, it is conceived, applies only to inland checks.

SECTION IV.

CERTIFICATION OF CHECKS.

§ 1601. A check being always payable immediately on demand, the holder can only present it for payment, and the bank can only fulfil its duty to its depositor by paying the amount demanded. In other words, the holder has no right to demand from the bank anything but payment of the check. And the bank has no right, as against the drawer, to do anything else but pay it.[25] Consequently there is no such thing as acceptance of checks in the ordinary sense of the term. For acceptance ordinarily implies that the drawer requests the drawee to pay the amount at a future day, and the drawee "accepts" to do so, thereby becoming the principal debtor, and the drawer being his surety. But still, by consent of the holder, the bank may enter into an engagement quite similar to

22. Moses v. Franklin Bank, 34 Md. 574; Norris v. Despard, 38 Md. 491.

23. Harker v. Anderson, 21 Wend. 372. See Edwards on Bills, 396.

24. Morrison v. Bailey, 5 Ohio St. 13 (1855). In Pollard v. Bowen, 57 Ind. 234 (1877), Niblack, J., says: "A protest of a check is not necessary in case of its nonpayment." See also Jones v. Heiliger, 36 Wis. 149; Griffin v. Kemp, 46 Ind. 172; Wittich v. First Nat. Bank, 20 Fla. 847; Wood River Bank v. First Nat. Bank, 36 Nebr. 744, 55 N. W. 239.

25. Oyster & Fish Co. v. Bank, 51 Ohio St. 106, 36 N. E. 833, 46 Am. St. Rep. 560, quoting with approval the text.

that of acceptance, by certifying the check to be "good" instead of paying it.

§ **1601a. Effect of certification of check.**— By certifying a check (1) the bank becomes the principal and only debtor; (2) the holder by taking a certificate of the check from the bank, instead of requiring payment, discharges the drawer;[26] (3) and the check then circulates as the representative of so much cash in bank, payable on demand to the holder. Such in brief is the effect of the certification of a check. It has been said to be, and obviously is, "equivalent to acceptance"[27] in respect to the obligation it creates upon a bank; but it would be confounding terms to regard it as altogether the same thing in its effect upon the relation of the parties.

The certification by a bank of an acceptance made payable at its counter by one of its customers, has the same effect and imports the same obligation on the part of the bank as the like certification of a check drawn upon it.[28]

§ **1602. Certification of checks is of recent origin.**— The certification of checks is an expedient and outgrowth of modern commerce quite recent in its origin, but now of daily and extensive occurrence. It was a practice unknown when Kyd and Byles wrote their treatises. It is not alluded to in the works of Story, and receives but brief mention in the elaborate volume of Parsons, written in 1862, and published as recently as 1868. And yet now the reports are filled with cases on the subject; and recent writers — Morse[29] and Bigelow[30] and Redfield[31] — give it considerable prominence and attention. The fact stated by the United States Supreme Court that "it is computed by competent authority that the average daily amount of such (certified) checks in use in the city of New York is not less than one hundred millions of

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26. Boyd v. Nasmith, 17 Ont. 42, citing the text. It is stated in this case as worthy of remark, that the English and Canadian decisions furnish no precedent bearing expressly on this point. People v. St. Nicholas Bank, 77 Hun, 160, 28 N. Y. Supp. 407; Metropolitan Nat. Bank v. Jones, 137 Ill. 634, 27 N. E. 533, 31 Am. St. Rep. 403.

27. Merchants' Bank v. State Bank, 10 Wall. 648.

28. Flour City Nat. Bank v. Traders' Nat. Bank, 42 N. Y. S. C. 244, per Barker, J.

29. Morse on Banking.

30. Bigelow on Estoppel.

31. Redfield & Bigelow's Lead. Cas.

dollars," [32] is sufficient warrant for an enlarged statement of the principles affecting them.

§ **1603. Bank by certifying check becomes principal debtor.**— Let us consider more at length the effect of the certification of checks. In the first place, the bank becomes at once the principal debtor.[33] When the holder presents the check to the bank, the latter can only respond to the demand for payment by making payment. But if it be agreed to between them, the check is certified to be good;" and thus, in contemplation and by operation of law, it is the same as if the funds had been actually paid out by the bank to the holder, by him redeposited to his own credit, and a certificate of deposit issued to him therefor.[34] In other words, a certified check is a shorthand certificate of deposit in favor of the holder, and payable to him, or to him or order, or to bearer, according to its terms.[35]

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32. In Merchants' Bank v. State Bank, 10 Wall. 648, Justice Swayne said: "By the law merchant of this country, the certificate of a bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee; that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good; and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available, also, to him for all the purposes of money." * * * "The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting, and passing from hand to hand large sums of money. It is computed by a competent authority that the average daily amount of such checks in use in the city of New York is not less than $100,000,000. We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt on their validity."

33. Andrews v. German Nat. Bank, 9 Heisk. 217; Merchants' Bank v. State Bank, 10 Wall. 648; Essex County Bank v. Bank of Montreal, 7 Biss. 193; First Nat. Bank v. Leach, 52 N. Y. 350; Freund v. Importers, etc., Bank, 12 Hun, 537; Drovers' Nat. Bank v. Provision Co., 117 Ill. 106.

34. National Commercial Bank v. Miller, 77 Ala. 175, citing the text; Garrettson v. North Atchison Bank, 39 Fed. 165, citing the text. See McCord v. National Bank, 96 Cal. 197, 31 Pac. 51; National Bank v. Jones, 137 Ill. 634, 27 N. E. 533, 31 Am. St. Rep. 403.

35. Thomson v. Bank of British North America, 82 N. Y. 1; Farmers', etc., Bank v. Bank of Allen County (Tenn.), 12 S. W. 545.

Thus, the bank ceases to be the debtor of the original depositor, and becomes the debtor of the holder of the check, who may demand the amount, and sue the bank for its recovery at any time,[36] even after the lapse of many years.[37] It will be too late after the bank has certified the check for the drawer to revoke it, and the bank will be bound to pay it though notified by the drawer not to do so.[38] It will also be too late for the bank to say that the check was forged, and was not in fact the drawer's, unless it be still in the hands of one who was guilty of the forgery, or had knowledge of or complicity in it, for it has conceded its genuineness, and indeed asserted it by certification.[39] Nor can it say that there were in fact no funds of the drawer to meet the check, for its certificate is an assurance that there were such funds, and that it will apply them to that purpose.[40] These doctrines are now universally settled, and the United States Supreme Court has declared that it could not inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon them.[41]

36. Gerard Bank v. Bank of Penn Township, 39 Pa. St. 92; Morse on Banking, 281–283; Willetts v. Phœnix Bank, 2 Duer, 121; Muth v. Trust Co., 88 Mo. App. 596.

37. Gerard Bank v. Bank of Penn Township, 39 Pa. St. 92. In this case the check was certified October 7, 1852. The drawer withdrew his funds October 10, 1854, and the holder demanded payment September 3, 1859. The bank was held liable, the Statute of Limitations not having accrued.

38. Freund v. Importers, etc., Bank, 12 Hun, 537, 76 N. Y. 352; First Nat. Bank v. Leach, 52 N. Y. 350; Garrettson v. Bank, 47 Fed. 867, citing text.

39. See *infra*, § 1359 *et seq.*, and chapter XVIII, on Acceptance, § 532 *et seq.*, vol. I. But if the body of the check is a forgery (*i. e.*, the amount "raised") and the bank thereafterward pays the check thus certified, in ignorance of the forgery and without fault or negligence on its part, it will be entitled to recover of the holder the amount thus paid, upon the ground of mistake of fact. Continental Bank v. Tradesmen's Bank, 36 App. Div. 112, 55 N. Y. Supp. 545.

40. Espy v. Bank of Cincinnati, 18 Wall. 621. Following the principle, as stated in the text, it has been decided by the Supreme Court of Washington, with special reference to general deposits, that a bank is estopped to dispute its indebtedness to a city, where, at various times during a period of two years, it has given a city credit for money deposited, and entered the amounts in a pass-book delivered to it, and kept by the city treasurer, although in fact city warrants, instead of money, had been actually received by the bank, when it has allowed the city to transact its business upon the assumption that the money in question was on deposit and no attempt was made by the bank to avoid the transaction for a period of a year and a half after the last of such deposits had been made. See Tacoma v. German-American Bank, 15 Wash. 294, 46 Pac. 256.

41. Merchants' Bank v. State Bank, 10 Wall. 648.

In New York it has been (and as it seems rightly) held that the legal effect of certification is only to warrant the signature, and not the terms of the check; that evidence that it was understood by the custom of merchants to warrant more is inadmissible; that the teller has no authority to warrant more, and his act in doing so would not bind the bank.[42]

§ **1604. Holder taking certification of check discharges drawer.**— In the *second* place, the holder, by taking a certificate of the check instead of payment, discharges the drawer. This results from what has been already said. If the bank refuses payment, the drawer should be notified. But if the holder receives something else in lieu of payment, it is the same as payment; and as the drawer cannot legally withdraw the funds after checking on them, it would be unjust that they should be held at his risk or his liability on the check extended.[43] The indorser of a check who is a new drawer would also ordinarily be discharged if the holder had it certified instead of requiring payment; but if the indorser request or consent to the certification, this rule would not apply;[44] and if the holder of a certified check indorse it, his indorsee may hold him liable as well as the bank.[45]

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42. Security Bank v. National Bank, 67 N. Y. 458; Marine Nat. Bank v. National City Bank, 59 N. Y. 67; White v. Continental Bank, 64 N. Y. 316; 2 Ames on Bills and Notes, 802. See also Espy v. Bank of Cincinnati, 18 Wall. 621. *Contra,* Louisiana Bank v. Citizens' Bank, 28 La. Ann. 189.

43. In First Nat. Bank v. Leach, 52 N. Y. 350 (1873), Peckham, J., said: "The theory of the law is, that where a check is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account. Every well-regulated bank adopts this practice to protect itself. * * * It follows, that after a check is certified the drawer of the check cannot draw out of the funds then in the bank necessary to meet the certified check. The money is no longer his." Morse on Banking, 382; Essex County Nat. Bank v. Bank of Montreal, 7 Biss. 197. "But if the drawer, in his own behalf or for his own interest, gets his check certified and then delivers it to the payee, the drawer is not discharged." Minot v. Russ, 156 Mass. 458, 31 N. E. 489; Randolph Nat. Bank v. Hornblower, 160 Mass. 401, 35 N. E. 850. In last case it was also held, that "if the payee, before delivery, requests drawer to send check to bank for him and get it certified, the rule is the same." Metropolitan Nat. Bank v. Jones, 137 Ill. 634, 27 N. E. 533, 31 Am. St. Rep. 403.

44. Mutual Nat. Bank v. Rotge, 28 La. Ann. 933; Oyster & Fish Co. v. National Lafayette Bank, 51 Ohio St. 106, 36 N. E. 833, 46 Am. St. Rep. 560, citing Head v. Hornblower, 156 Mass. 458, 31 N. E. 489.

45. Mutual Nat. Bank v. Rotge, 28 La. Ann. 933.

§ **1605. Certified check circulates as cash.**— In the *third* place, the check when certified circulates as the representative of so much cash in bank, payable whenever demanded, to the holder. It is then like cash, but still it is not the same as cash, for "*nullus simile est idem.*" Frequently a depositor procures his own check to be certified before he offers it in payment. In such cases it does not lose its character as a check in any particular — it only has the additional credit imparted to it by the certificate.[46]

§ **1606. As to how a check may be certified; no particular form of certification is requisite.**— Ordinarily the bank officer simply writes the word "good" across the face of the instrument.[47] Sometimes his name, or initials, is added.[48] In England a well-known mark was at one time generally used for this purpose; but by statute now a distinct promise, written and signed, is requisite.

§ **1606a. Effect of verbal statement of bank officer that check is good.**— In the absence of any statutory provision on the subject, the mere verbal statement of the bank officer that the check is "good," [49] or a promise on the part of the bank to pay it, will be sufficient to operate as certification, and by way of estoppel, provided such statement or promise be communicated to the holder, and induce him to take the check.[50] But unless so communicated it would not be.[51] It has been held by the United States Supreme Court, that even where so communicated, it would not bind the bank further than as to the genuineness of the drawer's signature,

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46. Dike v. Drexel, 11 App. Div. 77, 42 N. Y. Supp. 979.

47. Barnet v. Smith, 10 Fost. 256.

48. Morse on Banking, 284.

49. Barnet v. Smith, 10 Fost. 256. In Pope v. Bank of Albion, 59 Barb. 226, the court said: "Any language, whether verbal or written, employed by an officer of a banking institution, whose duty it is to know the financial standing and credit of its customers, representing that a check drawn upon it is good, estops the bank from thereafter denying, as against a *bona fide* holder of the check, the want of funds to pay the same." See Morse on Banking, 286, 287.

50. Nelson v. First Nat. Bank, 48 Ill. 36; Carr v. Nat. Security Bank, 107 Mass. 48; Clews v. Bank of New York Nat. Banking Assn., 114 N. Y. 74. Denied in Missouri: Bank of Springfield v. First Nat. Bank, 30 Mo. App. 272. It has been held, however, that such verbal statement was insufficient to discharge the payee when check cashed by the holder on his indorsement. Farmers', etc., Bank v. Bank of Allen County (Tenn.), 12 S. W. 545; The North Atchison Bank v. Garrettson, 2 C. C. A. 145, 51 Fed. 168.

51. Bank v. Pettel, 41 Ill. 492.

and the state of his account; and if the check were "raised" in respect to the amount, the bank giving information that it was "good" and not intending to certify it for circulation would not be bound,[52] and in the United States Circuit Court for the First Circuit it has been held that the verbal promise of a bank to pay a check when not in funds to do so is void under the Statute of Frauds, being a verbal agreement to pay the debt of another.[53]

§ **1606b. Certification of check payable in future.**— Ordinarily the certification states no time of payment, and the check is then payable instantly on demand; but if the certificate specify a future day of payment, it is binding between the bank and the holder receiving it.[54]

§ **1607. As to what checks may be certified, and when.**— No officer of the bank has authority to certify a check when there are no funds of the drawer to meet it. And it is only in favor of *bona fide* holders for value and without notice that, without funds to meet the check, the law will enforce the liability of the bank upon its officers' certificate.[55] Nor can any officer or agent of the bank certify his own checks; for no one acting in a fiduciary capacity as trustee or agent can employ his position for his own private benefit. And where the name of the officer who certifies the check is the same as the drawer, that circumstance is sufficient to charge all persons dealing with the check that they are the same person; and if such be truly the case, and the check were improperly certified, no holder could recover.[56] No officer, moreover, has any im-

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52. In Espy v. Bank of Cincinnati, 18 Wall. 621 (1873), Miller, J., said: "There was no design or intent on the part of the bank to assume a responsibility beyond the funds of the drawer in their hands, nor to enable the payee of the check to put it in circulation. Nothing was said or done by the bank officer which could be transferred with the check as a part of it to an innocent taker of it from the payee. Such subsequent taker would have no right to rely on what was said by the bank officers, any further than the payee would." But see Louisiana Nat. Bank v. Citizens' Bank, 28 La. Ann. 189; Kahn v. Walton, 46 Ohio St. 203. In this case the check appears to have been accepted before the bank verbally replied that it was good.

53. Morse v. Massachusetts Nat. Bank, 1 Holmes, 209.

54. Bank of England v. Anderson, 4 Scott, 50.

55. Atlantic Bank v. Merchants' Bank, 10 Gray, 532; Morse on Banking, 194, 195; Claflin v. Farmers, etc., Bank, 25 N. Y. 293; Cooke v. State Nat. Bank, 52 N. Y. 115.

56. Claflin v. Farmers, etc., Bank, 25 N. Y. 293, overruling same case in 36 Barb. 540; Gale v. Chase Nat. Bank, 43 C. C. A. 496, 104 Fed. 214.

plied authority to certify a check until it is presented for payment, when, of course, it must be actually due and payable. Therefore, should any officer certify a post-dated check, such check bears on its face, until the day of its date arrives, notice and information to all parties receiving it, that it has not been certified in the usual course of business; and if it turn out that the drawer had no funds on deposit at the time of the certification, no party so receiving it can hold the bank liable.[57] Without special authority conferred upon him, the officer of a bank has no implied authority to certify any but commercial checks — that is, those drawn in commercial form, in the usual course of business; and if the check bear upon it a memorandum that it is to be "held as col-

57. Clarke Nat. Bank v. Bank of Albion, 52 Barb. 593. In this case the check was dated January 10, 1866; but it was drawn and certified early in December, 1865, and discounted about the same time to Ward & Brother, bankers. The check was for $6,000, and the drawer when it was certified had only $16.75 to his credit; and he made no deposit to meet it. The court saying: "Checks are never presented for acceptance, but only for payment, to enable the holder immediately to demand and receive the money stated therein — and in theory are not intended to circulate as commercial paper. They are always supposed to be drawn upon a previous deposit of funds, and are an appropriation of so much of the money in the hands of the banker to the holder of the check (Story on Promissory Notes, §§ 488, 489). They must be regarded as drawn and dated the day they bear date (The Mohawk Bank v. Broderick, 13 Wend. 133). Where a check is drawn and negotiated before it bears date, the effect is, that the same is payable on demand, on and after the day on which it purports to bear date, and nothing more (The Mohawk Bank v. Broderick, 10 Wend. 308). They are not due before payment is demanded, in which respect they differ from bills of exchange on a particular day (Chitty on Bills, 7th Am. ed., 322; Harker v. Anderson, 21 Wend. 374). From these propositions of law, it follows that this check was certified by the cashier before its payment could have been legally demanded, and before it could be presumed that the drawer had made a deposit for its payment; all of which appeared on the face of the paper, and was in the law full notice to Ward & Bro. Post-dated checks are instruments often used, and their nature and character are well understood by bankers and the trading community. By all such persons it is regarded that the drawer is not in funds at the bank on which he draws his check, when he makes and delivers the same, and does not expect to be until the arrival of the date inserted in the check. Ward & Bro. could not then have maintained an action on the check against the bank, because: First. This check was certified by the cashier before it was payable by its terms, and before any legal demand of payment was or could be made. Second. It was certified when the presumption is that the drawer had no funds in the bank to meet it. Third. Ward & Bro. were not *bona fide* holders of this check without notice of the facts, which vitiates the certification."

lateral," etc., the cashier's certification is not in due course, and will not bind the bank unless expressly authorized.[58]

§ 1607a. Certification of unindorsed check.— Sometimes a check payable to order is certified without the indorsement of the payee being upon it, and when it is already in the hands of a third party. In such cases it is understood that the proper indorsement will be obtained before the amount is withdrawn, and that the amount will be held by the bank to meet it. But if in fact the holder be the assignee by delivery of the check for a valid consideration and entitled to receive the money, although not an indorser, the bank, it has been held, would be protected in paying him, where the check was drawn for accommodation.[59]

It has been held in New York that the purchaser of a certified check payable to order, who takes it by delivery without indorsement by the payee, holds it subject to all equities and defenses existing between the original parties. The bank has a right to require the indorsement of the payee.[60] The usual form of certification is " Good for $——, when properly indorsed."

§ 1608. Checks certified by mistake.— If the bank certifies a check to be good by mistake, under the erroneous impression that the drawer had funds on deposit, when in fact he had none, or has been induced by some fraudulent representation to certify it as good, the certification may be revoked and annulled, provided no change of circumstances has occurred which would render it inequitable for such right to be exercised. If the check still remains in the hands of the holder who held it when it was certified, and the mistake is discovered and notified to him so speedily that he has time afforded him to notify and preserve the liability of indorsers, the bank may retract its certificate.[61] But if another

58. Dorsey v. Abrams, 85 Pa. St. 299.

59. Freund v. Importers, etc., Bank, 76 N. Y. 352 (1879). Compare Abrams v. Union Nat. Bank, 31 La. Ann. 61. See § 726, as to equities pleadable against purchaser of overdue paper which present analogies to the question decided in this case. Meridian Nat. Bank of Indianapolis v. First Nat. Bank of Shelbyville, 7 Ind. App. 322, 33 N. E. 247, 34 N. E. 608, 52 Am. St. Rep. 450, citing text.

60. Goshen Nat. Bank v. Bingham, 118 N. Y. 349; Lynch v. First Nat. Bank, 107 N. Y. 181; Meridian Nat. Bank of Indianapolis v. First Nat. Bank of Shelbyville, 7 Ind. App. 322, 33 N. E. 247, 34 N. E. 608, 52 Am. St. Rep. 450, citing text.

61. Irving Bank v. Wetherald, 36 N. Y. 335, 34 Barb. 323; Second Nat. Bank v. Western Nat. Bank, 51 Md. 128. See chapter XVIII, on Acceptance, § 493, vol. I; Brooklyn Trust Co. v. Toler, 65 Hun, 187, 19 N. Y. Supp. 975.

person has become the holder of it, or circumstances have so changed that the rights of the holder would be prejudiced, and especially if it has been paid to a *bona fide* holder without notice, it is absolutely estopped from doing so.[62] If an authorized officer of the bank transcends his authority and certify a check when the drawer has no funds, the bank will be liable to any innocent holder of the check.[63]

§ 1609. As to who may certify for the bank; president or board of directors may.— What officers of the bank have implied power *ex officio* to certify checks is next to be considered. The board of directors undoubtedly have, for they are the bank's managers and its representatives in the broadest sense.[64] And the president of the bank, who is *ex officio* their president and mouthpiece, also undoubtedly has such power.[65]

§ 1610. Cashier has implied power to certify checks.— The cashier undoubtedly has implied power to certify checks, and it has been so held in numerous cases.[66] In Massachusetts alone has the contrary doctrine prevailed, on the ground that it is a power to pledge the credit of the bank to its customers, which, by the very constitution of a bank, resides only in the president and directors. And there it has been held that even if it were proved that the teller had by usage certified checks, it would be a bad usage, and could not be upheld.[67] But besides the authorities cited in the note as sustaining the cashier's implied power, it has been decided by the United States Supreme Court that a bank is liable upon checks certified by its cashier, although it was proved that he acted without authority, and although it was not shown that he had ever certified checks before, or that the cashiers of banks in the same place were accustomed to certify checks. The court said: "The power of the bank to certify checks has been sufficiently considered. The question we are now considering is the authority

62. Bank of Republic v. Baxter, 31 Vt. 101; Meridian Nat. Bank of Indianapolis v. First Nat. Bank of Shelbyville, 7 Ind. App. 322, 33 N. E. 247, 34 N. E. 608, 52 Am. St. Rep. 450, citing text.

63. Hill v. Trust Co., 108 Pa. St. 3.

64. See chapter on Corporations as Parties.

65. Claflin v. Farmers, etc., Bank, 25 N. Y. 293.

66. Clarke Nat. Bank v. Bank of Albion, 52 Barb. 592; Pope v. Bank of Albion, 59 Barb. 226; Cooke v. State Nat. Bank, 52 N. Y. 115.

67. Mussey v. Eagle Bank, 9 Metc. (Mass.) 313; Atlantic Bank v. Merchants' Bank, 10 Gray, 532.

of the cashier. It is his duty to receive all the funds which come into the bank and to enter them upon its books. The authority to receive implies and carries with it authority to give certificates of deposit and other proper vouchers. When the money is in the bank he has the same authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry on the books of the bank. This he is authorized to do *virtute officii.* The power is inherent in the office." [68] And the exercise of such power is rather a mere transfer of credit from the drawer of the check to the holder of it than a pledge of the credit of the bank.[69] He cannot issue a certificate of deposit to himself, because to do so would be to perfect a contract through one consenting mind, an act inconsistent with his position of trust and confidence.[70]

§ **1610a. Teller has implied power to certify checks.**— The teller of the bank also undoubtedly has an inherent implied power to certify checks, for, though a subordinate of the cashier, he is simply an arm with which certain portions of his work are performed;[71] and it has been thought that he is the more proper officer to discharge this particular duty.[72] But the fact that the teller may certify checks by no means implies that when he may, the cashier may not. The authority of an assistant teller to certify checks may be implied from a course of dealing acquiesced in by the bank.[73]

§ **1610b. Assistant cashier has no implied power to certify checks.** — The assistant cashier of a bank has no implied power to accept or certify a check, and where such an officer wrote on the check presented to the bank, "Accepted, A. J. Chester, A. Cash.," it was held that even a *bona fide* holder for value was chargeable with an infirmity in the transaction, the style of the acceptance putting him on guard as to the authority of the officer.[74]

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68. Merchants' Bank v. State Bank, 10 Wall. 648; Muth v. Trust Co., 88 Mo. App. 598.

69. Morse on Banking, 192. **70.** Lee v. Smith, 84 Mo. 304; *post,* § 1611.

71. Farmers, etc., Bank v. Butchers, etc., Bank, 14 N. Y. 624, 16 N. Y. 133; Mead v. Merchants' Bank, 25 N. Y. 146; Irving Bank v. Wetherald, 36 N. Y. 335; Hill v. Trust Co., 108 Pa. St. 1. *Contra,* Mussey v. Eagle Bank, 9 Metc. (Mass.) 313; Muth v. Trust Co., 88 Mo. App. 598.

72. Farmers, etc., Bank v. Butchers, etc., Bank, 14 N. Y. 624, 16 N. Y. 133.

73. Hill v. Trust Co., 108 Pa. St. 1.

74. Pope v. Bank of Albion, 57 N. Y. 127.

§ 1611. Bank officer cannot certify his own check.— There is this limitation upon the implied power of the president or other officer of a bank to certify checks: he cannot certify his own check, and any party taking a check drawn by a party, and then certified by him for a bank as its officer, takes it with notice of the double relation he is acting in, and cannot be placed upon the footing of a *bona fide* holder without notice. This doctrine rests on the principle that no person can act as agent of both parties to a contract, although he may himself have no interest on either side; nor can he act as agent in regard to a contract in which he has any interest, or in which he is a party on the side opposite to his principal.[75]

§ 1611a. Deposits, general and special.— Deposits made with bankers may be either general or special. A deposit is special when the thing deposited has been placed in the charge or custody of the bank or banker, and to be specifically returned according to the terms of the special deposit. When a deposit is made, it is presumed to be general and not special. A general deposit, ordinarily speaking, consists of a deposit of money in bank — in such case the depositor parts with the title to the money deposited, and thereby loans it to the bank. The bank, in consideration of the loan and the right to use the money for its own profit, agrees to refund the same, or any part thereof upon check or checks. A general deposit creates the relationship of debtor and creditor between the bank and the depositor, and in no sense is the relationship of trustee and *cestui que trust* created; but it is otherwise with a special deposit.[76]

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75. Claflin v. Farmers, etc., Bank, 25 N. Y. 294, overruling 36 Barb. 540. See also N. Y. & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 64; Titus v. Great Western Turnpike Co., 5 Lans. 253; *ante*, § 1607; Lee v. Smith, 84 Mo. 304.

76. Commercial Bank of Albany v. Hughes, 17 Wend. 94; Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; Bullard v. Randall, 1 Gray, 605, 61 Am. Dec. 433; Am. & Eng. Encyc. of Law (1st ed.), vol. II, p. 94, and authorities there cited. See also Matter of Mueller, 15 App. Div. 67, 44 N. Y. Supp. 280; Decker v. Union Dime Sav. Inst., 15 App. Div. 55, 44 N. Y. Supp. 521; Gray v. Merriam, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172; Anderson v. Bank, 112 Cal. 598, 44 Pac. 1063, 53 Am. St. Rep. 228; Nichols v. State, 46 Nebr. 717, 65 N. W. 774; First Nat. Bank of Farmersville v. Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334; Paul v. Draper, 158 Mo. 197; Leaphart v. Commercial Bank, 45 S. C. 563, 23 S. E. 939, 55 Am. St. Rep. 800; Thomasson v. Commercial Bank, 45 S. C. 570, 23 S. E. 942; Union Sav. Bank & Trust Co. v. Indiana Lounge Co., 20 Ind. App. 325, 47 N. E. 846.

SECTION V.

WHOSE CHECKS SHOULD BE PAID BY THE BANK.

§ 1612. Signature of check-drawer should be identical with entry of credit.— When a deposit has been made in a bank, its officers should be careful that no portion of it is paid out upon the check of any party but the depositor or depositors. The proper and only safe rule for the bank to adopt is to require the signature to be identical in terms with the credit on its books.[77] Thus if the credit be simply to A. B., let the check be signed simply A. B.; and if it be to "A. B., trustee," or "A. B., trustee for C. D.," let the signature be *in totidem verbis*.[78] So if several persons not partners make a deposit to their joint credit, the signature of each one should be required. But if it be to their joint and several credit, the check of any one may be honored.[79] Where one or more of the joint depositors abscond, equity will relieve the others.[80]

§ 1612a. Conversion of trust fund.— If a deposit be made in bank to the credit of a certain person as agent or trustee, the use of such terms would charge the bank with notice that the funds were there in a fiduciary relation; it would have no lien upon them for the private debts of the depositor, and if it permitted them to be used for his private purposes in transactions with the bank it would be bound.[81] But it has been held that the bank is not bound to in-

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77. Tryon v. Okley, 3 G. Greene, 289; Bates v. First Nat. Bank, 89 N. Y. 286; Patterson v. Marine Bank, 130 Pa. St. 419; Citizens' Nat. Bank v. Alexander, 120 Pa. St. 476; First Nat. Bank v. First Nat. Bank, 58 Ohio St. 207, 50 N. E. 723, 65 Am. St. Rep. 748.

78. Innes v. Stephenson, 1 Moody & R. 145; Stone v. Marsh, Ryan & M. 364; Sloman v. Bank of England, 14 Sim. 459, 9 Jur. 243; Ihl v. Bank of St. Joseph, 26 Mo. App. 139. As illustrative of the general principle stated in the text, see Clark v. Saugerties Sav. Bank, 62 Hun, 346, 17 N. Y. Supp. 215.

79. Morse on Banking, 266. A special deposit made by H. to be paid to D. & W., upon their joint check, and not otherwise, upon which the conditions have not been complied with for sixteen months, should, upon demand, be paid to the said H. Bank of Le Roy v. Harding, 1 Kan. App. 389, 41 Pac. 680.

80. *Ex parte* Hunter, 2 Rose, 382; *Ex parte* Collins, 2 Cox, 427.

81. Central Nat. Bank v. Connecticut Mut. Ins. Co., U. S. S. C., Nov., 1881, Morrison's Transcript, vol. III, No. 1, 52; Pannell v. Hurley, 2 Collyer New Cas. 241. See also Duncan v. Jaudon, 15 Wall. 165; Bailey v. Finch, L. R., 7 Q. B. 34; *Ex parte* Kingston; *In re* Gross, L. R., 6 Ch. App. 632; Bundy v. Town of Monticello, S. C. Ind., Feb., 1882, Cent. L. J., March 3, 1882, p. 177 (vol. XIV, No. 9); Ihl v. Bank of St. Joseph, 26 Mo. App. 139. A check

quire whether checks drawn in proper form by the trustee in favor of third parties, are conversions of the fund to his own use; the contract between the bank and the depositor being that the former will pay according to the checks of the latter, and when drawn in proper form, the bank is bound to presume that the act of the

signed by a bank cashier on a trust account in his name in the bank, where no money is paid upon it, and it is used only to make good the bank reserve, is not a payment, and the *cestui que trust* may follow the trust fund. And further, that knowledge of the bank officer of the trust character of the fund, was notice to the bank. Wiggins v. Stevens, 33 App. Div. 83, 53 N. Y. Supp. 90; First Nat. Bank of Central City v. Hummel, 14 Colo. 259, 23 Pac. 986, 20 Am. St. Rep. 259; Meldrum v. Henderson, 7 Colo. 256, 53 Pac. 148. In the case last cited, it was held: "If one having trust fund deposits the same in a bank as his own money, has placed it to his individual credit and mingles it with his other funds in such manner that its identity is lost, its true character is by his own act destroyed, and he cannot, after the banker's assignment for the benefit of creditors, follow it into the hands of the assignee and recover it as a trust fund." In this connection, see first report on the case of Hummel v. First Nat. Bank, 2 Colo. App. 571, 32 Pac. 72. It would be otherwise if the trust funds were deposited to the individual credit of the trustee and such funds were commingled with and used as a part of the general funds of the bank — in such a case owners of the trust would not be entitled to preference in contest with other creditors over the funds belonging to insolvent bank. See Shute v. Hinman, 34 Oreg. 578, 56 Pac. 412, 58 Pac. 882. In Wisconsin held, that even if the money had been placed on deposit to the credit of a guardian of an infant, trust cannot attach and a preference therefor cannot be allowed, if the money thus deposited was commingled with the funds of the bank. The claimant must be able to trace into and satisfactorily identify it in the hands of the assignee, or received on its substitute or substantial equivalent." See Burnham v. Barth, 89 Wis. 362, 62 N. W. 96. See also Thuemmler v. Barth, 89 Wis. 381, 62 N. W. 94; Henry v. Martin, 88 Wis. 367, 60 N. W. 263. And accordingly, it has been held that the principal may establish his ownership of the funds in bank deposited to the credit of his agent. See Boody v. Lincoln Nat. Bank, 70 Hun, 392, 24 N. Y. Supp. 1139. But where one of two trustees indorses upon a note, payable to both, the name of his cotrustee without authority, and deposits the same in bank to his individual account, and misappropriates the fund, the bank is the party to the breach of trust and is responsible for the loss, unless the claim of the first estate therefor is barred by limitations. See Barroll v. Foreman, 88 Md. 188, 40 Atl. 883. See also Duckett v. National Bank of Baltimore, 88 Md. 8, 41 Atl. 161, 1062; Aurora Nat. Bank v. Dils, 18 Ind. App. 319, 48 N. E. 19. And upon the same principle, if a debtor makes a deposit with a creditor bank, with an agreement that it shall be subject to the depositor's order for a specific purpose, it cannot, in violation of such order, be applied by the bank in payment of the depositor's debt. See Carter v. Martin, 22 Ind. App. 445, 53 N. E. 1066. An assignee for creditors who deposits funds in bank which subsequently becomes insolvent, is not entitled

trustee is in the course of the lawful performance of his duty, and to honor them accordingly.[82]

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to recover the amount deposited from the assignee of the bank as trust funds, where the bank had on hand only a very small amount in cash at the time it failed, the money so deposited being mingled with other money, and used by the bank in the usual and ordinary course of business in the payment of its debts, and no new loans being made by the bank, and no property of any kind or securities on hand being purchased with the money so deposited. Jones v. Chesebrough, 105 Iowa, 303, 75 N. W. 97; State v. Midland State Bank, 52 Nebr. 1, 71 N. W. 1015, 66 Am. St. Rep. 484. As further illustrative of the principle announced in the text, see Kelley v. Chenango Valley Sav. Bank, 22 App. Div. 202, 47 N. Y. Supp. 1041; Exchange Bank v. McDill, 56 S. C. 565, 35 S. E. 260; Pollock v. Carolina Interstate Bldg. & Loan Assn., 51 S. C. 420, 29 S. E. 77, 64 Am. St. Rep. 683; Hamilton *et al.*, Exrs. v. Toner, 17 Ind. App. 389, 46 N. E. 921; Tiernan, Exr. v. The Security Bldg. & Loan Assn., 152 Mo. 135, 53 S. W. 1072; Pundmann v. Schoenich, 144 Mo. 149, 45 S. W. 1112; McNulta v. West Chicago Park Commission, 40 C. C. A. 155, 99 Fed. 900; Merchants' Nat. Bank v. School District, 36 C. C. A. 432, 94 Fed. 705; Lanterman v. Travous, 174 Ill. 459, 51 N. E. 805.

82. National Bank v. Insurance Co., 104 U. S. 54; State Nat. Bank v. Reilly, 124 Ill. 469; Woodbridge v. First Nat. Bank, 45 App. Div. 166, 61 N. Y. Supp. 258. In New York it has been held that checks drawn on an account in the drawer's name as "executor," not evidence that the money belonged to a particular estate. See Mittnacht v. Bache, 16 App. Div. 426, 45 N. Y. Supp. 81; Heidelbach v. National Park Bank, 87 Hun, 117, 33 N. Y. Supp. 794. In the last case it was held, that where a party seeks to trace the proceeds of property after it has been deposited in bank with the individual money of the depositor, it is sufficient, for the purposes of identification, and to establish the character of the proceeds as trust money, to trace the proceeds into the bank, to show that they were there at the time notice was given of the true owner's rights. But any collusion between the bank and the depositor whereby a breach of trust is committed toward *a cestui que trust*, would make bank liable. Knobeloch v. Germania Bank, 43 S. C. 233, 21 S. E. 13. But if a bank is explicitly directed to put a certain sum to the credit of a party as trustee, and yet places the same to the personal account of that party who commits a breach of trust by misappropriating it within the bank, it is liable to the trust estate for such participation in the breach of trust after notice; and no subsequent ratification of the wrongful act of the bank by the trustee can bind the beneficiaries of the trust estate. See Duckett v. National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 63 Am. St. Rep. 513. Whether the bank be liable or not, it is well settled that money received by a person in a fiduciary character and deposited to his individual credit in bank, the money so deposited can be followed and the trust made a charge on the balance in the beneficiaries' hands, and if such depositor has an individual account in bank, and thus mixes the trust funds with his own money and afterward draws out sums by checks in the ordinary manner, the drawer must be taken to have drawn out his note money in preference to the trust money. See Drovers' Bank v. Roller, 85 Md. 495, 37 Atl. 30, 60 Am. St. Rep. 344.

§ 1612b. Gifts of deposit.— One may so deposit funds in bank as to constitute a gift *inter vivos;* and within the last decade quite a number of decisions has been rendered illustrative of that fact. The test always is whether or not the depositor intended the funds deposited to be a gift to take effect immediately. In the case of McElroy v. Albany Savings Bank, it was held that an entry in a savings bank's pass-book representing moneys deposited by the husband, which read: "Albany Savings Bank in account with Mrs. Alida P. Bell, or James C. Bell, her husband, or survivor of them," constituted the parties named joint owners of the sum deposited, and entitled the wife, if she survive her husband, to take the fund; and it was further held, in the case referred to, that it was not necessary to the validity of such a gift that the pass-book should be delivered to, or remain in, the possession of the wife during her lifetime. The more recent case of Martin v. Martin sustains the principle announced in the McElroy case. In the Martin case, an account in the bank was opened: "Wm. Martin, James Martin may draw." This deposit was made by James Martin, and at the time of opening the account, he stated to the officers of the bank that it was understood and intended that, at his death, the money should belong to Wm. Martin. The bank officers explained to James Martin that the money would belong to Wm. Martin and be subject to his check. Wm. Martin was ignorant of the transaction. James Martin kept the pass-book in his possession until a few days before his death, when he delivered it, with others, to the person whom he had nominated as executor, requesting him to take charge of them and see that what was right was done, and stating at the same time that Wm. Martin was worthy of being helped. The court held that the transaction constituted a trust in favor of Wm. Martin, and that the money in bank was his property. The court said: "And the fact that there was no delivery of the pass-book, or that James Martin reserved the right in himself to revoke this trust, or the want of knowledge of William, are not potential to prevent impressing the deposit with the attributes of a trust." [83]

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83. McElroy v. Albany Sav. Bank, 8 App. Div. 46, 192, 616, 40 N. Y. Supp. 340, 422, 1145; Board of Missions v. The Mechanics' Sav. Bank, 40 App. Div. 120, 54 N. Y. Supp. 28, 57 N. Y. Supp. 582; Martin v. Martin, 46 App. Div. 445, 61 N. Y. Supp. 813; Cunningham v. Davenport, 147 N. Y. 43, 41 N. E. 412, 49 Am. St. Rep. 641; Hatch v. Fourth Nat. Bank, 147 N. Y. 184, 41 N. E. 403; Matter of Bolin, 136 N. Y. 177, 32 N. E. 626; Bishop v. Corning, 37 App.

§ **1613. In the case of a partnership deposit** it should, as a rule, be paid out only upon a check signed in the copartnership name. But any one of the firm is empowered to make such signature. If there are dormant partners, the bank is not bound to pay a check signed by one of them in the partnership name, unless it knew or should have known the fact that the signer was a member of the copartnership; for otherwise its refusal to pay would be legal and proper.[84] Whether or not a copartner could bind the firm by signing the names of the several partners has been questioned. It would seem that he could.[85] And where a check was signed by one partner "for A. B. C. and D. C.," [86] and another "A. & Co., per procuration of A.," [87] they were each held sufficient as copartnership checks.

§ **1614.** It is lawful for a bank to show that a deposit standing in the name of an individual partner was really a partnership deposit; but it would be necessary to go further and show that it was really paid in on partnership account, and was designed to constitute, or at least ought rightfully to have been designed to constitute, a fund for partnership purposes, in order to warrant the bank to pay out to partnership checks.[88] If two distinct firms unite in their capacities as such to form a third, payment upon the check of either firm would be valid.[89]

§ **1615. As to personal representatives and trustees.**— Where a deposit is made to the credit of several executors or administrators, the check of any one may be honored, for the reason that each one

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Div. 345, 57 N. Y. Supp. 697; Proseus v. Porter, 20 App. Div. 44, 46 N. Y. Supp. 656; Beaver v. Beaver, 137 N. Y. 59, 32 N. E. 998; Bishop v. Seaman's Bank for Savings, 33 App. Div. 181, 53 N. Y. Supp. 363.

84. Cook v. Seeley, 2 Exch. 749.

85. Norton v. Seymour, 3 C. B. 792; Grant on Banking, 32; Morse on Banking, 274. A partner acting as general agent for his firm in the transaction of its business may empower the firm's employees or other persons to draw checks upon the firm's bank account, and if the checks so drawn are within the apparent scope of the firm's business, the bank will be protected in honoring the same. Evans v. Evans, 82 Iowa, 493, 48 N. W. 929.

86. *Ex parte* Buckley, 14 M. & W. 469, overruling Hall v. Smith, 1 B. & C. 407.

87. Williamson v. Johnson, 1 B. & C. 149.

88. Sims v. Bond, 5 B. & Ad. 389.

89. Duff v. East India Co., 15 Ves. Jr. 198.

is competent in law to control the estate in hand.[90] But the rule respecting trustees is different. They act under a joint power, and the signature of all is, generally speaking, necessary to the validity of the check.[91] But in an English case, where there were five trustees of a small trust fund, and they were widely apart from each other, the Court of Chancery ordered that payment might be made "to them, or any of them," to save expense.[92] In the event of the death of an executor, to whose credit a deposit stands, the bank should pay thereafter to the check of the *administrator de bonis non* of the estate of the prior deceased, and not that of his own personal representative.[93]

§ 1616. In the case of deposits by corporations, the bank should ascertain, by examination of the corporate charter and by-laws, what officers are competent to draw checks. If the corporation should furnish to the bank the name of the party authorized to draw checks, it would undoubtedly be justified in paying, and should pay, checks drawn by such party.[94] But otherwise, the check should purport on its face to be the corporate act. And in England, where three railroad directors were empowered to draw checks, and the three persons who were in fact directors signed their individual names to a check without styling themselves directors, it was held that the check did not sufficiently purport to be the check of the company, although it bore the impression of a stamp of the corporate name, and would not bind it even in the hands of a *bona fide* holder for value.[95] But in cases where the

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90. Pond v. Underwood, 2 Ld. Raym. 1210; Gaunt v. Taylor, 2 Hare, 413; *Ex parte* Rigby, 19 Ves. 462; Allen v. Dundas, 3 T. R. 125; Can v. Read, 3 Atk. 695.

91. Morse on Banking, 267; Neiman v. Beacon Trust Co., 170 Mass. 452, 49 N. E. 748, 64 Am. St. Rep. 315. In the last case it was held, that where a deposit is made in bank in the name of two persons jointly, with a provision that no payment shall be made from same, except upon their joint checks and with no mention of amounts of their respective shares or interest, if bank wrongfully pays out the whole deposit to one of the depositors, it is liable to the other for the amount of his actual interest therein at the time of such payment, although such interest is greater than it was when the deposit was made.

92. Shortbridge's Case, 12 Ves. Jr. 28.

93. Alleghany Bank's Appeal, 48 Pa. St. 328; Farmers, etc., Bank v. King, 57 Pa. St. 364.

94. Fulton Bank v. New York & Sharon Canal Co., 4 Paige, 127.

95. Serrell v. Derbyshire R. Co., 9 C. B. 811, 19 L. J. C. P. 377.

money has been paid out by the bank on such checks, if it can be traced to the corporation and proved to have been actually received by it, the bank will be entitled to charge the amount in account against the corporation.[96]

§ **1616a.** The usage of a corporation in drawing its checks, and customary manner of conducting its business, may justify the payment of checks drawn according to such course of business even when the proper officers do not sign the checks. And it has been recently held by the United States Supreme Court that where checks had been drawn by the president and secretary of a corporation on a bank which acted as its treasurer during a long period, and without objection, the bank had a right to assume their authority to draw checks, or over-checks, and to assume also that the money was obtained and used by the corporation; and that the fact that such officers were illegally elected would not affect the validity of their transactions in the premises.[97]

SECTION VI.

WHAT CHECKS SHOULD BE PAID BY THE BANK.

§ **1617.** When a check is presented to the bank, all that the holder can require of the bank is its payment; he cannot require its certification or acceptance, for although the bank may consent to the holder's request to certify it, if it so pleases, it is by no means compellable to do so.[98]

§ **1617a. Checks are payable according to priority of presentment.** — But the holder has a right to demand payment on presentment of the check, and if a number of checks be presented during the day, it is the duty of the bank to pay them according to priority in the time of presentment at its counter, and not according to their priority in date. It has no right to distribute a fund *pro rata* amongst several checkholders when it has not sufficient funds to pay all; nor has it a right to pay a check subsequently pre-

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96. *In re* Norwich Town Co., 22 Beav. 143.

97. Mahoney Mining Co. v. Anglo-California Bank, Morrison's Transcript, vol. III, No. 2, p. 180. See also same case in vol. III, No. 5, p. 785.

98. Bradford v. Fox, 39 Barb. 203; *ante*, § 1601; Mt. Sterling Nat. Bank v. Green, 99 Ky. 262, 35 S. W. 911.

sented, to the exclusion of one previously presented.[99] The rule for it to follow is, "first come first served," and a departure from it renders it responsible to the first comer.[1] When a number of checks are presented at once, and their gross amount is beyond the funds of the drawer, it would seem that the bank is not bound to pay any of them;[2] but it has been said that in such a case, "if the bank choose to pay the first in date, it would be difficult to see on what ground either the drawer or the holders of the others could complain."[3] And it seems but right to let priority of date decide when there is no priority in presentment.

§ 1618. Bank may require proof of payee's identity, and may have reasonable time to ascertain genuineness of indorser's signature.— The bank should not pay the check drawn upon it save to the actual payee, or to his order;[4] and if it mistakes the payee's identity when the check is unindorsed, it is responsible.[5] It is also entitled to a reasonable time to ascertain the genuineness of an indorser's signature when the check is payable to order.[6] Yet if the

99. Matter of Brown, 2 Story, 502; 2 Parsons on Notes and Bills, 78; Morse on Banking, 248, 249. Payment by a bank of checks drawn on a special deposit, while neglecting to apply such deposit to the payment of a prior order drawn thereon and placed in cashier's hands by agreement of the parties, will render the bank liable to the owner of the order for the amount due thereon, if sufficient funds had been placed in such special deposit to cover the amount of the order. See Taggart v. First Nat. Bank, 12 Wash. 538, 41 Pac. 892. Drawing of checks upon a general deposit in a bank prior to garnishment of drawer's account does not exempt an amount equal to such checks, when latter are not presented until after service of garnishment. Commercial Bank v. Chilberg, 14 Wash. 247, 44 Pac. 264, 53 Am. St. Rep. 873.

1. Morse on Banking, 248, 249.

2. Dykers v. Leather Mfg. Co., 11 Paige, 611.

3. 2 Parsons on Notes and Bills, 78.

4. Goshen Nat. Bank v. Bingham, 118 N. Y. 349; *ante*, § 1607.

5. Dodge v. National Exchange Bank, 30 Ohio St. 1; Risley v. Phœnix Bank, 11 Hun, 484; Shipman v. Bank of the State of New York, 126 N. Y. 318, 27 N. E. 371, 22 Am. St. Rep. 821. "A bank which ignorantly pays money to the holder of an instrument upon the faith of a third person's statement that he knows the holder to be the payee, and is afterward compelled to pay the amount to the true payee, may recover the sum from the third person in an action for damages occasioned by the deceit." Lahay v. City Nat. Bank of Denver, 15 Colo. 339, 25 Pac. 704, 22 Am. St. Rep. 407; Chism, Churchill & Co. v. Bank, 96 Tenn. 641, 36 S. W. 381, 54 Am. St. Rep. 863, citing text; Crippen v. National Bank, 51 Mo. App. 508; First Nat. Bank v. Peace, 168 Ill. 40, 48 N. E. 160, citing text.

6. Robarts v. Tucker, 4 Eng. L. & Eq. 236; *ante*, § 1571; Pickle v. People's Nat. Bank (Tenn.), 12 S. W. 920, citing the text.

bank should pay an unindorsed check payable to a certain person or order, to the real assignee thereof, the payment would be good, the money having reached the hands of the party actually entitled to receive it.[7]

§ 1618a. **The bank should not pay a check after notice of its loss or before maturity.**[8]— "Payment of the check by the bank before it is due will not be a discharge, unless made to the real proprietor of it; and, therefore, where a banker, contrary to usage, paid the check before it bore date, which had been lost by the payee, it was held that he was liable to repay the amount to the person losing it. In this case, although the holder had the legal title arising from the possession of the check, yet he was not *bona fide* the holder, with authority to collect, and as the banker paid it out of the usual course of business, he paid it at the risk of being obliged to pay it again, if the party presenting it had not just right to receive it."[9] The bank cannot charge the check against the depositor's account, unless it makes payment of it in the usual course of business.[10] On this principle it was held in Connecticut, that, where the plaintiffs who received the check from a third party payable to their order, indorsed it to the order of the bank cashier, inclosed it in an envelope, and sent it to the bank for deposit by a messenger whom they knew to be untrustworthy, and the latter removed the envelope, received payment of the bank, and then absconded with the amount — the plaintiffs were entitled to recover the amount of the bank.[11]

§ 1618b. **Whether death of drawer revokes check.**— The death of a drawer of a check, as is stated by many authorities, operates as a revocation of the authority of the bank or banker upon which it is drawn to pay it; and though it is conceded that if the bank or banker pay the check before notice of the death, the payment is valid;[12] otherwise, it has been considered, it is

7. Freund v. Importers & Traders' Nat. Bank, 76 N. Y. 352.

8. Godin v. Bank of Commonwealth, 6 Duer, 76; Morse on Banking, 260.

9. Wheeler v. Gould, 20 Pick. 545, Shaw, C. J., citing Da Silva v. Fuller from Chitty on Bills.

10. Crawford v. West Side Bank, 100 N. Y. 53, citing the text.

11. Bristol Knife Co. v. First Nat. Bank, 41 Conn. 421, Phelps and Foster, JJ., dissenting.

12. Byles on Bills (Sharswood's ed.), 24; Chitty on Bills (13th Am. ed.), 429; 2 Parsons on Notes and Bills, 82; Drum v. Benton, 13 App. D. C. 245.

not.[13] This view has been generally based upon the decision in the English case of Tate v. Hilbert,[14] where it was held that the gift of a common check on a banker payable to bearer was not a valid *donatio mortis causa,* or an appointment or disposition in the nature of it. It is quite true that authority to an agent is revoked, as a general rule, by death of the principal;[15] but this doctrine is qualified by the equally well-settled principle, that if the authority be coupled with an interest in the thing vested in the agent, the death of the principal operates no revocation.[16] Now where a check is given to the payee for a valuable consideration (and the check imparts value), the authority to the payee to collect the amount from the bank is coupled with a vested interest in the check. He can sue the drawer upon the check if it be dishonored.[17] The drawing of the check without funds to meet it is a fraud,[18] and the English case above referred to does not determine, as has been supposed, that when a check is given for value, the authority of the banker to pay it is revoked. The death of the drawer of an ordinary bill of exchange does not revoke it,[19] and we can discern no principle of law which allows the death of the drawer to affect the rights of a checkholder who has given value for it.[20] The idea that the death of the drawer of a check

13. Ibid.; Morse on Banking, 260, where it is said: "At the instant of his (the drawer's) death, the title to his balance vests in his legal representatives, and his own order is no longer competent to withdraw any part of that which is no longer his property."

14. 2 Ves. Jr. 118 (1793), 4 Brown Ch. Cas. 286; Chitty, Jr., on Bills, 510.

15. Story on Agency, § 488. **16.** Story on Agency, §§ 488, 489.

17. *Ante,* §§ 1587, 1588, 1589. But the mere possession by an executor of a check, signed by his testatrix, not dated, the body of it being written by the executor, drawn upon a bank where the testatrix had insufficient funds for the payment of the check, accompanied by proof that the papers of the testatrix came into the possession of the executor, does not afford satisfactory evidence that the testatrix was indebted to the executor, the payee of the check, in its amount. Matter of Humfreville, 6 App. Div. 535, 39 N. Y. Supp. 550.

18. § 1596 *et seq.*

19. See *ante,* § 498; Chitty on Bills, 282, 287; Cutts v. Perkins, 12 Mass. 206; Edwards on Bills, 454; 2 Parsons on Notes and Bills, 287.

20. In Thompson on Bills, 244, it is said: "It has been held in England that a check on a banker is revoked by the grantor's death, so that payment of it by the banker will not be good unless it is made before he hears of the drawer's death. It seems to be considered as a kind of mandate. In Scotland, such a check, being an assignment of the funds in the banker's hands, might be completed by presentment to him even after the drawer's death." Morse on Banking, 260.

given to the payee for value, operates a revocation, is, as it seems to us, a total misconception of the law. For a check is a negotiable instrument as often, if not more frequently, given for value, than any other species of commercial paper. The drawer is deemed the principal debtor;[21] and it is anomalous to hold that his death in anywise lessens his obligations, or the right of the bank to pay it, when given for value.[22]

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21. *Ante*, § 1587, and cases cited.

22. Burke v. Bishop, 27 La. Ann. 465 (1875), 21 Am. Rep. 567, seems to sustain these views, though it was declared, as is conceded: "If it had been a check drawn by Hampton Elliott, and he had died before it was presented, and the check was a donation, the check would have been worthless, because by demise of the donor, his mandate to his agent, the bank, was revoked." In an article published in the *Bankers' Magazine*, of New York city, for February, 1879, p. 619, the author has amplified the views which are here presented in the text; and from that article the following extract is made: "It is an entire misconception of the nature of a check, as we think, to look upon it as a mere mandate. It imports that the payee has given value for the right to draw the funds from the banker, and to hold that it is a mere mandate to the banker to pay the amount it calls for, is to lose sight of its higher and more comprehensive character, that of a negotiable instrument, employed as a necessary instrument of commerce, circulating from hand to hand almost as freely as money, and is to allow the greater to be swallowed up in the less. If it is to be regarded as an authority to the banker to pay the amount, it ought also to be regarded as an authority to the payee, or other holder, to receive the amount. Being presumably given to the payee for value, the authority to him to receive the amount is presumably an authority coupled with an interest. Then it is a double mandate. In so far as it is an authority coupled with an interest, it is irrevocable. No citation of authority is needful for this universally recognized doctrine. If the banker's authority to pay be revoked by the drawer's death, we are driven to this paradoxical conclusion: that an authority coupled with an interest may be practically revoked and annulled by the revocation of another authority not coupled with an interest; and the law would appear in this state of self-stultification that the authority to collect the amount continues, and is irrevocable, while the authority to pay, which is necessary to its exercise, ceases by revocation! Is not this *reductio ad absurdum?* According to the view which we have elsewhere taken of a check, it operates as an assignment of the fund upon which it is drawn, as between the drawer and the payee, or holder, and the assignment binds the bank as soon as it is notified thereof by the presentment of the check. See Daniel on Negotiable Instruments, § 1643. But we acknowledge that this is not the predominant view, and that the numerical weight of authority is against it. Be this as it may, it is universally conceded that the check operates as an assignment of the fund *pro tanto*, as soon as the bank consents to it by certification or payment. This being the case — the assignment depending not upon the drawer who has by the act of drawing given his consent, and not upon the act of the banker — we can-

§ 1619. Bank may take time to ascertain if there are funds to meet check.— If the bank is not in funds to pay the check at the time it is presented, it should at once refuse payment. If there

not see how the death of the party who has consented can annul the right of another to acquiesce and concur in his act. Professor Parsons, in a note to his text, takes this view. Says he: 'The right on the part of the drawee to complete the assignment would seem to be a privilege of his own, and it is somewhat difficult to see how the death of the drawer can affect it. The drawer has given the holder a written instrument authorizing the latter to apply to the drawee for the assignment of certain funds. The holder of the bill who has received it for a sufficient consideration has an interest in this authority — not merely in the proceeds of the bill, but in the bill itself; and the rule is, that an authority coupled with an interest is irrevocable.' 2 Parsons on Notes and Bills, 287, note. This language is used in respect to an ordinary bill; but the author evidently regards it as equally applicable to a check. We concede that if the check were a gift to the payee, and the banker knew that fact, the death of the drawer would operate as a revocation of the banker's authority to pay it. In such a case the authority to the donee to collect, as well as that of the banker to pay, is not coupled with such an interest as to continue them in force. 'If it had been a check drawn by Hampton Elliott, and he had died before the check was presented, and the check was a donation, the check would have been worthless, because, by the demise of the donor, his mandate to his agent, the bank, was revoked,' is the language of the Supreme Court of Louisiana, in Burke v. Bishop, 27 La. Ann. 465 (1875). In such a case all that is said in Tate v. Hilbert would apply. But the banker is not to presume that a check is a donation. To require such a presumption on his part, is to make him presume what in ninety-nine cases out of a hundred is not the fact, is to make him presume contrary to what a purchaser may presume; is to except a check from the universally accepted rule of the law merchant that negotiable instruments import value; and is to attach one presumption to the check while the drawer is alive, and another to the same paper upon his demise. In the case of Cutts v. Perkins, 12 Mass. 206, a master of a ship in London bound to the United States, having goods on board consigned to a Boston merchant, and being indebted to a London merchant, drew a bill on the consignee in favor of the London merchant for the amount of the freight money. Before the bill was presented the master died, and it was contended that his death operated as a revocation of the bill. Putnam, J., delivering the opinion of the court, said: 'Upon the delivery of a bill of exchange to the payee the liability of the drawer becomes complete. Some writers have holden that where the indorsement was intended as a mere authority to enable one to receive the money for the use of the indorser, the death of the indorser should operate as a revocation of the authority. But the law is clearly otherwise, when the authority is coupled with an interest, and in such case the death of the drawer will not be a revocation of the request on the drawee to accept.' This case, as we think, correctly states the law. If the death of the drawer revokes the drawee's right to accept and pay the bill, then an indorser's death must also revoke it, for he is regarded as a new drawer, and thus confusion and

is a doubt whether or not it is in funds, the bank may take time to examine or run up its account in order to ascertain, but it should be careful not to detain the check an unreasonable time. It has been held that, according to the usage of trade, a check drawn on a banker in the city of London "may be retained by the banker on whom it is drawn until five o'clock P. M. of the day on which it is presented, and if there be no assets, it may then be returned to the person presenting it, and that, too, although it has been in the first instance canceled by mistake, as intended to be honored."[23] This privilege of retention of checks until five o'clock is applicable by custom only to the city of London; but it has been held in the United States that a bank might return a check at any time within twenty-four hours, on discovering that there were no funds to meet it, without being estopped by its detention for that period from showing that fact.[24]

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uncertainty are introduced into the law merchant in respect to instruments which of all others should be most sure and stable. In Billing v. De Vaux, 3 M. & G. 565, a bill drawn in favor of the plaintiff, was accepted by letter after the drawer's death. The payee sued the acceptor, and he was held liable. Tindal, C. J., said: 'I am not aware of any principle of law by which, upon the death of the drawer of the bill, the rights and liabilities of the parties thereto were at all varied.' Coltman, J., said: 'The other circumstance relied on is that Mersing, the drawer, was dead at the time the letter was written to him, and, therefore, that it is to be considered as mere waste paper. Possibly that might be the case were its effects confined to the parties themselves. But here the bill had been put in circulation.' The bill was in the hands of the payee. Maule, J., said: 'The letter (of acceptance) operates for the benefit of Mersing's (the drawer's) estate, for his death could not vary the rights and liabilities of third parties.' We think this case direct authority as against the inferences which have been drawn from Tate v. Hilbert. Rights accrue upon the delivery of a bill or check to the payee. They are not varied by the subsequent death of the drawer. The drawee of the bill may accept and pay it; the drawee of the check may also honor it; for it is presumably given for consideration, and its payment operates for the benefit of the estate of the deceased, which, upon its dishonor, would be bound for its payment out of general assets. It is to be hoped that the erroneous doctrines of the text-writers may soon be brushed away, and that the clear principles which apply to this important question may be universally recognized and adopted." See Lewis v. International Bank, 13 Mo. App. 202; May v. Jones, 87 Iowa, 189, 54 N. W. 231.

23. Morse on Banking, 251.

24. Overman v. Hoboken City Bank, 31 N. J. L. 563. In this case the check was presented to the Hoboken City Bank between 12 and 1 o'clock on October 31st. On the following day, about 12 o'clock, noon, that bank returned it to the Ocean Bank, from which it was received, marked "not good." It was held that the retention of the check for this period, a little less than

§ 1620. In the next place, as to part payment of checks.— If the bank refuses to pay the check in full, the holder is clearly not bound to receive part payment thereof; for he has an order for so

twenty-four hours, was not implied acceptance, and created no obligation on the Hoboken Bank to pay it. Beasley, C. J., saying: "There can be no doubt that the drawee of a bill of exchange or check can so deal with it that, although he make no express acceptance, the law, with an eye to the public interest, will infer an acceptance on his part. Thus, if such drawee were to return the bill in his possession contrary to the usual mode of intercourse between himself and the holder, and under such circumstances as to induce a reasonable belief that it had been honored, such conduct might amount in law to a constructive acceptance. But no case was cited upon the argument, and none has been found in which it was ruled that a mere retention of the bill by the drawee, such retention being unqualified by any adventitious circumstance, such as a usage of trade, or an understood mode of intercourse between the parties, will, by intendment of law, be considered equivalent to an acceptance of such bill. Treating the subject on principle, we must arrive at the opposite result. It is the business of the holder of the bill of exchange or check to present it for acceptance or payment. Upon such presentation, the drawee has a reasonable time to inspect his accounts and ascertain whether he is in funds to meet the demand; and it has been said that such reasonable time is the space of twenty-four hours (Bellasis v. Hester, 1 Ld. Raym. 280). After the lapse of this reasonable time, whatever period that may be, the holder of the bill has a right to know whether the bill is accepted or dishonored. But it is his duty to wait upon the drawee to ascertain this. If, therefore, in the ordinary course of commercial business, a holder of a bill leave it with the drawee, or send it to him by mail, and such holder do not, after the efflux of a reasonable time, call for such bill, so as to ascertain whether it has been accepted or not, there is nothing in such a transaction upon which to raise or imply an engagement to accept, or a contract of acceptance. In the same manner, if a check, instead of being presented at the counter of a bank by the holder or his agent, should be forwarded by mail, such bank, it is conceived, in the absence of any established course of dealing between itself and such holder, would be under no obligation to return such check, but could safely wait in silence the further action of such holder. In the case of Jeune v. Ward, 2 Stark. 326, the bill had been retained by the drawee over a month, and Lord Ellenborough, at *nisi prius*, had permitted a recovery as on an acceptance, having put the case to the jury on the broad ground that it was the duty of the drawee to return the bill to the holder. But the Court of King's Bench, considering this a misdirection, granted a new trial, and Mr. Justice Bayley, in his opinion delivered on that occasion, thus expresses his view of the law: 'Where a bill of exchange is left for acceptance in the ordinary course of commercial transactions, it is the duty of the party to call for it within a reasonable time, in order to ascertain whether it has been accepted or not, unless, as in one of the cases cited, some other and peculiar course of dealing has been established between the parties.' The same rule is laid down by Chitty in these words: 'But it would seem that the mere detention of a bill for an unreasonable time by the drawee will not amount to an accept-

much money, and any less amount fails to meet its demands. And, on the other hand, it is frequently said, that a bank not having full funds to pay the check, is not bound to pay it in part, as it is entitled to possession of the check as its voucher against the drawer for payment.[25] Whether, indeed, it would be justified in making part payment, if so inclined to do, has been questioned, and a late writer has observed that "the better rule, perhaps, would be, to save misunderstandings and complications, that if a bank cannot pay in full, it not only may not, but must not pay at all."[26]

It is quite clear, we think, that unless the holder will surrender the check, the bank is not obliged to pay it in part, for it is entitled to the check as a voucher. But if the holder offers to give up the check on receiving part payment, we cannot perceive that the bank would be warranted in refusing such part payment; and

ance, although the drawee disfigure, cancel, or destroy the bill. And, by the usage of trade in London, a check may be retained by a banker on whom it was drawn, till 5 o'clock in the afternoon of the day on which it is presented for payment, and then returned, though it has been previously canceled by mistake. And constructive acceptances ought to be watched with the utmost care, for when a party puts his name on a bill, he knows what he does, and that he thereby enters into a contract; but it is laying down a very loose and dangerous rule when any degree of latitude is given to these constructive acceptances. The cases which have been determined in favor of these constructive acceptances have all been decided on very special circumstances' (Chitty on Bills, 175). Equally clear and explicit is the language of Prof. Parsons. He says: 'We think, however, both on authority and reason, that mere detention or delay should not, of itself and alone, be considered as the equivalent of acceptance'" (2 Parsons on Notes and Bills, 284). See § 492, vol. I. But "Banks are required to know at all times the balance to the credit of each individual customer, and they accept and pay checks drawn by customers at their own risk. If through inattention or negligence, a bank pays checks when the drawer has no funds to his credit, it must look to him for the correction of the error and not to the party to whom the checks were paid."

25. Matter of Brown, 2 Story, 502; St. John v. Homans, 8 Mo. 382; Murray v. Judah, 6 Cow. 490; Coates v. Preston, 105 Ill. 473.

26. Morse on Banking, 257. The author continues: "The drawer has not requested the bank to make a part payment. He has demanded that it do a certain act, to wit, pay a certain sum of money on his account. If it will not do this act according to the terms of the authority embodied in the request, it by no means follows that it is authorized to substitute for it a partial performance, or in fact a materially different act. Power to pay only a part of a sum is not necessarily implied in an order expressed without alternative to pay that specific sum." Henderson v. United States Nat. Bank, 59 Nebr. 280, 80 N. W. 898.

so, likewise, if the holder would place a sufficient sum to the drawer's credit, to make the check good before drawing out the amount. This view is sustained in a well-considered *nisi prius* case,[27] and was previously intimated by Professor Parsons, at least to the extent that the drawer would have no right to complain of the part payment.[28] Therefore, we should say, as the holder consents, the bank would have no right to refuse it.

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27. Bromley v. Commercial Nat. Bank, American Law Times, vol. V, p. 219, 9 Phila. (Ct. of C. Pl.) 522. In this *nisi prius* case it appeared that the payee of a check for $725 presented it to the bank for payment. The teller, when about to pay it, discovered that there was but $229.92 to the drawer's credit. The payee then demanded the payment of this balance to him, which the bank refused. The plaintiff then offered to deposit to the drawer's credit a sufficient sum to make the check good, if the bank would then pay it. This it also refused. The court held that the payee was entitled to the balance in the bank.

28. 2 Parsons on Notes and Bills, 78, 79. In 1 Parsons on Notes and Bills, 552, it is said: "In our chapter on Checks we consider the law of presentment in regard to them; here we will only say, that the exception should be construed more liberally with regard to checks, at least where the check is drawn on a public banking corporation. These corporations do not receive goods on consignment, therefore there can be no reason to expect that the check will be honored on any such grounds as this. There would seem to be scarcely any reasonable grounds to expect payment, and consequently any right to draw a check, unless the bank had sufficient funds to pay it." In a note subjoined to the foregoing observations, the learned author adds: "We are not aware of any authority for this. In Edwards v. Moses, 2 Nott & McC. 433, all the facts that appeared were, at the time when the check should have been presented, the drawer had withdrawn all his funds. Richardson, J., said that it was a mere case of overdrawing, and due presentment and notice were held necessary. But we doubt the authority of this case. In Cruger v. Armstrong, 3 Johns. Cas. 5, the check was drawn for $2,500. On the day of its date the bank paid out checks of the drawer to the amount of $3,500, and at the close of banking hours a balance was left of $400. Presentment was held necessary, Lewis, C. J., dissenting. The authority of this case may be somewhat doubtful. Radcliffe, J., said that presentment was necessary, though notice might not have been, and founds his opinion on this, which is clearly incorrect. Kent, J., said: 'In the present case there is no such demand proved, nor is there anything in this case to take it out of the general rule. It cannot be considered as a check fraudulently drawn without effects in the hands of the banker. The presumption is that the check would have been paid if diligently presented; at least, there is not sufficient evidence to justify a resort to the drawer without having made the experiment.' The answer to this may perhaps be, that the drawer is bound to know what his balance in bank is, and, as the holder is not bound to present a check in any case until the next day, and as there were checks outstanding, the amount of which added to that of the check in suit exceeded his balance, the presumption of payment would have been slight."

§ **1621. In the fourth place, as to what is payment by the bank.**— Where a check drawn upon a bank is presented to it by the holder, for deposit to his credit, and the amount is credited to the holder, the legal effect is precisely the same thing as though the money were first paid out to him, and then by him deposited in the bank. It is the right of the bank to refuse to pay it, or it may reject it conditionally.[29] But if it accepts the check as valid, and pays out the money (or what, as some authorities hold, is the same thing, credits it to the holder's account), it cannot at any time thereafter, even on the same day, return the check on discovering that there were no funds to meet it, and cancel the transaction,[30] for the collection is then treated as accomplished.

But if the check-holder merely requested the check to be placed to his account, and the bank does not debit the drawer, or credit the holder with the amount, or cancel the check, it may return the check on discovering that it was an overdraft, provided it does so in time to give the holder due notice of dishonor. "If," says Lord Denman, C. J., in an English case, "on delivering the check, he (the holder) had said at once, 'cash on this check,' or 'give me credit for it,' he must have drawn from Reader (the bank clerk) a distinct answer; but by merely saying, 'place this to my account,' he leaves it upon the usual terms, and subject to the contingencies to which bills or checks so paid in are liable; and if he received notice of dishonor in proper time, it was sufficient."[31]

§ **1622.** Mr. Morse observes that "if the bank, as probably happens in the great majority of cases, simply takes the check without especial remark, and notes it on the depositor's bank-book, thus treating it in every respect as if it were a check upon any other bank instead of upon itself, these facts do not create a pay-

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29. Pratt v. Foote, 9 N. Y. 463; Oddie v. National City Bank, 45 N. Y. 735; Morse on Banking, 320, 321; *semble*, St. Louis, etc., R. Co. v. Johnston, 133 U. S. 573; Bartley v. State, 53 Nebr. 311, 73 N. W. 744.

30. Oddie v. National City Bank, 45 N. Y. 735 (1871). See Irving Bank v. Wetherald, 36 N. Y. 337; City Nat. Bank v. Burns, 68 Ala. 267, 44 Am. Rep. 138. But it is not thereby prevented from recovering against the drawer. State Sav. Assn. v. Boatman's Sav. Bank, 11 Mo. App. 292; Metropolitan Nat. Bank v. Loyd, 90 N. Y. 534; Manufacturers' Nat. Bank v. Swift, 70 Md. 516; Wasson v. Lamb, 120 Ind. 517.

31. Boyd v. Emmerson, 2 Ad. & El. 184. See Oddie v. National Bank, *supra*; Union Nat. Bank v. Citizens' Bank, 153 Ind. 45, 54 N. E. 97. See Kavanaugh v. Bank, 59 Mo. App. 540.

ment or render the bank liable for the amount to the depositor. The officers, having dealt with the check in the ordinary form, have placed the bank only under ordinary obligation, to wit, that of collecting the check in due course of business for the benefit of the depositor."[32] In California it is considered that if the depositor hands the bank officer a check on another bank, and it is credited on his bank-book, it is to be regarded as received for collection, and if not paid may be returned and canceled; and that the same rule applies even though the check be on the same bank where the depositor has it credited on his account.[33]

§ **1622a. Conditional payments through clearing-houses.**— For the purpose of facilitating exchanges and adjusting accounts between themselves, the banks of many of our larger cities have entered into associations known as clearing-houses. Each bank sends to the clearing-house all paper received by it during the day payable by other banks of the association; on the following morning it is notified whether by reason of bills payable by it in excess of bills payable to it, it is debtor to, or *e converso* creditor of, the clearing-house; if the former, it immediately remits a sum sufficient to balance its accounts; if the latter, it receives a remittance from the clearing-house to make good the deficiency. The checks against it, deposited in the clearing-house for collection, invariably accompany the memorandum of the state of its account. These are received generally between the hours of eleven and twelve o'clock in the forenoon, and the bank is allowed usually until one o'clock in the afternoon to examine them for the purpose of returning those of which payment has been stopped, or which for any reason the bank declines to pay. If not returned before the prescribed hour, all checks are regarded as absolutely paid, and the liability of the bank immutably fixed. Under these circumstances, it has been held that the entry by the drawee bank of a check received from the clearing-house, upon its journal to the credit of the payee bank, the check being afterward rejected and returned to the payee and the entry annulled and charged back to the payee, before one o'clock, the pre-

32. See Morse on Banking, 320. See *post*, § 1623.

33. National Gold Bank v. McDonald, 51 Cal. 65. Upon this principle where a bank allows a customer to check against a draft placed in its hands for collection, its receiver may recover on the draft for the amount advanced by the bank thereon. Stapylton v. Cie des Phosphates de France, 31 C. C. A. 383, 88 Fed. 53.

scribed hour, did not constitute payment thereof, the filing and entry of the check being a mere conditional acceptance, subject to the right of the bank to annul the entry, and return the check within the prescribed time.[34]

SECTION VII.

PAYMENTS BY CHECKS.

§ 1623. In respect to payment by checks, a creditor may, if he pleases, accept a check in absolute discharge of the debt; but where a check is received by the creditor, there is no presumption that he takes it in payment, but, on the contrary, the implication is that it is only to be regarded as payment if cashed.[35] And so

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34. German Nat. Bank v. Farmers' D. Nat. Bank, 118 Pa. St. 309. See also Merchants' Bank v. Bank of the Commonwealth, 139 Mass. 517; Merchants' Bank v. Eagle Bank, 101 Mass. 281; Bank of North America v. Bangs, 106 Mass. 401; Manufacturers' Bank v. Thomson, 129 Mass. 438; Exchange Bank v. Bank of North America, 132 Mass. 147. See also Blaffer v. Louisiana Nat. Bank, 35 La. Ann. 254; Preston v. Canadian Bank of Commerce, 23 Fed. 179.

35. Currie v. Misa, L. R., 10 Exch. 153 (1875), 12 Moak's Eng. Rep. 592; The People v. Baker, 20 Wend. 602; Small v. Franklin Mining Co., 99 Mass. 277; Ocean Tow Boat Co. v. Ship Ophelia, 11 La. Ann. 28; Smith v. Miller, 43 N. Y. 171 (1870), 52 N. Y. 546 (1873); Bradford v. Fox, 38 N. Y. 289; Sweet v. Titus, 4 Hun, 639; Davison v. City Bank, 57 N. Y. 82; Phillips v. Bullard, 58 Ga. 256; Everett v. Collins, 2 Campb. 515; Tapley v. Marstens, 8 T. R. 451; Heartt v. Rhodes, 66 Ill. 351. So of an order. Rice v. Dudley, 34 Mo. App. 383; Mullins v. Brown, 32 Kan. 317; Larsen v. Breene, 12 Colo. 484, citing the text. See Briggs v. Holmes, 118 Pa. St. 283, as to rebuttal of presumption of conditional payment by a long course of dealing. Check may by agreement be taken as absolute payment, and whether so taken or not is question of fact for the jury. Blair & Hoge v. Wilson, 28 Gratt. 165; Wisner v. Schopp, 34 App. Div. 199, 54 N. Y. Supp. 543, citing Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695. In New York held, that a check, if not objected to, is, for the purpose of a legal tender, the equivalent of money. See Wright v. Robinson & Co., 84 Hun, 172, 32 N. Y. Supp. 463; Sage v. Burton, 84 Hun, 267, 32 N. Y. Supp. 1122; Burrows v. The State, 137 Ind. 477, 37 N. E. 271, 45 Am. St. Rep. 210, while the decision of the court in this case sustains the doctrine announced in the text, it is also held that a check, while not payment, is presumptively of some value in the hands of the person in whose favor it is drawn. In this case Burrows was prosecuted for larceny of a check, and in order to determine the grade of the offense, it was necessary to ascertain the value of the thing stolen. The court saying, "In all jurisdictions where the value of notes, bills of exchange, drafts, and checks is not *prima facie* fixed by statute, the question of their value is solely for the jury and courts should not invade its

strong is this implication, the check being presumptively drawn upon a fund deposited to meet it, that more evidence is required to prove that a check given to take up a note is received in satisfaction and discharge than is demanded when one note is given for another.[36] Certainly the holder of a bill or note is not bound to give it up on receipt of a check until the latter is paid.[37] In Massachusetts, the law on this subject has been well expressed, the court saying: "A check is merely evidence of a debt due from the drawer. Whether it shall operate as payment or not depends upon two facts: *first,* that the drawer has funds to his credit in the bank on which it is drawn; and *second,* that the bank is solvent, or,

province;" and further, that the fact that the drawer of the checks has funds in the bank, does not give rise to any presumption affecting its value. Bowen v. Van Gundy, 133 Ind. 670, 33 N. E. 687; Sutton v. Baldwin, 146 Ind. 361, 45 N. E. 518, citing the text; Drum v. Benton, 13 App. D. C. 246; Orner v. Sattley Mfg. Co., 18 Ind. App. 122, 47 N. E. 644; Cox v. Hayes, 18 Ind. App. 220, 47 N. E. 844; Greer v. Laws, 56 Ark. 37, 18 S. W. 1038; Williams v. Costello, 95 Ala. 592, 11 So. 9; Lowenstein & Bros. v. Bresler, 109 Ala. 326, 19 So. 860; Western Bros. Mfg. Co. v. Maverick, 4 Tex. Civ. App. 535, 23 S. W. 728; Johnson-Brinkman Commission Co. v. Bank, 116 Mo. 558, 22 S. W. 818, 38 Am. St. Rep. 615; Hall v. Railway Co., 50 Mo. App. 179. But see Carroll Bank v. First Nat. Bank, 50 Mo. App. 17. But see McElwee v. Metropolitan Lumber Co., 16 C. C. A. 232, 69 Fed. 302; Bailey v. Pardridge, 134 Ill. 188, 27 N. E. 89. See Angus v. The Chicago Trust & Sav. Bank, 170 Ill. 298, 48 N. E. 946.

36. Olcott v. Rathbone, 5 Wend. 590; 2 Parsons on Notes and Bills, 86; Allen v. Tarrant & Co., 7 App. Div. 172, 40 N. Y. Supp. 114; Kendall v. Equitable Life Assurance Society, 171 Mass. 568, 51 N. E. 464, the court saying: "It cannot be said, as matter of law, that a promissory note given for the amount of a debt has been paid by the giving of a second note, but whether the latter operates as such payment, is a question of fact depending upon the intention of the parties and the other circumstances attending the transaction." See also Agawam Nat. Bank v. Downing, 169 Mass. 297, 47 N. E. 1016. Checks given in payment of taxes not to be taken technically as payment absolute, but only as conditional payment, and if check is not paid the claim for taxes remains unsatisfied — the law contemplates the payment of taxes in money. See Houghton v. City of Boston, 159 Mass. 138, 34 N. E. 93; Bush v. Abraham, 25 Oreg. 337, 35 Pac. 1066; Megrath v. Gilmore, 10 Wash. 339, 39 Pac. 131; Campbell v. Hanney, 19 R. I. 300, 33 Atl. 444; Matter of Callister, 88 Hun, 88, 34 N. Y. Supp. 628; Greenwich Ins. Co. v. Oregon Improvement Co., 76 Hun, 194, 27 N. Y. Supp. 794; Equitable Nat. Bank v. G. & S. Co., 113 Cal. 692, 45 Pac. 985.

37. The People v. Baker, 20 Wend. 602; Barnet v. Smith, 10 Fost. 256; Hansard v. Robinson, 7 B. & C. 90; Moore v. Barthrop, 1 B. & C. 5; Pearce v. Davis, 1 Moody & R. 365; Ward v. Evans, 12 Mod. 521; Wentworth v. Woods Machine Co., 163 Mass. 28, 39 N. E. 414.

in other words, pays its bills and the checks duly drawn upon it, on demand. The receipt of a check, therefore, before presentment, if there is no laches on the part of the holder, is not payment of the debt for which it is delivered. But if the party receiving it is guilty of laches in presenting it, and the bank in the meantime suspends payment, he thereby makes it his own, and it shall operate as payment of his debt, the drawer having funds in the bank at the time of drawing the check, and not having withdrawn them." [38] Or if he enter into any composition with the bank by which the payment is extended, or if he consent to a qualified or conditional acceptance, fixing some other time or mode of payment than is implied in the language or terms of the check.[39] In Virginia, the Supreme Court of Appeals says, Burks, J., giving the opinion: "The giving of a check for an antecedent debt is not an absolute payment and extinguishment of the debt in the absence of an agreement giving it that effect. Ordinarily, it is only a means of payment, and the debt will not be extinguished unless and until the check be paid, or unless loss be sustained by the drawer in consequence of the laches of the holder, in which case the debt will be discharged in proportion to the loss sustained." [40] When checks deposited with a bank, and credited in the depositor's pass-book, are taken, in the absence of any special agreement, they are deemed to be taken for collection, and not as cash. They may be afterward returned and the credit annulled if there are no funds to meet them; and this is so whether the check is drawn on the same bank or another.[41]

38. Taylor v. Wilson, 11 Metc. (Mass.) 44; Sweet v. Titus, 4 Hun, 639; Thomas v. Supervisors, etc., 115 N. Y. 50; Merchants' Nat. Bank v. Samuel, 20 Fed. 664; Tarbox v. Childs, 165 Mass. 408, 43 N. E. 124, court said that "By the law of Massachusetts, a negotiable note taken for an antecedent debt is deemed to be a payment unless there is something to show a contrary intention." This is in contravention of the usual rule, and attention is called to the judicial construction of this act in this and other Massachusetts cases. See also Davis v. Parsons, 157 Mass. 584, 32 N. E. 1117; Bank v. Union Trust Co., 149 Ill. 343, 36 N. E. 1029.

39. Warrensburg Co-op. Assn. v. Zoll, 83 Mo. 97.

40. Blair & Hoge v. Wilson, 28 Gratt. 171 (1877); Kilpatrick v. Home B. & L. Assn., 119 Pa. St. 30; Woodburn v. Woodburn, 115 Ill. 427; Railroad Co. v. Buckley, 114 Ill. 241; Comptoir D'Escompte v. Duesbach, 78 Cal. 15; McIntosh v. Tyler, 54 N. Y. S. C. 99; Bernheimer v. Herrmann, 51 N. Y. S. C. 110; Cox v. Hayes, 18 Ind. App. 220, 47 N. E. 844; People's Sav. Bank v. Gifford, 108 Iowa, 277, 79 N. W. 63.

41. National Gold Bank, etc. v. McDonald, 51 Cal. 64 (1875); Morse on Banks, 320, 321. It would be otherwise if the depositor has an arrangement

§ 1624. Whether agent for collection may receive check in payment.— It is frequently the case that a bank or other agent for collection of a bill or note receives the check of a debtor and surrenders up the bill or note to him. This practice was sustained in an English case, where it was held that a banker in London, to whom bills of exchange had been sent for collection, was not guilty of negligence toward his correspondent in surrendering them up on receipt of checks drawn upon a banker in London, though the checks were dishonored for want of funds. This decision was based upon the ordinary course of trade and business of bankers.[42] But Mr. Chitty observes: "That doctrine may now be questionable, and most of the London bankers, on presenting a bill for payment in the morning, leave a ticket where it lies due, and declaring that 'in consequence of great injury having arisen from the nonpayment of drafts taken for bills, no drafts can in future be received for bills, but that the parties may address them for payment to their bankers, or attach a draft to the bill when presented.'"[43] And Mr. Byles considers that the practice is no longer usual in London, and doubts if it would be protected.[44]

§ 1625. In United States agent for collection should not receive check in payment.— In the United States it is quite certain that a banker or other agent, holding a bill or note for collection, would act at his peril in delivering it up on receipt of a check for the amount; and that if the debtor did not pay the amount in money, and the drawer or indorsers were not duly notified, they would be discharged, and the loss would fall upon the collecting agent.[45] If, indeed, on the same day that the bill or note was

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with his bank that out of town checks were deposited as cash, credited on his pass-book and allowed to draw against such credit. The Nat. Park Bank v. Levy Bros., 17 R. I. 746, 24 Atl. 777; Bailie v. Augusta Sav. Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74; Cox v. Hayes, 18 Ind. App. 220, 47 N. E. 844.

42. Russell v. Hankey, 6 T. R. 12 (1794).

43. Chitty on Bills (13th Am. ed.) [*369], 415.

44. Byles on Bills (Sharswood's ed.) [*24], 100; Bank v. Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 118, citing and approving text.

45. Whitney v. Esson, 99 Mass. 110; Turner v. Bank of Fox Lake, 3 Keyes, 425; Smith v. Miller, 43 N. Y. 171, 52 N. Y. 546; Rathbun v. Citizens' Steamboat Co., 76 N. Y. 376; Fifth Nat. Bank v. Ashworth, 123 Pa. St. 212; *ante*, § 334. But a custom of the bank to receive checks in payment has been held to be binding upon the customer, whether he has knowledge of the existence

due the agent received a check for the amount and delivered up the bill or note, but on presentment of the check at the bank, and refusal of payment that very day, it had been returned, the bill or note reclaimed and protested, and the drawer or indorsers duly notified, then no right would be forfeited, but the liability of all preserved.[46] But if the agent neglected to present the check until the next day, it would then be too late to preserve recourse against the drawer, if a foreign bill, by making protest; and if in the meantime the bank had failed, the loss would fall upon the agent. And in New York, the Court of Appeals would seem to have gone further than this, and to hold that in all cases the agent must present the check on the very day he receives it, or he would be liable for any resulting loss. This seems to us the correct doctrine, for the agent exceeds authority in taking the check, and, therefore, acts at his peril.[47] And while it may

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of such custom or not. See Farmers' Bank & Trust Co. v. Newland, 97 Ky. 464, 31 S. W. 38; Scott v. Gilkey, 153 Ill. 168, 39 N. E. 265; Foster, Recr. *v.* Rincker, 4 Wyo. 484, 35 Pac. 470.

46. Turner v. Bank of Fox Lake, 3 Keyes, 425; Smith v. Miller, 43 N. Y. 171; First Nat. Bank v. Buckhannon Bank, 80 Md. 475, 31 Atl. 302.

47. In Smith v. Miller, 43 N. Y. 171 (1870), Allen, J., said: "If the check were worthless when given, or became worthless before it could have been, with reasonable diligence, presented for payment, the loss would have fallen upon the defendants, and they would not have been discharged from their liability, unless the plaintiffs had omitted to notify them in due time of the nonpayment of the bill. There would, in such case, be no loss resulting from negligence. * * * When a check is taken instead of money, by one acting for others, as was done by the plaintiffs, a delay of presentment for a day, or for any time beyond that within which, with proper and reasonable diligence, it can be presented, is at the peril of the party thus retaining the check and postponing presentment. If a custom can exist in law, and does exist in fact, authorizing such delay at the risk of the absent principal, it must be shown; it cannot be presumed to exist without evidence. The undisputed evidence in this case shows a practice, if not inconsistent with the existence of any such custom, at least more in harmony with the relative rights and obligations of the parties as recognized by law; and which, had it been adopted by the plaintiffs, would have prevented all loss. The proof is, that the account of the drawers of the check was good at the bank during all business hours of the day on which it was drawn; that the amount to their credit, and subject to their draft, was more than sufficient to pay all outstanding checks; and if this check had been presented it would have been paid, or certified as good, which would have been equivalent to payment. The plaintiffs had two full hours for presenting the check. * * * It was the duty of the plaintiffs to present the check at the bank at least during the day on which they received it, and obtain either the money or a certificate, or cause

be, and as a general rule undoubtedly is, the practice of creditors, in mercantile communities, to take checks in the collection of debts, and frequently to surrender other instruments on receiving them, such a practice, on the part of the principal, falls far short of a usage which would permit the agent to do likewise.[48] If, however, the principal received the check from the agent for collection, who took it instead of money, without objection, he would waive his right to hold the agent responsible, and ratify the transaction.[49] It has been held that a bank might receive its own certificates of deposit in payment of a note sent it for collection, and that the debtor would be discharged thereby, though the bank soon after became insolvent and never remitted to its principal.[50] Where a commission merchant was authorized to receive cash checks or sight drafts in payment for consignments sold by him, he was held not thereby justified in accepting time checks in payment, and that any loss resulting therefrom should be borne by him.[51]

§ 1626. Whether receiving certified check is payment.— It not infrequently happens that a depositor intending to offer his checks to creditors, procures their certification by the bank before he delivers them to the payees; and the questions then arise whether or not such certified checks, when taken for debts, are to be regarded as so much cash taken in absolute payment, or are, notwithstanding the certificate of the bank, still mere checks,

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the same to be protested for nonpayment; and not having done so they were chargeable with negligence and the consequent loss." See 52 N. Y. 546 (1873); Bank v. Union Trust Co., 149 Ill. 343, 36 N. E. 1029.

48. Whitney v. Esson, 99 Mass. 110; National Bank v. American Exchange Bank, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527, citing text.

49. Rathbun v. Citizens' Steamboat Co., 76 N. Y. 376 (distinguishing Walker v. Walker, 5 Heisk. 425), Church, C. J., saying: "The circumstances here are capable of but one construction, according to the mode and habits of business, and that is, that the plaintiffs adopted and ratified the act of the carrier (in taking the check) by the unqualified acceptance of the check. * * * The case of Walker v. Walker, 5 Heisk. 425, gives some countenance to the contention of the plaintiff," but Chief Justice Church explains the difference between that case and the one under consideration, showing that in the Tennessee case the drawer of the check failed before the principal received it from his agent; and that as the principal did not know that intervening fact he was not regarded as ratifying the transaction. Northwestern Life Ins. Co. v. Sturdevant, 24 Tex. Civ. App. 331, 59 S. W. 61.

50. British & American Mortgage Co. v. Tibballs, 63 Iowa, 472.

51. Harlam v. Ely, 68 Cal. 522.

with the usual characteristics of such instruments; and whether or not the holder must exercise any extraordinary diligence in presenting them. Both upon reason and authority it may be stated, that although it be the fact that certified checks pass from hand to hand, as cash, they are not cash, or currency, in the legal sense of those terms, but they do not lose, by the fact that they are certified when delivered, any of the characteristics which attach to uncertified checks; nor do they impose any greater diligence upon the holder, who has the same time in which to present them as if they were uncertified.[52]

§ **1627.** The only effect of the certification of the check is to give it additional currency, by carrying with it the evidence that it was drawn in good faith, on funds to meet its payment, and lending it to the credit of the bank in addition to the credit of the drawer. Beyond this it does not differ from an uncertified check, nor does it make any difference whether the drawer is actually charged on the books of the bank or not with the amount of the check when it is certified as "good." According to general usage the bank, when it makes such certificate, expects to pay the check out of the drawer's funds in its hands, and makes some memorandum, or takes some other course, by which it will not permit the amount necessary to meet the check to be anticipated; and this both drawer and payee understand. So the practical effect of certifying the check is the same, whether the drawer is actually charged on the books or not, as in either case that amount of his funds is withdrawn from his control until the payment of the check is refused.[53]

§ **1628. Bank cannot offset amount due by holder against check.**— A bank upon which a check is drawn, it has been held, cannot plead, as offset, an amount due the holder of the check against him, because a check is only conditional payment, the holder being the mere agent of the drawer to procure the money which is

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52. Bickford v. First Nat. Bank, 42 Ill. 238; Rounds v. Smith, 42 Ill. 245; Brown v. Leckie, 43 Ill. 497; Larsen v. Breene, 12 Colo. 484, citing the text. But see Matter of Staten Island R. Co., 44 N. Y. S. C. 422. In this case, a certified check was held a sufficient payment within the meaning of a statute requiring a certain per cent. of stock subscriptions to be paid in cash. Following the case of Matter of Staten Island R. Co., *supra*, is the case of White v. Eiseman, 134 N. Y. 101, 31 N. E. 276; Dike v. Drexel, 11 App. Div. 77, 42 N. Y. Supp. 979.

53. Brown v. Leckie, 43 Ill. 501.

demanded by the check, and to apply the same when received in payment of the debt due by the drawer to him.[54] Especially does this rule apply when the holder of the check is to receive the amount for the benefit of another. Vast amounts of property are sold by agents, brokers, and commission men for their principals, and it would be unreasonable and unjust when they received a check, as the means of procuring the money of their principals, to permit the bank to set off an amount due by them individually.[55]

SECTION VIII.

OVER-CHECKS.

§ 1629. We have already seen that it is a fraud for a person to draw a check upon a bank when he has no funds on deposit to meet it.[56] It is in effect a representation to the payee that there are funds to meet it, and the holder is deceived and misled if such be not the case. But further than this, the overchecking a deposit has been regarded as a most improper act on the part of the depositor, and even fraudulent, unless done by arrangement with the bank; for its officers, naturally relying on the good faith of their customer, are apt to pay his check without security, and the bank may thus be defrauded of its money.[57] Certainly it is a bad practice to overdraw, and one that should not be tolerated; but it is too severe to regard an over-check as in all cases *prima facie* a fraud and imposture in a criminal point of view.

§ 1630. Over-checks may be authorized by the bank.— It is undoubtedly in the power of the bank to authorize over-checks, or checks without any funds whatever, upon negotiations with the drawer. Such dealing would be in the nature of a loan; and the bank would be bound, if the arrangement were consummated, upon a legal contract. But mere permission to overdraw, not communicated to the check-holder, would certainly be of no avail in legal effect. And such permission would not warrant a drawer in stating absolutely, solely on the faith thereof, that his check was "good."[58] In a case before the United States Su-

54. Brown v. Leckie, 43 Ill. 501.
55. Brown v. Leckie, 43 Ill. 501.
56. See *ante*, § 1596.
57. True v. Thomas, 16 Me. 36; Morse on Banking, 318.
58. Ballard v. Fuller, 32 Barb. 68.

preme Court, in which it appeared that a mining corporation had legal authority "to enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes for which it was created," could enter legally into an arrangement with a bank to pay its over-checks; and where such checks were customarily drawn by its president and secretary without objection, the bank had a right to assume that they were authorized to draw them.[59] Ordinarily a bank may charge the legal rate of interest upon overdrafts, but where there is a statute providing a greater rate than the seven per cent., except where there is an agreement in writing to pay a greater rate, a rate in excess of the legal rate cannot be charged, but where the depositor gave his note closing out an overdraft, and the note provides for interest at the rate of eight per cent., the provision in the note is a sufficient compliance with the statute on the subject of usury.[60]

§ **1630a. Bank officer paying over-check without authority is bound.**— The officers of the bank should be careful to pay no over-check without distinct authority from the bank; for such over-check would be chargeable against them, and its payment would be a grave departure from official duty. And no payee or holder should receive a check, knowing that the drawer had no funds to meet it, as he would thus join in an attempt to mislead the bank; and if he got the money on such a check he could be compelled by suit to return it.[61]

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59. Mahoney Mining Co. v. Anglo-Californian Bank, U. S. S. C., Jan., 1882, Morrison's Transcript, vol. III, No. 5, p. 785. See also vol. III, No. 2, p. 180. In New York held, that if one has an account in bank as county treasurer and overdraws his said account, the overdraft is in the nature of a loan to the depositor individually, as he had no right to borrow money upon the security of the county, and the proceeds of securities held by him in trust for the county, and in the custody of the bank, could not be used by the bank to make good the individual obligation of such depositor. See Greene v. The County of Niagara, 8 App. Div. 409, 40 N. Y. Supp. 862.

60. Loan & Exchange Bank v. Miller, 39 S. C. 175, 17 S. E. 592; Wheatley v. Kutz *et al.*, 19 Ind. App. 293, 49 N. E. 391.

61. Martin v. Morgan, Gow. 123, 1 B. & B. 289, 3 Moore, 635; Byles on Bills (Sharswood's ed.) [*16], 88; Morse on Banking, 254; Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625. The last case, query: "Is it negligence in a cashier to pay over checks to a reasonable amount of regular customers who had but little property, but who had credit and were accustomed to pay their debts."

SECTION IX.

CANCELED, DISHONORED, AND STALE CHECKS.

§ **1631.** When a check is presented to a bank for payment, or is offered in a business transaction, the bank or the party negotiating for it should examine it carefully and observe whether or not it bears upon it any mark indicating that it has been canceled, or has grown stale. And the party to whom the holder offers to transfer it, should observe whether or not there are any marks of dishonor about it. For if the check bear upon it indications that it has been canceled — as, for instance, if it appears to have been torn to pieces and pasted together — the bank will be liable to the drawer, if it turn out that it had been canceled by the drawer, as its appearance was sufficient to excite its suspicions, and to have led to a refusal of payment.[62] So if the check bear marks of its dishonor, a transferee would be entitled to stand in no better position than his transferrer, as it would then have (like any other negotiable instrument so marred) "a death wound apparent on it."[63]

§ **1632. Bank should not pay long outstanding check.**— A check is payable instantly on demand; and as heretofore set forth, it should be presented within a day when the payee receives it in the place where drawn, and forwarded by the next day, when forwarding is necessary, in order to preserve the payee's recourse against the drawer, in the event of a failure of the bank.[64] But if the bank remains solvent the holder may retain the check as long as he pleases, and hold the drawer liable until the time for suit is ended by the Statute of Limitations.[65] But the payee acts unwisely if he delays to present a check, as the bank and the drawer may both fail. And it is not advisable for a bank to pay a check which has been long outstanding, or for any one to receive it by transfer, without inquiry. For while age cannot in-

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62. Scholey v. Ramsbottom, 2 Campb. 185.

63. See Goodman v. Harvey, 4 Ad. & El. 870; §§ 724, 732, 788, vol. I; Hutchings v. Da Costa, 88 Wis. 371, 60 N. W. 427.

64. See *ante*, § 1590 *et seq.;* Shawmut Nat. Bank v. Manson, 168 Mass. 425, 47 N. E. 196. In this case, it was held that a check cannot be considered as overdue, if deposited by payee on the date of issuance, in payee's bank, and thereafterward presented through the clearing-house to the bank upon which drawn.

65. Thompson on Bills, 118.

validate a good check (unless the limitation has applied), and the fact that it was dishonored when transferred, and that presentment was delayed, does not lessen the drawer's liability,[66] unless he has suffered loss,[67] yet the lapse of a long period from its date before its payment, is a circumstance so out of the ordinary course of business that it ought to arouse suspicions and excite inquiry. And the bank paying, or the party receiving such a check, acts at his peril.

§ **1633. When check is deemed stale.**—No precise period of time can be specified at which a check would be deemed so stale as to subject the receiver to equitable defenses, or a bank to loss, in the event that such defenses arose, or the liability of the drawer ceased. In Pennsylvania, where at the time the check was drawn, the drawer had no effects in the bank, nor provided any afterward, and a year and a day after the day named for payment it was presented to and paid by the bank, and it appeared that the debt was discharged by the drawer after the check was drawn, it was held that the circumstance of its age was sufficient "to put the bank on inquiry," and its negligence precluded it from relief against the drawer.[68] So the lapse of two and a half years, especially when the check contained a mark indicating that it was a memorandum check, has been held to open the check to equities.[69] And in another case, the lapse of five months.[70] In an English case, where the owner lost a check, and it was paid five days after its date to a shopkeeper by the bank, it was held that the shopkeeper should refund to the true owner, having taken the check overdue, unless, indeed, he were protected by the title of his assignor, and the burden of proof to that effect lay on him. Holroyd, J., said: "A check is payable immediately, the holder of it takes it at his peril, and a person taking it after it is due takes it also at his peril." [71] In New York, where the check was transferred fourteen months after its date, the lapse of time was

66. Cowing v. Altman, 79 N. Y. 168.

67. See § 1590.

68. Lancaster Bank v. Woodward, 18 Pa. St. 357.

69. Skillman v. Titus, 32 N. J. L. 96.

70. First Nat. Bank v. Needham, 29 Iowa, 249 (1870).

71. Down v. Halling, 4 B. & C. 330 (17 Eng. C. L.), 6 Dowl. & R. 445, 2 Car. & P. 11. But this case is explained in London, etc., Bank v. Groome, cited in note, § 1634, and distinguished from Rothschild v. Corney (below), in London Banking Co. v. Groome, 36 Eng. Rep. 322.

held sufficient to put the transferrer on inquiry; but it being proved that the check was delivered long after its date, and was on the same day transferred to the holder, it was decided to be valid in his hands, notwithstanding there was a good defense as between the drawer and payee.[72]

§ **1634.** On the other hand, the fact that the holder received the check one day,[73] four days,[74] six days,[75] eight days,[76] or ten days,[77] or nearly a month[78] after date has been considered insufficient to subject him to equitable defenses, though taken in connection with other circumstances, its being somewhat stale might be evidence of bad faith.[79] Where six months elapsed between the date and presentment of the check the United States Supreme Court held that it was not open as against the holder to the equities of the drawer against the payee, the drawer's funds remaining in the bank and he being in no wise prejudiced by delay in presentment.[80] And if by the drawer's fault the bank pays an altered, forged, or otherwise invalid check, the bank will not be liable to him.[81] And where the drawer himself delayed nine

72. Cowing v. Altman, 71 N. Y. 436, overruling 5 Hun, 556.

73. Himmelman v. Hotaling, 40 Cal. 111.

74. First Nat. Bank v. Harris, 108 Mass. 514. In this case, "a check on a bank in Boston was sent from Boston by mail to Rochester, in New York, and there bought four days after its date, and was presented for payment two days afterward. Held, that the buyer was not subject to equities existing between the original parties, of which he had no notice, either on the ground that the lapse of time between the date of the check and his purchase of it should have put him upon inquiry, or on the ground of unreasonable delay in making presentment."

75. Rothschild v. Corney, 9 B. & C. 388.

76. London & County Bank v. Groome, English High Court, Q. B. D., Dec. 19, 1881, Cent. L. J., April 28, 1882, vol. XIV, No. 17, explaining Down v. Halling, *supra*.

77. Ames v. Meriam, 98 Mass. 294, the court saying: "A holder who takes a check in good faith and for value several days after it is drawn, receives it without being subject to defenses of which he has no notice before or at the time his title accrues."

78. Lester v. Given, 8 Bush, 357.

79. Bank of Bengal v. Fagan, 7 Moore P. C. 72; London, etc., Bank v. Groome, *supra*. Retaining successive cashier's checks, under circumstances which disprove bad faith in omitting to present any of them for payment until after all have been issued, the principal is to be deemed a *bona fide* holder of the checks, and, as such, entitled to recover the amount thereof from the banker. Henry v. Allen, 151 N. Y. 1, 45 N. E. 355.

80. Bull v. Bank of Kasson, 123 U. S. 105.

81. Lickbarrow v. Mason, 2 T. R. 63.

months to issue the check, he could not object against the holder who received it from him the circumstances of its staleness.[82] Without any circumstances of this kind arising, the certain age at which a check may be said to be stale is as uncertain as the fixing of the day on which a young lady becomes an old maid. Mr. Morse says that its age "must be something so extraordinary as to be inconsistent with the ordinary course of business in order to give the bank the right to demand delay."[83] Another writer regards a check as "never overdue,"[84] but this is going too far.

§ **1634a. Excuses for want of presentment and notice.**— A declaration by the drawer of a check before maturity that it would not be paid, would excuse want of presentment or notice,[85] and a part payment before maturity would waive the necessity of presentment and notice, as it would be the presumed intention of the parties that it should not be presented.[86]

SECTION X.

RIGHT OF HOLDER OF UNCERTIFIED CHECKS TO SUE THE BANK.

§ **1635.** The question whether or not the holder of a check may sue the bank holding funds of the drawer, upon its refusal to pay it, has divided the opinions of courts and jurists, and no little perplexed the legal profession. And it has been observed by a discriminating writer that "when one comes to examine the authorities which range themselves on either side, and to investigate the chains of reasoning by which these authorities respectively seek to support themselves, the tale of the two honorable knights who fought about the question of whether the shield between them was golden or silvern, is forcibly brought to mind. Each line or argument in its turn seems the more correct and the more satisfactorily backed by respectable vouchers."[87] But this writer concludes that the weight of authority is in favor of the check-holder's right of action, and expresses his own judgment to

82. Boehm v. Sterling, 7 T. R. 423.

83. Morse on Banking, 264; Scroggin v. McCleland, 37 Nebr. 644, 56 N. W. 208, 40 Am. St. Rep. 520; Farmers' Nat. Bank v. Dreyfus, 82 Mo. App. 399, quoting text.

84. Thompson on Bills, 118.

85. Minturn v. Fisher, 7 Cal. 573. See *ante*, §§ 1596, 1598.

86. Levy v. Peters, 9 Serg. & R. 125.

87. Morse on Banking, 459.

the like effect.[88] We shall first review the authorities, and then state our own conclusions.

§ 1636. The doctrine that check-holder cannot sue the bank.— There are a series of cases in which it is declared that the check-holder cannot sue the bank unless the check has been certified, or otherwise accepted; cases, however, in which no question respecting checks was presented, the instrument in suit being either an order or a bill of exchange. These cases are often cited in support of the proposition that the check-holder cannot sue the bank without acceptance; but really they are not authority for that doctrine, as a check is necessarily drawn upon a bank, and differs from an order or a bill of exchange, which need not be.[89] There are also a number of cases in which the opinion has been expressed, or the decision has been pertinently made to the like effect, that the check-holder cannot sue the bank. They proceed upon the ground that there is no privity of contract between the holder of the check and the bank, unless the latter does some act by which it is created; that while it may be an appropriation of the fund, in whole or in part, as between the drawer and the holder, until the bank consents to it, it is in nowise bound to pay the amount to the holder; that especially is this the case when the check is for part of a deposit, as one cause of action might thus be split up into many; and that the only remedy which exists for a wrongful refusal of the bank to pay the amount deposited to meet the check, is a suit by the drawer, or the holder in tort, for the wrong done; or suit by the drawer for damages for breach of the implied contract to pay it.[90]

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88. Morse on Banking, 473; Fonner v. Smith, 31 Nebr. 107, 47 N. W. 632, 28 Am. St. Rep. 510.

89. Mandeville v. Welch, 5 Wheat. 277 (case of a bill of exchange); Cowperthwaite v. Sheffield, 3 N. Y. 243 (1850), (bill of exchange); New York Bank v. Gibson, 5 Duer, 574 (1856), (bill of exchange); Grinnell v. Suydam, 3 Sandf. 133 (bill of exchange); Luff v. Pope, 5 Hill, 413 (order on individual — not a bank); Dana v. Third Nat. Bank, 13 Allen, 445 (bill of exchange); First Nat. Bank of Union Mills v. Clark, 134 N. Y. 368, 32 N. E. 38; St. Amand v. Bank of Commerce, 49 La. Ann. 1060, 22 So. 207.

90. Bank of Republic v. Millard, 10 Wall. 152 (1869); St. Louis R. Co. v. Johnston, 133 U. S. 574; First Nat. Bank v. Whitman, 94 U. S. 343; Laclede Bank v. Schuler, 120 U. S. 511; Florence Mining Co. v. Brown, 124 U. S. 385; Fourth Street Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. Rep. 439; Northumberland Bank v. McMichael, 106 Pa. St. 460; Creveling v. Bloomsbury Nat. Bank, 46 N. J. L. 255; Dickinson v. Coates, 79 Mo. 251; National Commercial Bank v. Miller, 77 Ala. 172; Brennan v. Merchants' Nat. Bank, 62 Mich. 343;

§ 1636a. Views of United States Supreme Court; exception to general rule.— The Supreme Court of the United States has unanimously adopted the view, that ordinarily a check-holder cannot sue the bank;[91] but it has qualified its opinion by remarking: "It may be, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex æquo et bono*

Colorado Nat. Bank v. Boettcher, 5 Colo. 190; Citizens' Nat. Bank v. Imp. & Traders' Nat. Bank, 51 N. Y. S. C. 389; Viets v. National Bank, 38 N. Y. S. C. 485; Pickle v. People's Nat. Bank, 12 S. W. 919; Hawes v. Blackwell (N. C.), 12 S. E. 245; Satterwhite v. Melczer, 24 Pac. 184; Chapman v. White, 6 N. Y. 412 (1852). The instrument in suit was called a bill, but was really a regular check drawn by one bank upon another. Carr v. National Security Bank, 107 Mass. 45 (1871); Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82 (1871); Van Alen v. American Nat. Bank, 52 N. Y. 4 (1873); Duncan v. Berlin, 60 N. Y. 151 (1875); Tyler v. Gould, 48 N. Y. 682; Planters' Bank v. Merritt, 7 Heisk. 117; Planters' Bank v. Kesee, 7 Heisk. 200; National Bank v. Second National Bank, 69 Ind. 579; Rosenthal v. Martin Bank, U. S. C. C., South. Dist. of N. Y., Nov., 1879, 34 Am. Rep. 238; Essex Bank v. Bank of Montreal, 7 Biss. 193; Bullard v. Randall, 1 Gray, 605. In Moses v. Franklin Bank, 34 Md. 580 (1871), Alvey, J., said: "It is certainly a general rule that the drawee who refuses to accept a bill of exchange cannot be held liable on the bill itself; nor to the holder for the refusal, except it be upon the ground of fraud and loss to the latter. A bank upon which a check is drawn occupies in this respect a similar position to that of a drawee of a bill of exchange. It is but the agent of the depositor, holding his funds upon an implied contract to honor and to take up his checks to the extent of the funds deposited. The obligation of the bank to accept and pay is not to the holder, but to the drawer." Bellamy v. Majoribanks, 8 Eng. L. & Eq. 523 (1851), Parke, B.; Purcell v. Allemong, 22 Gratt. 742 (1872), Anderson, J., *obiter;* 2 Parsons on Notes and Bills, 61, 62. See *post*, §§ 1644, 1645; Gregory v. Merchants' Nat. Bank, 171 Mass. 67, 50 N. E. 520. Following the principles announced in the class of cases referred to in the text, it has been decided in New York that an ordinary uncertified check upon a general account is never a legal or equitable assignment of any part of the same standing to the credit of the depositor and confers no right upon the payee that he can enforce against the bank. See People v. St. Nicholas Bank, 77 Hun, 159, 28 N. Y. Supp. 407; Railroad Co. v. Bank, 54 Ohio St. 60, 42 N. E. 700, 56 Am. St. Rep. 700 (reference is made in the opinion of the court to the review in the text of the arguments pro and con on this subject); House v. Kountz, 17 Tex. Civ. App. 402, 43 S. W. 561; Grocer Co. v. Bank, 71 Mo. App. 132.

91. Bank of Republic v. Millard, 10 Wall. 152; First Nat. Bank v. Whitman, 94 U. S. (4 Otto) 343; Commercial Nat. Bank of Charlotte v. First Nat. Bank, 118 N. C. 783, 24 S. E. 524, 54 Am. St. Rep. 753; Grocer Co. v. Bank, 71 Mo. App. 132.

would be applicable, as the bank having assented to the order, and communicated its assent to the paymaster (the drawer), would be considered as holding the money to the plaintiff's use; and, therefore, under an implied promise to pay it on demand." [92] And in Pennsylvania the exception thus suggested is established.[93]

The Supreme Court of the United States also considers that "whilst an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against the same, yet the authorities establish that if in the transaction connected with the delivery of the check it was the understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of a specified fund, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers and parties charged with notice." White, J.[94] Until notice of the existence of the check has been given to the bank, or demand for its payment made, the bank is unaffected by its execution.[95]

§ **1636b. In England** a check has been held to constitute no equitable assignment of the fund, although the drawer instructed the banker by letter to place the amount to the drawer's credit, Sir G. Jessel, Master of the Rolls, saying: "A check is clearly not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's." [96] And again, where, under the act of 36 & 37 Vict., whereby the assignee of a chose in action may sue in his own name, the holder of a check sought to charge the bank, the attempt failed, and Brett, J., said: "The bank has made a contract with the drawer that they will

92. Bank of Republic v. Millard, 10 Wall. 152.

93. Seventh Nat. Bank v. Cook, 73 Pa. St. 485. In the more recent case of Saylor v. Bushong, not yet reported, but referred to in the Public Ledger of April 15, 1882, the Supreme Court of Pennsylvania, per Trunkey, J., says: "If the bank expressly or impliedly promises the drawer to pay the check the holder may sue (the bank) if payment be refused. When a depositor settles his account with the bank and leaves the exact amount of an outstanding check expressly for its payment, and the bank tacitly retains the money and settles on that basis, it is liable to the holder on the implied acceptance." Now reported in 100 Pa. St. 23.

94. Fourth St. Nat. Bank v. Yardley, 165 U. S. 644, 17 Sup. Ct. Rep. 439; St. Aman v. Bank of Commerce, 49 La. Ann. 1060, 22 So. 207.

95. Laclede Bank v. Schuler, 120 U. S. 511.

96. Hopkinson v. Foster, L. R., 19 Eq. Cas. 74 (1874). See also Wharton v. Walker, 4 B. & C. 163; Yates v. Bell, 3 B. & Ald. 643; Warwick v. Rogers, 5 M. & G. 374.

honor his checks to the amount of his account. They break that contract. How can that give a right of action to a third person? The check is but an order to pay, and not an absolute assignment of anything." [97]

§ 1637. **The opposing view that the check-holder may sue the bank** as soon as it wrongfully refuses to pay the check has been taken in a number of cases which were well considered, and rests upon conceptions of the relations of the parties which are consistent with and favorable to the usages of trade, and are difficult to be successfully combated. Thus it has been decided in South Carolina, that the check-holder had a right of action in assumpsit against the bank, if it refused to pay the check, when it had funds of the drawer available for doing so, upon the implied promise which the law raises in his behalf.[98] A similar view seems to have been taken in Louisiana.[99] It has been directly and distinctly so decided in Illinois,[1] Iowa,[2] Missouri,[3] Kentucky,[4] and in Illinois has been held that the right to sue the bank passes by transfer to each successive holder.[5]

The learned editor of Byles on Bills[6] seems to be of this opin-

97. Schroeder v. Central Bank, 34 L. T. R. 735, 24 W. R. 71.

98. Fogarties v. State Bank, 12 Rich. Law, 518; Simmons Hardware Co. v. Bank, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700, note; Fonner v. Smith, 31 Nebr. 107, 47 N. W. 632, 28 Am. St. Rep. 510.

99. Van Bibber v. Louisiana Bank, 14 La. Ann. 481; but this was overruled in Case v. Henderson, 23 La. Ann. 49. Case v. Henderson since overruled by Gordon v. Mulcher, 34 La. Ann. 608, and the authority of Van Bibber v. Louisiana Bank, *supra*, re-established.

1. Chicago Marine, etc., Ins. Co. v. Stanford, 28 Ill. 168; Brown v. Leckie, 43 Ill. 500; Munn v. Burch, 25 Ill. 35 (1861); Union Nat. Bank v. Oceana County Bank, 80 Ill. 212; Bank of America v. Indiana Banking Co., 114 Ill. 483; Springfield M. & F. Ins. Co. v. Peck, 102 Ill. 260.

2. Roberts v. Austin, 26 Iowa, 316 (1868).

3. Senter v. Continental Bank, 7 Mo. App. 532 (1879); McGrade v. German Sav. Inst., 4 Mo. App. 330 (1877); Zelle v. German Sav. Inst., 4 Mo. App. 401 (1877); Lewis v. International Bank, 13 Mo. App. 204; State Sav. Assn. v. Boatman's Sav. Bank, 11 Mo. App. 292; but held in Missouri not to apply to a check upon part of a fund. Coates v. Doran, 83 Mo. 337; Dickinson v. Coates, 79 Mo. 250; Ripley Nat. Bank v. Latimer, 64 Mo. App. 321.

4. Lester v. Given, 8 Bush, 358 (1871); Blades v. Grant County Dep. Bank, etc., 101 Ky. 163, 40 S. W. 246, 41 S. W. 305.

5. Union Nat. Bank v. Oceana County Bank, 80 Ill. 212.

6. In Byles on Bills (Sharswood's ed.) [*21], 96, note 1, it is said by the learned American editor: "A bill of exchange is not an equitable as-

ion. And in Kentucky it has been held that where the drawer of the check notified the bank by letter, the holder could sue the bank;[7] but the check is itself notification, and we cannot see how a letter from the same hand could add to its effect If the money is deposited as the check-holder's, although in the drawer's name, and the fact is communicated to the bank before any other right has attached to the fund, it would clearly be in equity the property of the holder, and he might recover it of the bank.[8]

§ 1638. True principles applicable to rights of check-holder.— Our own views on this question may be expressed as follows: There are four distinct parties who may be immediately interested in the effect of a check drawn upon a deposit — (1) the drawer; (2) the holder; (3) the bank; and (4) a stranger — claiming the amount under a subsequent check, assignment, or levy.

(1) Now, as between the drawer and the payee (or holder), there is no doubt that the delivery of the check constitutes an assignment of the amount;[9] and as we have already seen, it is a

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signment or appropriation, but the cases treat a check on a banker as such; and if the holder is a holder for value, as to whom the drawer cannot revoke rightfully the power which he holds, coupled with an interest, why should not the banker upon distinct claim and notice be held bound by the equity?"

7. Lesler v. Given, 8 Bush, 361. See Weinstock v. Bellwood, 12 Bush, 140.

8. Allen v. American Nat. Bank, 3 Lans. 517 (1871). See Hopkinson v. Foster, L. R., 18 Eq. Cas. 74 (1874), and *ante*, § 1636.

9. Matter of Brown, 2 Story, 502; Bell v. Alexander, 21 Gratt. 6; Bank of Republic v. Millard, 10 Wall. 152; Morrison v. Bailey, 5 Ohio St. 13; Robinson v. Hawks, 9 Q. B. 52; German Sav. Inst. v. Adae, 8 Fed. 106; Pease v. Landauer, 63 Wis. 20, approving the text. In Keene v. Baird, 8 C. B. (N. S.) 372, Byles, J., said: "In one thing a check differs from a bill of exchange: it is an appropriation of so much money of the drawer's in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person; whereas, it is not necessary that there should be money of the drawer's in the hands of a drawee of a bill of exchange." But it has been remarked, touching this expression of Byles, J., by Sir G. Jessel, Master of the Rolls, in Hopkinson v. Forster, L. R., 19 Eq. Cas. 74 (1874): "I do not understand the expressions attributed to Mr. Justice Byles, in Keene v. Baird, but I am quite sure that learned judge never meant to lay down, that a banker who dishonors a check is liable to a suit in equity by the holder." See Negotiable Instrument Law of New York, § 325, holding opposite view, supported by decisions in that State. O'Connor v. Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816, is illustrative of the New York view, holding, as it does, that an ordinary uncertified check upon a bank account is neither a legal nor an equitable as-

fraud to give the check without having a corresponding amount to meet it.[10] But as yet the drawer and payee (or holder) are the only parties whose rights are affected by the check. Something more is necessary to affect the bank, or a stranger holding another check. As soon as the payee (or holder) presents the check to the bank and demands payment, we think that thing is done.[11] For the bank is then notified of the appropriation of the amount to the holder. If a subsequent check is presented, drawn on the same fund, it would be a fraud upon the holder to pay that, and thus deprive him of his precedence.

If a subsequent assignment, in a different form, were made of the fund by the drawer, it would be valid against the drawer if communicated to, and acted upon by, the bank before presentation of the check. For otherwise the bank would suffer from a wrong committed by the drawer in which it had no participation.

The objection to the check-holder's suing the bank, on the ground that there is no privity between him and the bank, seems to us utterly untenable. It is true there is privity before the presentment of the check, but by that very act they are brought in privity, and the check-holder's right to sue the bank completed.

The sole motive often, if not generally, inducing the depositor to place his funds in bank is the desire to have them in safety, where they may be checked on at convenience. The bank re-

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signment of any part of the sum standing to the credit of the depositor, and confers no rights upon the payee which he can enforce against the bank. Such a check is simply an order, which may be countermanded and payment forbidden by the drawer at any time before it is actually cashed. The rule that when deposits are received by a bank, unless they are special deposits, they belong to it as a part of its general funds, and the relation of debtor and creditor arises between it and the depositor, applies where the deposit is of trust money, unless the act of depositing it is a misappropriation of the fund. Thomas v. Exchange, 99 Iowa, 202, 68 N. W. 780; Henderson v. United States Nat. Bank, 59 Nebr. 280, 80 N. W. 898; First Nat. Bank v. Keith, 183 Ill. 475, 56 N. E. 179.

10. See *ante*, § 1596.

11. In Morse on Banking, 471, it is said: "It is true — and it is all that the cited cases decide — that before demand for payment no assignment exists, no obligation has been created, no privity has grown up, and the very right of the bank to pay may be taken away by any one of a great number of occurrences. But the act of presentment and demand, made before any one of these occurrences has taken place, is the act which creates at once, by usage of business and understanding of all concerned, the obligation, the privity, and the appropriation, or at least the right to claim an appropriation." Bank of Antigo v. Union Trust Co., 149 Ill. 343, 36 N. E. 1029.

ceives its reward in the use of the money, and in the business attracted in checking it out. And it is the universal understanding between banks and depositors, arising from the customs of trade, that the check of the latter is to be paid upon presentment.[12] The United States Supreme Court so declares in a recent opinion, though as yet it has not followed that declaration to its logical sequence.[13] The drawer of the check makes the de-

12. Roberts v. Austin, 26 Iowa, 324. "As to the objection of want of privity, although at one time there was some conflict of opinion, it is now laid down by text-writers to be settled, that in cases of simple contract, if one person makes a promise to another for the benefit of a third, the latter may maintain an action upon it, though the consideration did not move from him. 2 Greenleaf on Evidence, § 109, and authorities cited in note 1. Nor does it make any difference in principle that the beneficiary or party suing upon the promise was unknown to the promisor. This want of knowledge by the promisor as to who will be the party enforcing the promise exists in the case of every negotiable instrument. The promisor having made his promise upon sufficient consideration, whether it is in writing, verbal, or implied, may and ought to be required to perform it according to the tenor of it, and not otherwise, to the party becoming entitled thereto." "As to the objection of liability to several parties who may hold the checks, instead of to the one depositor, it should be remembered that, by the custom of merchants and bankers everywhere, alike well known to farmers, mechanics, merchants, bankers, and courts, the party receiving the deposit does so upon either an express or implied promise to pay the same upon presentation of the checks of the depositor, by whomsoever presented. If, therefore, he is made liable to numberless parties, it is because of his promise made for their benefit, and known to them, and which he has failed to perform." Munn v. Burch *et al.*, 25 Ill. 35. And if it be true, as it doubtless is, that the banker is liable to the depositor for the damages resulting to him by reason of the failure to pay his checks, this liability ought not, upon principle, to exempt him from the performance of his promise or undertaking to pay the checks; the holder may enforce the promise, while the depositor recovers nominal or special damages for the breach of it. Rolin v. Stewart, 14 C. B. 595. Parties are often liable to two actions at law, by different suitors, for one and the same wrongful act. A trespasser upon real estate may be liable, for one trespass, to two actions — one by the tenant, the other by the reversioner. So a party promising to discharge an incumbrance, and failing to do so, may be liable to an action by the promisee, and also to an action by the party holding the incumbrance. These are but illustrations of a large class of cases, both in tort and upon contract, where a party may be liable to two actions by different parties for the same wrong, or upon a breach of the same promise." See *post*, §§ 1643, 1644, and notes, and *ante*, § 1617; Gage Hotel Co. v. Union Nat. Bank, 171 Ill. 531, 49 N. E. 420, 63 Am. St. Rep. 270.

13. Central Nat. Bank v. Connecticut Mut. Life Ins. Co., U. S. S. C., Nov. 7, 1881; Morrison's Transcript, vol. III, No. 1, p. 62, Mathews, J.: "The

posit, and draws the check with this understanding. The bank receives the money with the like understanding, and so the holder receives the check. And the mutual understanding of the parties, although they have not individually concerted together, creates an implied privity, and completes the contract between them.

§ **1639.** But it is again objected, that if the holder could sue the bank for the amount, it would be liable to a suit from two different persons for the same thing, as the depositor could sue it also.[14] But while the depositor could sue the bank for the wrong done in refusing to pay his check, and recover any consequential damages,[15] he could not, we should say, sue it for the amount of the check after its presentment. For then the assignment is completed as against the bank — its assent has been obtained by its reception of the deposit, the right of the depositor parted with, and of the holder perfected. And while both depositor and holder could sue the bank, their causes of action would be as distinct as a tort is from a contract.[16]

§ **1640. Check-holder's remedies.**— From these views our conclusion is, that the check-holder has two remedies:

First: He may sue the drawer of the check and the bank in one action — the former as drawer, and the latter as an implied acceptor. For as an acceptance of a bill may be implied, so may the acceptance of a check. And as a promise to accept will operate as an acceptance to the holder who takes a bill on the faith thereof, so should it be as to a check. Now, by the very act of drawing a check, the drawer communicates to the payee the fact that the bank holds that amount to his credit, which it has agreed to pay on his check. By receiving the deposit, the bank has impliedly so agreed. And the holder receiving the check, in reliance on this condition of things, should be sustained,

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contract between the bank and the depositor is, that the former will pay according to the checks of the latter." Gage Hotel Co. v. Union Nat. Bank, 171 Ill. 531, 49 N. E. 420, 63 Am. St. Rep. 270.

14. In Bank of Republic v. Millard, 10 Wall. 156, Davis, J., said: "It is conceded that the depositor can bring assumpsit for the breach of the contract to honor his checks, and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise for the same thing, existing in two distinct persons at the same time."

15. Morse on Banking, 234; 2 Parsons on Notes and Bills, 62; Hopkinson v. Forster, L. R., 18 Eq. Cas. 74; Fonner v. Smith, 31 Nebr. 107, 47 N. W. 632, 28 Am. St. Rep. 510.

16. See Roberts v. Austin, *ante*, p. 671.

provided the drawer has not deceived him by drawing without funds to meet the check, and allowed to proceed against both parties in the manner above indicated.

It is no answer to these views to say that the holder of a bill cannot sue the drawee unless it be accepted. The drawee of a bill does not receive money to be paid out on checks. And the distinction between the bank or banker on whom the check is drawn, and the ordinary drawee of a bill, is the very gist of the distinction between the rights of the holders of the different instruments.

§ **1641.** *Second:* The check-holder may sue the drawer of the check on its dishonor, or sue the bank for money had and received to his use; for, as we have said, the bank receiving a deposit receives it for the use of the depositor, and for the use of such persons as he may order it to be paid to by his checks. Assumpsit is an equitable action, and *ex æquo et bono,* the check-holder should be entitled to recover from the bank the amount for which he holds the depositor's order.

§ **1642. Damages for improper dishonor of check.**— The depositor may always recover nominal damages from the bank improperly dishonoring his check, and a trader may recover substantial damages. If not a trader, the depositor would have to allege and prove special injury.[17] An agent who has put to his private

17. In Rolin v. Stewart, 14 C. B. 607 (78 Eng. C. L.), Williams, J., said: "I think it cannot be denied that if one who is not a trader were to bring an action against a banker for dishonoring a check at a time when he had funds of the customer in his hands sufficient to meet it, and special damage were alleged and proved, the plaintiff would be entitled to recover substantial damages. And when it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury, in estimating the damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract; just as in the case of an action for a slander of a person in the way of his trade, or in the case of an imputation of insolvency on a trader, the action lies without proof of special damage." The failure of a bank, which has on deposit funds sufficient for the purpose, to pay the check of a depositor, renders it liable either in tort or upon contract. If the depositor brings action against the bank as for a breach of contract, the failure of the bank to pay is not charged as willful, and no special damages are alleged or proved, and the check has finally been paid, the plaintiff is entitled to recover only nominal damages. See Burroughs v. Tradesmen's Nat. Bank, 87 Hun, 6, 33 N. Y. Supp. 864. In a complaint alleging general damages for improperly dishonoring plaintiff's check, held, that it is no part of the office

account funds of an undisclosed principal, may recover damages from the bank for refusal to honor his check upon them, although he had improperly obtained them.[18]

SECTION XI.

HOW FAR A CHECK IS AN ASSIGNMENT OF THE FUND DRAWN UPON.

§ 1643. We have seen already that a check operates as an assignment of the fund on which it is drawn *pro tanto*, from the very time it is drawn and delivered, as between the drawer and the payee or holder.[19] And *secondly*, that the assignment binds the bank as soon as the check is presented.[20] *Thirdly*, that as between the drawer and holder on the one part, and a party claiming under a subsequent assignment on the other, that if the latter holds a check also, and first presents it, he thereby acquires priority over the check not previously presented.[21] And any subsequent assignee to whom the bank had assented to pay the amount would, in like manner, acquire priority, as the bank would be bound to pay him in preference to the prior check-holder who had not presented the check.[22] But if the check were presented before any subsequent assignee had obtained the assent of the

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of a bill of particulars to state the elements which entered into and constituted the general damages. See Commercial Nat. Bank of Chicago v. Hand, 9 App. Div. 614, 41 N. Y. Supp. 823. The measure of damages for the unauthorized refusal of a bank to pay the note of a depositor who has funds on deposit sufficient for the purpose, is the amount of the actual loss sustained by the depositor, naturally resulting from the breach of contract arising from the relation of debtor and creditor existing between a bank and its depositor, according to the usual course of things, namely, the amount of the debt, with interest and costs. (Plaintiff in this suit was not a trader.) See Brooke, Recr. v. Tradesmen's Nat. Bank, 69 Hun, 202, 23 N. Y. Supp. 802; Schaffner v. Ehrman, 139 Ill. 109, 32 Am. St. Rep. 192.

18. Tassell v. Cooper, 9 C. B. 509.

19. *Ante*, § 1638. See Carroll Bank v. First Nat. Bank, 50 Mo. App. 93; Dowell v. Banking Assn., 62 Mo. App. 482; Hulings v. Hulings Lumber Co., 38 W. Va. 351, 18 S. E. 620; Niblock v. Park Nat. Bank, 169 Ill. 517, 48 N. E. 438; First Nat. Bank v. Keith, 183 Ill. 475, 56 N. E. 179.

20. *Ante*, § 1638; Bernard, Admr. v. Whitney Bank, 43 La. Ann. 50, 80 So. 702; Gage Hotel Co. v. Union Nat. Bank, 171 Ill. 531, 49 N. E. 420, 63 Am. St. Rep. 270; Bank v. National Union Trust Co., 149 Ill. 343, 36 N. E. 100.

21. *Ante*, §§ 1617, 1638; Wyman v. Fort Dearborn Nat. Bank, 181 Ill. 279, 54 N. E. 946, 72 Am. St. Rep. 259.

22. *Ante*, § 1617.

bank, and thus brought it in privity of contract with it, we should say that by such presentment the check-holder acquired priority for the reasons that have been heretofore considered.[23] And, therefore, a general assignment for the benefit of creditors would not defeat the check-holder, although he had not presented the check,[24] nor would the appointment of a receiver to take possession of the funds of the drawee.[25] There may be assignment of a bank deposit by mere parol.[26] And those cases which insist that a check does not *per se* import an assignment *pro tanto* seem to us to give less weight to written than to verbal testimony.[27]

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23. *Ante*, § 1617. *Contra*, cases cited, § 1636.

24. German Sav. Inst. v. Adae, 8 Fed. 106; First Nat. Bank v. Coates, 8 Fed. 540, Miller, J., held that check is an "equitable assignment" *pro tanto*. In Roberts v. Austin, 26 Iowa, 327, Cole, J., said: "The controversy then is simply this: Markell having received full consideration therefor, draws his checks upon his banker, with whom he has funds on deposit for their payment. Afterward, and before their presentation, Markell (by his assignee) notifies the drawee to withhold payment. This is done without any claim of wrong on the part of the drawees, and without any pretense or suggestion against their just and equitable right to the money specified in the check. Now, as between Markell on the one hand, and the holders of these checks on the other, in whose favor are the equities? No person could hesitate for a single moment in declaring that the money (which in effect has been brought into court for the benefit of the party entitled thereto) should be paid to the holders of the checks, rather than to Markell, who has once received from them the money which the checks represent. If, as between Markell and the holders, the latter would be entitled to the money, then, since the assignee of Markell stands in his shoes and succeeds only to his rights, the holders of the checks would be entitled to the money as against the assignee, and this, too, regardless of whether the holder of a check can maintain his action against the drawee, or whether a check operates as an assignment *pro tanto* of the deposit, as hereinbefore discussed." Atlanta Nat. Bank v. George, 109 Ga. 682, 34 N. E. 998. The Supreme Court of the United States holds that a check does not operate as such assignment as to give the holder of it by its receipt priority over an assignment for creditors. Fourth St. Nat. Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. Rep. 439; Florence Mining Co. v. Brown, 124 U. S. 385, 8 Sup. Ct. Rep. 531; Laclede Bank v. Schuler, 120 U. S. 511, 17 Sup. Ct. Rep. 644. *Contra*, Lunt v. Bank of North America, 49 Barh. 221.

25. Merrill v. Anderson, 10 Hun, 606 (1877). See Duncan v. Berlin, § 1644, note.

26. Risley v. Phœnix Bank, 11 Hun, 484; Oppenheimer v. First Nat. Bank of Butte, 20 Mont. 192, 50 Pac. 419.

27. See on this subject, *ante*, § 1636*a*.

§ 1644. Conflict between attachment and garnishment process and assignment.— It is a principle of law that wherever there is a legal or equitable assignment of a debt or fund prior to service of attachment or garnishment process upon the debtor, the assignee is entitled to priority over the attachment or garnishment creditor, provided he makes it known to the court in time to intercept its judgment in favor of such creditor, even though the party owing the debt or holding the fund assigned should not have had notice of such assignment prior to the service of such process,[28] and *a fortiori* does the rule apply where there is notice.[29]

And as a check is an assignment of the fund *pro tanto,* it would, upon this principle, defeat an attachment or garnishment, although not presented until after process was served upon the debtor.[30] This doctrine rests upon the ground that the attachment or garnishment creditor acquires no rights but those subsisting in his debtor at the time that process is served on the garnishee, and is in effect a mere suitor for whatever his debtor might then have a right to recover.

Where the payee of a check has indorsed it to a bank for deposit, and the amount has been put to his credit by the bank,

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28. Anderson v. De Soer, 6 Gratt. 364; Maher v. Brown, 2 La. 492; Giddings v. Coleman, 12 N. H. 153; Oppenheimer v. First Nat. Bank of Butte, 20 Mont. 192, 50 Pac. 419.

29. Legro v. Staples, 16 Me. 252; United States v. Vaughan, 3 Binn. 394; Colt v. Ives, 31 Conn. 25; Nesmith v. Drum, 8 Watts & S. 9; Adams v. Robinson, 1 Pick. 461.

30. See chapter I, §§ 15, 16, *et seq.*, vol. I; also Wheatly v. Strobe, 12 Cal. 98; Bank of America v. Indiana Banking Co., 111 Ill. 483. But *contra*, that a check is not an assignment, and will not defeat an attachment, see Tyler v. Gould, 48 N. Y. 682; Lord v. Caffrey, 46 Pa. St. 261; Imboden v. Perrie, 13 Lea, 504; Rice v. Dudley, 34 Mo. App. 392; Duncan v. Berlin, 60 N. Y. 151 (1875), Church, C. J.: "A check upon a bank does not operate as an assignment of the money deposited. * * * A parol acceptance is not valid (1 R. S. 768). The promise did not bind the bank, and no action would lie upon it in favor of the holder. The case of Bullard v. Randall, 1 Gray, 605, was similar in its circumstances to this; and the court held, they would not avail against the lien of a trustee process served before the check actually reached the bank. When the attachment was served, the check had neither been accepted, certified, nor paid, nor had it, in fact, been presented for payment." Held, that the attaching creditor had priority. See also Lunt v. Bank of North America, 49 Barb. 221; Attorney-General v. Continental L. I. Co., 71 N. Y. 325; Risley v. Phœnix Bank, 11 Hun, 484.

the drawer has put the matter beyond recall; and being no longer debtor of the payee could not be garnished by his creditor.[31]

§ **1645.** In England it is held that there are some cases in which equity would regard a check as an assignment of the fund, as in the case of the death of the drawer, and the consequent revocation of the banker's authority (which is there held to be its effect), the holder may have relief in equity against the banker.[32] But, as a general rule, a check is not there regarded as an assignment.[33]

SECTION XII.

CHECKS AS EVIDENCE.

§ **1646. In the hands of the payee,** a simple check which is unpaid and has not been presented for payment, cannot be used as evidence of any indebtedness from the drawer to the payee, for the drawer has only contracted that the bank should pay the amount on demand, and until demanded the drawer is not bound.[34] But when this is done and shown, the check then imports a debt from the drawer to the payee, and it may be sued on without proving the consideration, value received being presumed.[35]

In the hands of an indorsee, the check, in like manner, is not sufficient evidence that the drawer owes the debt, unless a demand upon the bank and refusal to pay be shown;[36] and as against the indorser, proof of notice of nonpayment must be superadded.[37]

The natural inference from the giving of a check is, that it was given in payment of a debt due the payee from the drawer, or that the payee gave cash for it when it was drawn, and in order to charge the payee as a debtor to the drawer, it must be shown

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31. National Park Bank v. Levy Bros., 17 R. I. 746, 24 Atl. 777.

32. Rodick v. Gandelle, 12 Beav. 325, 1 De G., M. & G. 763.

33. Hopkinson v. Foster, L. R., 19 Eq. 74.

34. Flemming v. McClain, 13 Pa. St. 177; Pearce v. Davis, 1 Moody & R. 365; 2 Parsons on Notes and Bills, 83.

35. See *infra*, § 1652; Cloyes v. Cloyes, 43 N. Y. S. C. 145, citing the text. Mr. Morse states that there must be "proof of the consideration on which the check was given." Morse on Banking, 290, 312. This is incorrect. See cases below, and see *infra*.

36. *Ante*, § 1586 *et seq.*; Ritchie v. Dep. & Tr. Co., 189 Pa. St. 410, 42 Atl. 20.

37. Ibid.

that the check was in fact loaned him.[38] Where the drawer's executor sued the payee of a paid check for the amount, charging that it was a loan, Lord Kenyon, C. J., said: "There is no evidence to establish a debt. No evidence is offered of the circumstances under which the draft was given; it might be in payment of a debt due by the testator, or the defendant might have given cash for it at the time."[39] But when it is shown that cash was not given for the check, that it was not taken in payment of a debt, there is no presumption that it was intended as a gift; and unless it were proved to have been so intended, the payee would be chargeable with the amount as a loan.[40] And whenever a loan from the drawer to the payee is proved, the check may be given in evidence of the amount.[41]

§ **1647. In the hands of the bank,** a check drawn upon it imports that the bank held funds of the drawer upon deposit, and has paid, out of them, the amount of the check to the holder.[42] And it does not import a loan from the bank to the drawer; but if it appears that the check was paid without funds, an implied promise is raised that the drawer will refund the amount to the bank.[43] The presumption of payment arising from possession of the check by the bank is, however, one that may be rebutted by positive evidence that no such payment has been made.[44]

§ **1648. In the hands of the drawer,** a check payable to a certain party or order, and bearing his indorsement, and which has been

38. Terry v. Ragsdale, 33 Gratt. 348; Huntzinger v. Jones, 60 Pa. St. 170; Connelly v. McKean, 64 Pa. St. 118; Patten v. Ash, 7 Serg. & R. 116; Graham v. Cox, 2 Car. & K. 702; Headley v. Reed, 2 Cal. 322; Thompson v. Pitman, 1 Fost. & F. N. P. 339; 2 Parsons on Notes and Bills, 84; Yates v. Shepardson, 39 Wis. 173; Poucher v. Scott, 40 N. Y. S. C. 223.

39. Cary, Executor of Greatorex v. Gerish, 4 Esp. 9.

40. Baker v. Williamson, 4 Pa. St. 456; Huntzinger v. Jones, 60 Pa. St. 170.

41. Healy v. Gilman, 1 Bosw. 235. A check is presumptively payment of a debt, and not a loan. See Mills v. McMullen, 4 App. Div. 27, 38 N. Y. Supp. 705; Levy v. Gillis (Del.), 1 Pennewell, 119, 39 Atl. 785; Ritchie v. Dep. & Tr. Co., 189 Pa. St. 410, 42 Atl. 20.

42. Lancaster Bank v. Woodward, 18 Pa. St. 361; Conway v. Case, 22 Ill. 127; Healy v. Gilman, 1 Bosw. 235; Fletcher v. Manning, 12 M. & W. 577; Pickle v. People's Nat. Bank, 12 S. W. 919, citing the text.

43. Fletcher v. Manning, 12 M. & W. 571; Thurman v. Van Brunt, 19 Barb. 409; Morse on Banking, 290, 291; Riverside Bank v. Land Co., 34 App. Div. 359, 54 N. Y. Supp. 266.

44. Pickle v. People's Nat. Bank, 12 S. W. 919.

paid by the bank, is as good a receipt for money paid to the payee as the drawer could desire.[45] But if the check were drawn payable to A. or bearer, or to bearer, which is the same in legal effect, it is not, *per se*, evidence in the drawer's hands, of payment to A. It must be proved that the party alleged to have been paid by the check received the money.[46] And if the check be payable simply to A., it seems that mere payment of the check is not evidence that A. received the money, unless the check bear A.'s indorsement.[47] But it may be doubted if the bank can require his indorsement unless the check be payable to his order.[48] And clearly, it cannot require the holder's indorsement when the check is payable to bearer.[49]

Without proof of the particular consideration, a check is not evidence that it was paid upon a particular account.[50]

§ 1649. It is almost, and indeed we suppose quite, the universal custom of banks which have paid the checks of their depositors, to cancel them by some mark indicating that they have been paid, and to return them in the depositor's bank pass-book as vouchers for the amounts paid out from his funds on deposit. And, doubtless, an obligation to do this may be inferred in most cases from the usage of business, and the prior course of dealing between the bank and its depositor.[51] When the bank pays the holder the amount of the check, it is clearly entitled to the possession of it as a voucher for the payment.[52] But after debiting it against the drawer in account with the bank, it is the duty of the bank to return the check to its depositor, who has the better right to their permanent possession, as they are to him vouchers of payment of his debt to the payee named in them; and the bank, until it returns the checks, has been said to hold them only as agent of the drawer.[53] In the case of over-checks, it would

45. Connelly v. McKean, 64 Pa. St. 113; Egg v. Barnett, 3 Esp. 196; Thompson v. Pitman, 1 Fost. & F. N. P. 339.

46. Patten v. Ash, 7 Serg. & R. 116; People v. Baker, 20 Wend. 602; People v. Howell, 4 Johns. 296; Mountford v. Harper, 16 M. & W. 825; Pearce v. Davis, 1 Moody & R. 365; Lloyd v. Sandilands, Gow. 13.

47. Flemming v. McClain, 13 Pa. St. 177.

48. 2 Parsons on Notes and Bills, 83.

49. Connelly v. McKean, 64 Pa. St. 113.

50. Aubert v. Walsh, 4 Taunt. 293.

51. Morse on Banking, 291. See Regina v. Watts, 2 Den. C. C. 14.

52. Matter of Brown, 2 Story, 512.

53. Burton v. Payne, 2 Car. & P. 520; Grant on Banking, 72, 75; Morse on Banking, 291.

doubtless be different, for they might be the only conclusive evidence that the bank possessed of the advance to the drawer, and this it would not be just to require it to part with.[54]

§ **1650.** When a suit is brought for money lent by a check, it has been held that the Statute of Limitations runs from the time the money was paid by the drawee, and not from the time the check was drawn, as otherwise it would follow that if an action had been brought by the drawer for money lent, he would be able to recover the amount, although the check might be subsequently dishonored.[55]

SECTION XIII.

NEGOTIABILITY AND TRANSFER OF CHECKS.

§ **1651. Negotiability of checks.**— A check, like a bill or note, in order to be negotiable, must be payable absolutely and at all events to a certain person or order, or to bearer, in money. If expressed to be payable "in bank bills," or "in currency,"[56] or if it lack words of negotiability,[57] or be deficient in any of the characteristics which impart negotiability to bills and notes, it will not be a negotiable instrument. Checks are sometimes, although by no means usually, intended for temporary circulation; but their principal object and purpose is to enable the holder to demand and receive immediately the amount called for. Negotiability in its full sense is, therefore, not of their essence, but an optional quality.[58]

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54. Grant on Banking, 73; Morse on Banking, 293.

55. Garden v. Bruce, L. R., 3 C. P. 300.

56. Bank of Mobile v. Brunn, 42 Ala. 108; Little v. Phœnix Bank, 2 Hill (N. Y.), 425; Famous Shoe Co. v. Crosswhite, 124 Mo. 34, 27 S. W. 397, 46 Am. St. Rep. 424, quoting text; Burns v. Kahn, 47 Mo. App. 215, citing text; The National Bank of America v. The National Bank of Illinois, 164 Ill. 503, 45 N. E. 968, citing text; Kavanaugh v. Bank, 59 Mo. App. 540, citing text.

57. Partridge v. Bank of England, 9 Q. B. 396. In Virginia checks are regulated by the statutory provisions which apply alike to bills and notes, even as respecting protest, and negotiable, if payable (1) at a particular bank, or (2) at a particular place thereof, for discount or deposit, or (3) at the place of business of a savings institution or savings bank, or (4) at the place of business of a licensed broker. Code 1873, chap. 144, § 7; Acts 1866, p. 149.

58. Mohawk Bank v. Broderick, 10 Wend. 304; The Famous Shoe Co. v. Crosswhite, 51 Mo. App. 55.

§ **1652.** Whenever a check is negotiable, it is undoubtedly subject to the same principles which govern ordinary bills of exchange in respect to the rights of the holder. In the *first* place, it is evidence of a valuable consideration as between the immediate parties thereto, and between the plaintiff and the drawer when payable to bearer.[59] In the *second* place, it may be transferred by indorsement, or by delivery without indorsement when payable to bearer.[60] In the *third* place, when sued upon, the possession is *prima facie* evidence of title, and the plaintiff is presumed to be a *bona fide* holder for value without notice of any defense existing between prior parties, and such defenses cannot be pleaded against him.[61] In the *fourth* place, even when it is proved that the real owner parted with it, or that the drawer drew it without consideration, the burden of proving *bona fide* ownership for value without notice will not devolve upon the

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59. In Morse on Banking, 312, it is said: "Possession is *prima facie* proof of title; but the plaintiff in a suit upon the check (payable to bearer) must show that he received it for value, and in the due course of business." The cases cited by the author do not sustain this proposition. On the contrary, they accord with the text, which states correctly the doctrine which prevails in respect to checks whether payable to bearer or to order, and in respect to all other negotiable instruments. In Conroy v. Warren, 3 Johns. Cas. 259, the check was payable to "No. 912 or bearer." It was declared on as given by defendant to plaintiff. Thompson, J., said, in answer to the objection that where a check is payable to bearer it is incumbent on the holder to prove a valuable consideration: "I take it to be well settled that with respect to bills of exchange and promissory notes, they in this respect stand on the same footing with specialties, and *prima facie* import a consideration. * * * The reason of the rule is equally applicable whether the bill or note be made payable to bearer or order, and I can see no good reason why it should not apply to bank checks." In Hoyt v. Seeley, 18 Conn. 357, Waite, J., said: "Here the plaintiff has declared upon this check as payable to bearer, and has averred that he is the lawful bearer thereof, and entitled to the payment of the money therein specified. This is enough to show a right of action in the plaintiff. The circumstances under which he became bearer are immaterial." Mauran v. Lamb, 7 Cow. 176; Johnson v. Wright, 2 App. D. C. 216, quoting at length and with approval the text; Famous Shoe Co. v. Crosswhite, 124 Mo. 34, 72 S. W. 397, 46 Am. St. Rep. 424, quoting text; Kavanaugh v. Bank, 59 Mo. App. 540, citing text.

60. Conroy v. Warren, 3 Johns. Cas. 259; Merchants' Bank v. Spicer, 6 Wend. 445; Woods v. Schroeder, 4 Harr. & J. 276; Hoyt v. Seeley, 18 Conn. 353; Keene v. Beard, 8 C. B. (N. S.) 380 (98 Eng. C. L.).

61. Cruger v. Armstrong, 3 Johns. Cas. 7. The check was payable to W. & J. C. or bearer. Radcliff, J., said: "The holder must *prima facie* be deemed the rightful owner, and it has accordingly been held that he need not prove a

holder;[62] but when shown to have been drawn for an illegal consideration, or to have been obtained from the drawer by fraud or theft, the burden of proof is thrown upon the holder, and he must show a *bona fide* title in order to recover.[63] And, in the *fifth* place, when a check is presented for payment by the holder, his indorsement is a guarantee of the validity of all prior indorsements, rendering him liable to refund any payment to him by virtue of an illegal indorsement through which he claims title.[64]

The mere credit of a check upon the books of a bank which may be canceled at any time does not make the bank the *bona fide* purchaser for value. If after such credit and before payment for value upon the faith thereof the holder receives notice of the invalidity of the check he cannot become a *bona fide* holder by subsequent payment.[65]

§ 1653. Indorsement of checks payable to bearer; English custom. — Even a check payable to bearer may be transferred by indorsement, though such checks are more generally passed by delivery merely. It is not, however, a necessary inference from the fact that a person has written his name on the back of a check payable to bearer that he intended to indorse it, as his name may have been written thereon for very different purposes. Thus it is customary in England for the holder of a check payable to bearer, upon receiving payment, to write his name on the back, and the usage of business gives to this simply the signification of

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consideration, except where circumstances of suspicion appear." Murray v. Judah, 6 Cow. 484; Mauran v. Lamb, 7 Cow. 176; Harbeck v. Craft, 4 Duer, 131; Merchants' Nat. Bank v. New Brunswick Sav. Inst., 33 N. J. L. 172; Kuhns v. Gettysburg Nat. Bank, 68 Pa. St. 445; Cecil Bank v. Heald, 25 Md. 563; Stewart v. Smith, 17 Ohio St. 82; Meridian Nat. Bank of Indianapolis v. First Nat. Bank of Shelbyville, 7 Ind. App. 322, 33 N. E. 247, 34 N. E. 608, 52 Am. St. Rep. 450, citing text; Doppelt v. National Bank, 175 Ill. 432, 51 N. E. 753.

62. See chapter XXIV, section VII, § 810 *et seq.*, vol. I; The Nat. Bank of America v. The Nat. Bank of Illinois, 164 Ill. 503, 45 N. E. 968, quoting text.

63. Fuller v. Hutchings, 10 Cal. 523; Merchants' Nat. Bank v. New Brunswick Sav. Inst., 33 N. J. L. 172; Kuhns v. Gettysburg Nat. Bank, 68 Pa. St. 445; Famous Shoe Co. v. Crosswhite, 124 Mo. 34, 27 S. W. 397, 46 Am. St. Rep. 424, citing text.

64. Central Nat. Bank v. North River Bank, 51 N. Y. S. C. 115; Third Nat. Bank v. Merchants' Nat. Bank, 76 Hun, 475, 27 N. Y. Supp. 1070; Doppelt v. National Bank, 175 Ill. 432, 51 N. E. 753.

65. Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231, 14 Sup. Ct. Rep. 94.

his receipt for the money.[66] Such an indorsement creates no liability. And whenever a check payable to bearer has a party's name so written thereon, it has been held in England necessary to prove the *animo indorsandi* in order to bind him.[67] When this is done he is undoubtedly bound as an indorser, and it was answered by Byles, J., in England, to counsel that argument to the contrary "would have been deserving of more attention if it had been addressed to the court a hundred years ago."[68]

A bank is not subject to charge for interest on sums deposited subject to check until payment is demanded, unless by special contract.[69]

SECTION XIV.

FORGERIES OF CHECKS.

§ **1654.** In another portion of this volume we have treated of forgeries of bills and notes, and also of alterations, but it is desirable to keep distinct the various classes of commercial paper affected by such frauds, and checks are governed to some extent by principles peculiar to them alone.

§ **1654a. Bank chargeable with knowledge of check-drawer's signature.**— We have seen that the drawee of a bill is bound to know the drawer's signature. In like manner a bank is bound to know the signature of a depositor who draws a check upon it; and it has been said that the bank "is even more bound" to know such depositor's handwriting than a drawee is bound to know a drawer's.[70] And this view is founded on reason, for, as a general rule, a deposit is made for the very purpose of being checked out, while a drawer has no right to require a drawee to accept or pay his drafts.

But a bank is not bound to know more than the signature of the drawer of the check; for in the ordinary course of business

66. Morse on Banking, 312.

67. Ancona v. Marks, 7 H. & N. 686 (1862).

68. Keene v. Beard, 8 C. B. (N. S.) 372 (98 Eng. C. L.).

69. Parkersburg Nat. Bank v. Als, 5 W. Va. 50.

70. Smith v. Mercer, 6 Taunt. 76. See People's Sav. Bank v. Capps, 91 Pa. St. 315; United States Nat. Bank v. National Park Bank, 59 Hun, 495, 13 N. Y. Supp. 411; Snodgrass *et al.* v. Sweetser, 15 Ind. App. 682, 44 N. E. 648; German Sav. Bank v. National Bank, 101 Iowa, 530, 70 N. W. 769; Iron City Nat. Bank v. Peyton & Co., 15 Tex. Civ. App. 184, 39 S. W. 223, citing text; McKeen v. Bank, 74 Mo. App. 281; Janin v. Bank, 92 Cal. 14, 27 Pac. 1100, 27 Am. St. Rep. 82.

the body of the check is as often as otherwise filled up by a clerk, and it is by no means a matter of suspicion that it is not filled up in the handwriting of the drawer.[71] If the rule were otherwise, a bank could never safely pay a check filled up in a handwriting not the drawer's, until it had inquired of the drawer whether it was properly filled up. And to require this would greatly embarrass commercial transactions.[72]

§ **1655.** As a bank must know its customer's signature, it has been held, and as a general rule the doctrine prevails, that if it pays out money on a forged check it cannot recover back the amount from the party to whom it was paid;[73] and unless the drawer whose name be forged is, by negligence or acquiescence, rightfully responsible, the bank cannot charge the amount paid in account against him.[74]

§ **1655a. Right of bank to recover money paid on forged checks.**— Ordinarily money paid under a mistake of fact may be recovered

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71. National Bank v. Nolting, 94 Va. 263, 26 S. E. 826; Snodgrass *et al.* v. Sweetser, 15 Ind. App. 682, 44 N. E. 648; National Bank of Commerce v. National Mechanics' Banking Assn., 55 N. Y. 213; Bank of Commerce v. Union Bank, 3 N. Y. 230; Redington v. Wood, 45 Cal. 406; National Park Bank v. Ninth Nat. Bank, 55 Barb. 124, 46 N. Y. 77; Bigelow on Estoppel, 435, 436.

72. Redington v. Wood, 45 Cal. 406.

73. Levy v. Bank of the United States, 4 Dall. 234; Bank of the United States v. Bank of Georgia, 10 Wheat. 333. See chapter XLII, on Forgery, § 1359; First Nat. Bank v. Ricker, 71 Ill. 439; First Nat. Bank v. First Nat. Bank, 58 Ohio St. 207, 50 N. E. 723, 65 Am. St. Rep. 748, citing text; Iron City Nat. Bank v. Peyton & Co., 15 Tex. Civ. App. 184, 39 S. W. 223, citing text; Neal v. Coburn, 92 Me. 139, 42 Atl. 348; First Nat. Bank v. Peace, 168 Ill. 40, 48 N. E. 160.

74. In Hardy v. Chesapeake Bank, 51 Md. 562, Alvey, J., said: "If the bank pays money on a forged check, no matter under what circumstances of caution, or however honest the belief in its genuineness, if the depositor himself be free of blame, and has done nothing to mislead the bank, all the loss must be borne by the bank, for it acts at its peril and pays out its own funds, and not those of the depositor. It is in view of this relation of the parties, and of their rights and obligations, that the principle is universally maintained, that banks and bankers are bound to know the signatures of their customers, and that they pay checks purporting to be drawn by them at their peril." Third Nat. Bank of New York v. Merchants' Nat. Bank, 76 Hun, 475, 27 N. Y. Supp. 1070; Wall v. Emigrant Industrial Sav. Bank, 64 Hun, 249, 19 N. Y. Supp. 194. In this connection, see authorities cited in note 83, § 1657; Snodgrass *et al.* v. Sweetser, 15 Ind. App. 682, 44 N. E. 648. See Janin v. Bank, 92 Cal. 14, 27 Pac. 1100, 27 Am. St. Rep. 82.

back, however negligent the party paying.[75] But that rule has not been generally deemed applicable in such cases as this, for, as is said, "the fact in this case is one in which the drawee has no right to mistake. The law refuses to hear him say he has mistaken it. The money is paid through the failure to fulfil his acknowledged duty, inasmuch as he has failed to detect this very nonexistence of the merely supposed fact of signature by a certain person."[76] No doubt there are cases which bear out this view. But where the bank discovers the forgery immediately, and demands restitution, offering to return the check, before the holder has lost anything by regarding the matter as all right, we cannot help thinking that it should be entitled to recover back the amount. Mr. Chitty seems to have had the same opinion.[77] And Professor Parsons has expressed it in favorable terms.[78] And the better doctrine, as we think, is, that the bank should have the right to recover, unless the circumstances of the holder had been changed so as to render it unjust.[79] Forgeries often deceive the eye of the most cautious and practiced expert; and when a bank has been so deceived, it is a harsh rule which compels it to suffer, although no one has suffered by its being

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75. See vol. II, § 1369.

76. Morse on Banking, 296; First Nat. Bank of Marshalltown v. Marshalltown State Bank, 107 Iowa, 327, 77 N. W. 1045, citing text; Iron City Nat. Bank v. Peyton & Co., 15 Tex. Civ. App. 184, 39 S. W. 223, citing text.

77. Chitty on Bills (13th Am. ed.) [*431], 485. See *ante*, chapter XLII, on Forgery, § 1361 *et seq.*; also Irving Bank v. Wetherald, 36 N. Y. 335.

78. 2 Parsons on Notes and Bills, 80, where it is said: "It is obvious that it (the bank) can reclaim the money from the payee, if the payee were in fault. But a more difficult question arises where a bank pays a forged check to an innocent holder. The cases on this subject are few and indecisive; but we think the law must be this: The bank can recover it from the payee, if the payee were in fault, or if an innocent payee, will then be in no worse condition than if the bank had refused to pay it. Still, the bank, rather than the holder, is bound to know whether the signature be genuine; and if by any change of accounts, by any consideration paid which might have been recovered had payment been refused, but cannot be recovered now, or by any loss of opportunities to get security or indemnity from the transferrer which the holder would have had but for the payment to him, the payee cannot be replaced in as good a position after he returns the money to the bank, then we say he is not bound to return it. Perhaps injury to the payee, by the demand of repayment, would be so far presumed, as matter of law, as to cast upon the bank the burden of proof."

79. See chapter XLII, on Forgery, § 1361, and § 1346, and notes. See also American Review, April, 1875, p. 433.

deceived. It is also a rule which tends to render those who trade for checks incautious, if by any means they can procure their payment by the bank. Parties often pronounce forgeries of their own signatures genuine.[80] Why blame a third party so severely? And why make an exception to a rule so just in its universal application?

§ **1656.** The doctrine that a bank is bound to know its customer's signature has been very strictly applied by the Supreme Court of the United States. Where the plaintiff deposited in the bank a check purporting to be drawn by one of its customers, and it was at once passed to the plaintiff's credit on his cash-book, but on the same day it was discovered by the bank to be a forgery and instantly returned to him, the court held that the plaintiff was entitled to refuse to take it back, and hold the bank liable for the amount in account with him. And it was said: "It is our opinion that when the check was credited to the plaintiff as cash, it was the same thing as if it had been paid; it is for the interest of the bank that it shall be so taken."[81] The case in which this view is taken has been quoted with approval,[82] but it does not commend itself, as we humbly think, to favor.

§ **1657. Exceptions to rule holding bank responsible when it pays forged checks.**—Even where the general doctrine, that the bank has no remedy where it has certified or paid a forged check against the holder, is recognized as a fixed principle of law, there are some exceptions which are insisted upon as reasonable and just. As the responsibility of the bank is based upon the presumption that it has greater means, and better opportunities to become familiar with the handwriting of depositors than are afforded the holder, it is declared to be decisive alone when the party holding the check has in no way contributed to the success of the fraud. And if the loss can be traced to the fault or negligence of any

80. Morse on Banking, 310.

81. Levy v. Bank of the United States, 4 Dall. 234, 1 Binn. 27. It is not stated in the report that it was a customer's check, but this inferentially appears. Iron City Nat. Bank v. Peyton & Co., 15 Tex. Civ. App. 184, 39 S. W. 223, citing text.

82. Bank of the United States v. Bank of Georgia, 10 Wheat. 333. It has been held, that if the bank paid a forged check to the holder it could not recover back from him the amount; but if he on demand repaid the bank he could not himself recover from a prior holder for value who had indorsed the check. Neal v. Coburn, 92 Me. 147, 42 Atl. 348, 69 Am. St. Rep. 495.

party it will be fixed upon him.[83] In the absence of actual fault or negligence on the part of the drawee bank, its constructive fault in not knowing the signature of the drawer, and detecting the forgery, will not preclude its recovering back the amount, or recalling its certificate, as against one who has received the money, or taken the check with knowledge of the forgery; or who took the check under circumstances of suspicion without proper precaution, or whose conduct has been such as to mislead the bank, or to induce payment or certification of the check, without the usual scrutiny or precautions against mistake or fraud.[84]

Accordingly, it has been held, that where a bank paid a check on which its depositor's name was forged, and which was presented by another bank, to which it was paid in accordance with a custom to rely upon the bank holding the check to assure its

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83. Gloucester Bank v. Salem Bank, 17 Mass, 33, 42. A bank-book, issued by a savings bank, contained the following rules: "The pass-book shall be the voucher of the depositor, and the possession of the pass-book shall be sufficient authority to the bank to warrant any payment made and entered in it. The bank shall not be liable or called upon to make any payment without the presentation of the pass-book at its window that the proper entry may be made in it." It contained also the following: "Although the bank will endeavor to prevent fraud on its depositors, yet the payment to persons producing the pass-books issued by the bank shall be valid payments to discharge the bank." The depositor (Wall) made his first deposit in bank in 1878, and at that time wrote his name in the bank signature-book. Thereafter, and prior to the payment hereinafter mentioned, a stranger wrote to Wall requesting information as to certain facts, knowledge of which would enable the stranger to answer the test questions usually put by the bank to depositors. Wall answered the letter, giving the information asked for. In 1889, the stranger, calling himself Wall, appeared at the bank with the pass-book. The paying-teller, after examination, thought the signature slightly different from that in the signature-book, and asked the stranger several of the test questions which were answered correctly, and thereupon the teller paid the sum demanded. Held, that notwithstanding the rules of the bank, it was bound to exercise, in making a payment, reasonable care and diligence. Further held, that the plaintiff, in furnishing a stranger with information as to the county in Ireland in which he was born, the ship in which he emigrated, and his mother's name, thus enabling the stranger to answer the test questions, was guilty of such contributory negligence as barred a recovery as matter of law. See Wall v. Emigrant Industrial Savings Bank, 64 Hun, 249, 19 N. Y. Supp. 194; Iron City Nat. Bank v. Peyton & Co., 15 Tex. Civ. App. 184, 39 S. W. 223, citing text.

84. National Bank of North America v. Bangs, 106 Mass. 445; Ellis v. Ohio Ins., etc., Co., 4 Ohio St. 628; First Nat. Bank v. Ricker, 71 Ill. 439.

genuineness, the amount might be recovered back.[85] And so where the payees took from a stranger a check payable to their order, and put it in circulation with their indorsement thereon, thus giving it currency and credit, it was likewise held that the amount might be recovered back.[86] So where the holder of a check having reason to question its genuineness, presented it to the drawee bank and demanded payment without disclosing his suspicions, and the bank teller, doubting its genuineness, refused to pay it unless the holder indorsed it,— it was held that on discovering that it was a forgery of the drawer's name, the bank might recover back the amount paid from the party who presented it for payment.[87] The payee or indorsee of a check whose indorsement is forged upon it, and upon which forged indorsement the bank has paid the check, may recover the amount of the check from the bank, which is regarded in judgment of law as holding it for the lawful owners; and it cannot exonerate itself

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85. Ellis v. Ohio Life Ins., etc., Co., 4 Ohio St. 628. See chapter XLII, on Forgery, § 1361.

86. In National Bank of North America v. Bangs, 106 Mass. 444, Wells, J., said: "In the present case the check had not gone into circulation, and could not get into circulation until it was indorsed by the defendants. Their indorsement would certify to the public, that is, to every one who should take it, the genuineness of the drawer's signature. Without it the check could not properly be paid by the plaintiffs. Their indorsement tended to divert the plaintiffs from inquiry and scrutiny, as it gave to the check the appearance of a genuine transaction, to the inception of which the defendants were parties. Their names upon the check were apparently inconsistent with any suspicion of a forgery of the drawer's name. But to the defendants, the presentation by a stranger or third party, of a check purporting to be drawn to their own order, which such third party proposed to negotiate for them for value, was a transaction which should have aroused their suspicions. It ought to have put them on inquiry for explanations; and if inquiry had been properly made it would have disclosed the fraud and prevented its success. The case finds that they acted in good faith. But that does not exclude such omission of due precautions as to deprive them of the right to throw the loss upon another party who acted in like good faith, and also without fault or want of due care. It is possible that the defendants may have received the check under circumstances which would exonerate them from the imputation of any actual fault or neglect. But the agreed statement fails to disclose any such explanation. A majority of the court are, therefore, of opinion that judgment must be for the plaintiffs, for the amount of the check and interest from the time it was paid." See Carpenter v. Northborough Nat. Bank, 123 Mass. 69.

87. First Nat. Bank v. Ricker, 71 Ill. 439.

from its obligation by showing that it paid the amount to others, who had not been authorized to receive it.[88]

SECTION XV.

ALTERATIONS OF CHECKS AFTER ISSUE.

§ 1658. The general principles as to alteration which apply to bills and notes, and which have been hereinbefore discussed, apply as well to checks. It was not long since seriously argued in the English Court of Appeal, Exchequer Division, that the alteration of the date of a check from the "2d" to the "26th" of March was not material, and that it was valid in the hands of a *bona fide* holder without notice, and who had been guilty of no negligence in taking it, and the inferior court had so held. The Court of Appeal overruled this decision, and held the check vitiated.[89] It not infrequently happens that a check genuine in its inception is altered after it leaves the hands of the drawer to a much larger amount; and that the bank, relying on the genuineness of the signature, pays such increased amount to the holder, and charges up the check in account with the drawer. The questions then arise: *First,* When and under what circumstances may the bank charge the drawer with the entire amount? and *second,* when may it recover back the amount in excess of the original and genuine amount from the party to whom it was paid?

As to the *first* question, as a general rule the bank can only charge the original amount against the drawer, for that limits the extent of his authority to it to pay out his deposit;[90] and if his check has been altered by any party, such alteration is a forgery of his name, for which he is by no means responsible, provided he afforded no opportunity for its commission.[91]

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88. Johnson v. First Nat. Bank, 6 Hun, 126. See also Talbot v. Bank of Rochester, 1 Hill, 295.

89. Vance v. Lowther, 1 Exch. Div. 176 (1876), 16 Moak's Eng. Rep. 583.

90. Robarts v. Tucker, 16 Q. B. 560; Smith v. Mercer, 6 Taunt. 76; Hall v. Fuller, 5 B. & C. 750, Bayley, J., said: "If, unfortunately, he (the banker) pays money belonging to the customer upon an order which is not genuine, he must suffer; and to justify the payment he must show that the order is genuine, not in signature only, but in every respect." Byles on Bills (Sharswood's ed.) [*323], 490; Chitty on Bills (13th Am. ed.) [*430], 485.

91. *Ante,* § 1344; City Nat. Bank v. Stout, 61 Tex. 567; National Bank v. Nolting, 94 Va. 267, 26 S. E. 826.

§ **1659. When checks carelessly drawn afford opportunity for alteration.**— But when the drawer has drawn his check in such a careless or incomplete manner that a material alteration may be readily accomplished without leaving a perceptible mark, or giving the instrument a suspicious appearance, he himself prepares the way for fraud, and then, if it is committed, he and not the bank should suffer. Thus, a depositor on leaving home gave his wife several checks signed in blank; and she filled up one for fifty-two pounds, two shillings, but began the word "fifty" with a small "f," and wrote it in the middle of a blank line; and also in writing the marginal figures, left a considerable space between the "£" mark and the figures "52." The check in this form was handed to her husband's clerk to get the money, and he, after inserting "three hundred" before the word "fifty," and "3" before the figures "52," presented it and drew three hundred and fifty-two pounds. It was held that the whole amount was chargeable against the drawer, as the careless drawing of the check had made the forgery easy and simple.[92] It has been thought that if the body of the check had been in the drawer's handwriting, and the additions had been made in a stranger's, the bank would have been put upon inquiry.[93] But the two different hands appearing in the case cited, the wife's and the clerk's, were not considered to have that effect; and it has been held in the United States that the difference in handwriting does not alter the question.[94]

§ **1660.** Sometimes the check is altered in other respects than in the amount after it has been issued by the drawer; as, for instance, in the name of the payee. In such cases the bank is not entitled to charge the check against the drawer, unless he drew the check so carelessly as to afford an opportunity for the fraud. Thus, in Massachusetts, two checks were filled up by the plaintiffs, payable to the order of two payees, and after being examined by the bookkeeper, they were sent to the post-office by a

92. Young v. Grote, 4 Bing. 253. The case of Bank of Commerce v. Union Bank, 3 N. Y. 230, might seem to conflict with this, but the alteration there was in words, and was not attributable to the drawer's negligence. The criticism upon this latter case made in Redfield & Bigelow's Leading Cases, 62, was afterward corrected in Bigelow on Estoppel, 435, note 2. National Bank v. Nolting, 94 Va. 267, 26 S. E. 826. See Cudahy Packing Co. v. National Bank, 21 C. C. A. 428, 75 Fed. 473.

93. Grant on Banking, 17, 18; Morse on Banking, 303.

94. Bank of Commerce v. Union Bank, 3 N. Y. 230; *ante*, § 1654.

clerk in sealed envelopes, addressed to the payees respectively. The clerk opened the envelopes, withdrew the checks, canceled the words "or order" in lead pencil, and inserted the words "or bearer" in ink, and then obtained the money for them from the bank. The court held that the depositors were clearly entitled to recover their deposit from the bank which had paid it out on the altered checks.[95] Thus, it seems that unless the drawer has made open the way for an alteration, the bank takes an altered check, whether the alteration be openly done, as in this case, or skilfully concealed, as in others, at its peril.[96] The words "or order" are frequently replaced by the words "or bearer," and the reverse. And the lesson of caution and prudence on the part of the bank cannot be too well learned or too closely followed. Its only safeguard is to scrutinize checks severely, and never to pay one at all mutilated in its appearance until after inquiry.

§ 1661. As to recovery of excess paid by the bank upon an altered check.— Where money is paid by the bank upon a "raised" or altered check by mistake, the general rule is that it may be recovered back from the party to whom it was paid, as having been paid without consideration; but if either party has been guilty of negligence or carelessness, by which the other has been injured, the negligent party must bear the loss. This doctrine is clear, and is sustained by authority. The bank is not bound to know anything more than the drawer's signature, and in the absence of any circumstance which inflicts injury upon another party, there is no reason why the bank should not be reimbursed.[97] Its certification of the check does not preclude it from showing an alteration;[98] nor does its teller's declaration, after he has examined it, that it is right in every particular.[99]

95. Belknap v. National Bank of North America, 100 Mass. 379.

96. Crawford v. West Side Bank, 100 N. Y. 54, citing the text.

97. Espy v. Bank of Cincinnati, 18 Wall. 614; Redington v. Wood, 45 Cal. 406; National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77, 55 Barb. 124; Bank of Commerce v. Union Bank, 3 N. Y. 230; Marine Nat. Bank v. National City Bank, 55 N. Y. 211, 59 N. Y. 67; Third Nat. Bank v. Allen, 59 Mo. 1; Parker v. Roser, 67 Ind. 500; First Nat. Bank v. State Bank, 22 Nebr. 767; Third Nat. Bank of New York v. Merchants' Nat. Bank, 76 Hun, 475, 27 N. Y. Supp. 1070.

98. Marine Nat. Bank v. National City Bank, 59 N. Y. 67. See *ante*, § 1606; Security Nat. Bank v. National Bank, 67 N. Y. 461.

99. Security Nat. Bank v. National Bank, 67 N. Y. 461; Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180, quoting text.

§ **1662.** In the transfer of bills, notes, and checks by the holder to another party, the very act of transfer makes the transferrer an implied warrantor of the genuineness of the instrument; and the transferee may recover on the instrument against the transferrer, as an indorser, if he indorses it; or may recover back the consideration, if he transferred it without indorsement.[1] But when the bank takes a forged check, its right of recovery does not seem to depend on any indorsement by the holder. It is its duty to know the drawer's signature. And if he takes a forged check from the holder (and he is not himself involved in the fraud), its right to recover back the amount is regarded as turning solely on the question whether or not the holder would be placed in a worse position than if payment had been refused. Such at least is the result of the authorities which recognize the right of the bank to recover.[2]

§ **1663. Bank not bound to know indorser's signature.**— A bank is not bound to know the signature of an indorser. And besides, the holder of the check, whether he indorses it or not, warrants the genuineness of all prior indorsements. Therefore, if the bank pay a check upon which the name of a prior indorser is forged, it may recover back the amount from the party to whom it was paid, or from any party who indorsed it subsequent to the forgery.[3] When the bank is in doubt as to the genuineness of an indorser's signature, it is entitled to demand a reasonable time for inquiry before making payment.[4]

There is no doubt that if the bank pays a check upon the forged indorsement of the payee's or special indorsee's name, the payee or such indorsee may recover back the amount, if the check had

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1. See §§ 672, 673, 731, 732, vol. I. Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 So. 440, 49 Am. St. Rep. 17.

2. *Ante*, § 1655.

3. Morse on Banking, 308, 310. See also Canal Bank v. Bank of Albany, 1 Hill, 287 (a bill); Commercial Exchange Bank v. Nassau Bank, 91 N. Y. 79. See *ante*, § 538, vol. I; Land Title & Tr. Co. v. Bank, 196 Pa. St. 230, 46 Atl. 420.

4. Robarts v. Tucker, 4 Eng. L. & Eq. 236, Maule, J.: "I conceive that if a bill were presented to a banker by a stranger, with an indorsement on it of a person necessary to make out the title, but unknown to the banker, the banker would be justified in refusing to pay at once." Parke, B.: "Probably, in such a case, the obligation would be to pay in a reasonable time."

been delivered to him; and the drawer may recover it back if he had not issued it.[5]

Cases have arisen in which checks have been paid on forged indorsement made by the person to whom the drawer delivered the check, mistaking his identity for one whose money is designated as payee; and when the person to whom the check has been delivered indorses it, and although it be a forgery of the name of the person to whom the bank took him to be, it has been considered that the bank should be protected in paying the check because the drawer was in fault in the first instance and the person who forged the instrument was the person to whom the drawer actually delivered the instrument.[6]

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5. Morgan v. Bank, 1 Duer, 434, 11 N. Y. 404; Dodge v. National Exchange Bank, 20 Ohio (N. S.) 246; Seventh Nat. Bank v. Cook, 73 Pa. St. 483; Pickle v. People's Nat. Bank (Tenn.), 12 S. W. 919, citing the text.

6. Land Title & Trust Co. v. Bank, 196 Pa. St. 230, 46 Atl. 420; Emporia Nat. Bank v. Shotwell, 35 Kan. 360, 11 Pac. 141. See also Maloney v. Clark, 6 Kan. 82; Robertson v. Colman, 141 Mass. 231, 4 N. E. 619, 55 Am. St. Rep. 471, note; United States v. National Exchange Bank, 45 Fed. 163; Bank of England v. Vagliano Bros., L. R., App. Cas. 107 (1891).

CHAPTER L.

BANK NOTES.

SECTION I.

DEFINITION, NATURE, AND FORMAL ELEMENTS OF BANK NOTES.

§ **1664.** Bank notes or bank bills (as they are equally as often called) are the promissory notes of incorporated banks, designed to circulate like money, and payable to bearer on demand.[1]

The terms "bank notes" and "bank bills" are of the like signification and for the purposes of interpretation, both in criminal and civil jurisprudence, are equivalent and interchangeable.[2]

In form and substance they are promissory notes, and they are governed by very many of the principles which apply to the negotiable notes of individuals given in the course of trade. But they are designed to constitute a circulating medium, and this circumstance imparts to them peculiar characteristics, and essentially varies the rules which govern promissory notes in general. They have been held not securities for money, but money itself.[3]

A bank bill may be described, in an indictment for uttering forged and counterfeited paper, as a promissory note.[4]

§ **1665.** Bank bills are usually made payable to bearer, though sometimes expressed to be payable to a certain person or bearer. But in effect the two forms are identical, and though the person named be incompetent to sue in one of the Federal courts of the United States, yet, if the bearer be competent he may sue; for a note payable to bearer is payable to anybody, and unaffected by the disabilities of the nominal payee.[5]

1. See 2 Parsons on Notes and Bills, 88.
2. Eastman v. Commonwealth, 4 Gray, 416; Low v. People, 2 Park. Cr. 37.
3. Southcot v. Watson, 3 Atk. 226.
4. Commonwealth v. Simonds, 14 Gray, 59; Commonwealth v. Thomas, 10 Gray, 483. But "silver certificates" of the United States may not be so described. Stewart v. State, 62 Md. 412.
5. Bank of Kentucky v. Wister, 2 Pet. 318.

§ **1666. Bank notes are invariably payable on demand.**— It is essential to enable them to circulate as currency, that they be redeemable in money at any time, and, therefore, they are made payable whenever demanded. Banks have often issued their notes payable at a future day, but such instruments are called "post notes," and are not bank notes in the accepted use of the term.

§ **1667. Style of execution.**— It would matter not upon what kind of paper the bank note was executed, or whether it were printed or written. But, being designed to circulate as money, they are generally printed on paper of fine fabric, and elaborated with vignettes and fanciful lettering, which, besides being ornamental, subserves the principal purpose of rendering counterfeits difficult. And private marks are often inserted in the texture of the paper, which enhance the facility of identification and the difficulties of forgery.

§ **1668. Issuing notes a common-law right.**— The privilege of issuing bank notes was, prior to the National Banking Act, regulated by statutes of the several States, and generally was confined to incorporated institutions, or persons acting under a general banking law; and none but such companies or persons could issue notes designed for the purposes of a circulating medium. But this restriction was purely statutory; for, in the absence of a statute, the right of banking pertains to every private citizen, and any one may issue his obligations in whatsoever form he pleases.[6]

§ **1669. How signed.**— The execution of bank notes should conform to the provisions of the statute authorizing their issue. They are usually required to be signed by the president and cashier of the bank, and when this is requisite, no note will be valid unless so signed. Where bank notes prepared for the official signatures were stolen from the bank's possession, and the signatures forged, it was contended that the negligence of the bank should render it liable for their payment. But it was held otherwise, because the crime had been committed after the notes had left the bank. Had they been complete when they were stolen, it would have been different.[7] If signed, but incomplete,

6. Morse on Banking, 1. As to the power of national banks to issue bills or paper credit to pass as money, see State v. Scougal, 3 S. Dak. 55, 51 N. W. 858, 44 Am. St. Rep. 756.

7. Gloucester Bank v. Salem Bank, 17 Mass. 1, 33.

at the time of the theft, it is conceived that they would not be binding on the bank.[8]

The date of bank notes is not evidence of the time they were issued, because they are often held by the bank for a long time after being prepared for circulation, and are constantly paid into the bank and reissued; and the date indicates rather the series to which the notes belong than the actual day of issue.[9] And it has been held that the figures denoting the number of the note are no part of the obligation, and that their alteration will not affect the rights of the holder if the proof shows the note to be genuine.[10]

§ **1670. Bankers' cash notes** are the promissory notes of bankers, and they were formerly called goldsmiths' notes, because the goldsmiths acted as bankers and gave these notes for money deposited with them. They are drawn like bank notes, payable to bearer on demand; and they generally pass as cash, and are legal tender, unless objected to. The use of checks upon deposits has to a great extent superseded them in England. They are so far like ordinary promissory notes that they may be indorsed, and then operate like bills drawn upon the bank. They are not money, like Bank of England notes; and if the bank has stopped payment when they are transferred, the loss is thrown upon the transferrer, unless the transferee, by laches, fails to present them, or to notify the transferrer that they are bad.[11]

§ **1671.** The *post notes* of a bank are promissory notes, payable on time, and yet designed to circulate as money. A bank authorized to issue paper for circulation may issue them;[12] and being issued for the purpose of circulating like money, they are subject to the rules which govern ordinary bank notes payable on demand, rather than to those which govern negotiable promissory notes;[13] and the rules of demand and notice do not apply to

8. See §§ 839, 840, 841, 842, vol. I, and notes.

9. Farmers & Mechanics' Bank v. White, 2 Sneed, 482; Greer v. Perkins, 5 Humphr. 588; Wright v. Douglas, 3 Barb. 554; Selfridge v. Northampton Bank, 8 Watts & S. 320; Long v. Bank, 81 N. C. 46, date immaterial; Note Holders v. Bank of Tennessee, 16 Lea, 46.

10. Note Holders v. Bank of Tennessee, 16 Lea, 46.

11. See on this subject Chitty on Bills [*522], 591.

12. Campbell v. Mississippi Union Bank, 6 How. (Miss.) 625.

13. Fulton Bank v. Phœnix Bank, 1 Hall, 562.

them.[14] But it seems that they are entitled to grace like other promissory notes.[15]

SECTION II.

HOW FAR BANK NOTES ARE SIMILAR TO MONEY.

§ **1672.** In an early case, it was said by Lord Mansfield, that bank notes "are not goods, nor securities, nor documents for debts, nor are so esteemed, but are treated as money — as cash in the ordinary course and transaction of business — by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payment as money or cash, * * * and are never considered as securities for money, but as money itself. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes."[16] These remarks, however, could only apply in their full significance to Bank of England notes, which, by statute, take the place of coin; for other bank notes, while in the ordinary transactions of business, taking the place of, and treated as, cash or money,[17] are nevertheless essentially distinguishable from it.

But they are so far money, in the usual acceptance of the word in common parlance, that they will pass by will bequeathing testator's money or cash;[18] and it has been said that a sheriff may receive them when current in discharge of an execution.[19] But this does not seem correct; and the officer who takes this responsibility acts at his own risk.[20]

In short, bank notes are not, legally speaking, money, but in a popular sense are often spoken of as money, and are conventionally used in its stead with the like effect.

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14. Key v. Knott, 9 Gill & J. 342.

15. Sturdy v. Henderson, 4 B. & Ald. 592; Chitty, Jr., on Bills, 1110; Staples v. Franklin Bank, 1 Metc. (Mass.) 43; Perkins v. Franklin Bank, 21 Pick. 483; Edwards on Bills, 522.

16. Miller v. Race, 1 Burr. 452; Tancil v. Seaton, 28 Gratt. 605.

17. Morrill v. Brown, 15 Pick. 173; Pierson v. Wallace, 2 Eng. (Ark.) 282; Edmunds v. Gigges, 1 Gratt. 359; Bullard v. Bell, 1 Mason, 243; Bayard v. Shunk, 1 Watts & S. 92; United States Bank v. Bank of Georgia, 10 Wheat. 333; Bradley v. Hunt, 5 Gill & J. 58.

18. Stuart v. Bute, 11 Ves. 662; Miller v. Race, 1 Burr. 457.

19. Scott v. Commonwealth, 5 J. J. Marsh. 643; Governor v. Carter, 3 Hawks, 328.

20. Armsworth v. Scotten, 29 Ind. 495.

§ **1672a. Bank notes not legal tender if objected to.**— Thus, it is a settled principle that current bank notes are a lawful tender in payment of debts, unless objected to because they are not money. But if, when tendered in discharge of any contract for the payment of money, the creditor objects to receiving them, because they are not money, the tender is unavailable, and he may insist on payment in the current coin.[21] And when judgment has been obtained for the payment of money, bank notes are not ordinarily so far cash or legal tender that they may be brought into court and tendered in satisfaction.[22]

§ **1673. Instruments payable in bank notes not negotiable.**— The difference between bank notes and money is again observable in the cases which maintain that a bill or note payable in bank notes is not negotiable, for its medium of payment has no fixed value.[23] In England, it has been held that a promissory note is not negotiable, even though it be payable in Bank of England notes; but in the United States a note payable in legal-tender notes would doubtless be considered negotiable.[24]

§ **1673a. May be taken in execution.**— By statute in England, and in most of the United States, bank notes may be taken in execution. At common law they could not be; but by custom in this country, it would seem that the common law has been changed, and that they may be taken in execution, or on attachment or garnishee process.[25]

§ **1674. Bank notes are negotiable like money,** and pass from hand to hand by delivery, possession in itself being sufficient evidence of title. This doctrine was established in the leading case of Miller v. Race,[26] where a bank note, payable to bearer, was stolen from the mail, and on the next day was acquired by the plaintiff for full value, in the usual course of business, and with-

21. Jefferson County Bank v. Chapman, 19 Johns. 322; Thomas v. Todd, 6 Hill, 340; Morse on Banking, 397; Wright v. Reed, 3 T. R. 554; Owenson v. Morse, 7 T. R. 64; Codman v. Lubbock, 5 Dowl. & R. 289; Chitty on Bills [*522], 524.

22. Armsworth v. Scotten, 29 Ind. 495; Hallowell, etc., Bank v. Howard, 13 Mass. 235; Coxe v. State Bank, 3 Halst. 172.

23. See chapter I, § 55 *et seq.*, vol. I.

24. See *ante*, § 57, vol. I.

25. Spencer v. Blaisdell, 4 N. H. 198; Morrill v. Brown, 15 Pick. 173; Wildes v. Nahant Bank, 20 Pick. 352; Lovejoy v. Lee, 35 Vt. 430.

26. 1 Burr. 452.

out any notice of the circumstance. The bank clerk detained the note when presented for payment; and it was held that the plaintiff could recover it, because such notes were universally treated as cash, and it was necessary for the purposes of commerce that their currency should be established and secured. These views are now universally entertained. It may be observed also, that while the finder of a bank note acquires no title as against the owner, he has such a possessory interest in it, as to enable him to recover it from a depositary, to whom he has confided its care, in the absence of any claim by the rightful owner; but he must show its genuineness, and the value claimed.[27]

SECTION III.

LIABILITY OF TRANSFERRER OF BANK NOTES.

§ **1675. Transfer warrants genuineness, but not solvency.**— Bank notes being payable to bearer are transferred by mere delivery; and although it has been thought that the transferrer may indorse them, with like effect as the indorsement of other negotiable promissory notes,[28] it would be exceedingly singular to do so, for bank notes are in their nature designed to circulate like money, not upon the credit of the transferrer, but upon their own credit as obligations redeemable in money at any time. Being used as money, it is quite clear and well settled that the person who transfers a bank note in payment of a debt, or otherwise for value in the course of business, warrants it, in like manner as his transfer imports a warranty of current coin, that is, that it is genuine, and not counterfeit. If it be counterfeit and spurious, it is not what his very act of transfer represents it to be. It is a mere nullity, instead of money or cash; and the debt remains undischarged.[29]

But the party who receives counterfeit bank notes is not without a duty on his part. In order to recover the debt for which

27. Tancil v. Seaton, 28 Gratt. 601 (1877). See also New York, etc., R. Co. v. Haws, 56 N. Y. 175 (1874); Bridges v. Hawkesworth, 7 Eng. C. L. & Eq. 424.

28. Corbet v. Bank of Smyrna, 2 Harr. 235; Thompson on Bills (Wilson's ed.), 123.

29. Pindall v. N. W. Bank, 7 Leigh, 617; Ramsdale v. Horton, 3 Pa. St. 330; Young v. Adams, 6 Mass. 182; Markle v. Hatfield, 2 Johns. 455; Mudd v. Reeves, 2 Harr. & J. 368; Edmunds v. Digges, 1 Gratt. 359; Eagle Bank v. Smith, 5 Conn. 71; Jones v. Ryde, 5 Taunt. 488. See § 731 *et seq.*, vol. I.

they were given in payment, or receive genuine notes in their stead, he must exercise diligence, by giving notice that they are counterfeit, and offering to return them within a reasonable time.[30] And what such reasonable time is must depend upon all the facts and circumstances of each particular case.[31] If the forgery be discovered immediately, the transferrer should be notified immediately; for he may have recourse against some antecedent transferrer, and lose his opportunity of asserting it by delay. A delay by the transferee for six months, after discovering that bank notes were counterfeit, to give notice, has been held unreasonable, and to forfeit his right of restitution;[32] and so a delay from May 25th to the 4th of July following;[33] so a delay for four months, where the parties resided within one hundred miles from each other;[34] and even as short a delay as fifteen days, where a bank received its own notes upon which the name of its president was forged.[35]

§ **1676. As to the warranty of solvency of the bank,** by the transferrer of its notes, a more difficult question is presented. The parties may, of course, bind themselves by any express agreement which they may choose to make. If the transferrer represents or warrants that the notes are worth par, he is responsible if it turn out otherwise;[36] and if the transferee stipulates that the risk shall be taken by himself, he cannot recover of the transferrer, if they turn out to be worthless.[37] But when bank notes are offered and received in payment of a prior debt, or in exchange for goods, or other notes, the courts differ as to the implied contract of the parties.

§ **1676a. View that transferrer warrants solvency of the bank.**— Many judges and jurists hold that the risk of the solvency of a bank lies upon the transferrer, upon the ground that the transfer

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30. See *ante*, § 1371.

31. Simms v. Clark, 11 Ill. 137.

32. Raymond v. Baar, 13 Serg. & R. 318.

33. Thomas v. Todd, 6 Hill, 340.

34. Pindall v. N. W. Bank, 7 Leigh, 617.

35. Gloucester Bank v. Salem Bank, 17 Mass. 44.

36. Commonwealth v. Stone, 4 Metc. (Mass.) 43; Corbet v. Bank of Smyrna, 2 Harr. 235; Gilman v. Peck, 11 Vt. 516; Alrich v. Jackson, 5 R. I. 218; Hellings v. Hamilton, 4 Watts & S. 462; Wainwright v. Weber, 11 Vt. 576; Frontier Bank v. Morse, 22 Me. 88.

37. Story on Promissory Notes, § 389.

imports that the notes are redeemable on demand at the bank; and that if they are not redeemed because of the bank's insolvency, the transferrer should redeem them himself. And also upon the ground that it is equitable for the loss to fall on the party who held the notes when the loss occurred.[38]

§ 1677. View that transferrer does not warrant solvency of the bank.— On the other hand, high authorities consider that the transferrer warrants nothing but the genuineness of the bank notes, and that the risk of their value is upon the transferee.[39] And this seems to us the correct view, whether they are transferred in payment of a prior debt,[40] or contemporaneously in exchange

38. Lightbody v. Ontario Bank, 11 Wend. 9, 13 Wend. 101; Houghton v. Adams, 18 Barb. 545; Harley v. Thornton, 2 Hill (S. C.), 509; Fogg v. Sawyer, 9 N. H. 365; Gilman v. Peck, 11 Vt. 516; Thomas v. Todd, 6 Hill, 340; Westfall v. Braley, 10 Ohio St. 188; Frontier Bank v. Morse, 22 Me. 88; Townsends v. Bank of Racine, 7 Wis. 185; 2 Parsons on Notes and Bills, 102–105, 191–195, 197; Williams v. Smith, 2 B. & Ald. 496. As to English rule, see § 1679*a*.

39. Bayard v. Shunk, 1 Watts & S. 92; Edmunds v. Digges, 1 Gratt. 359; Lowery v. Murrell, 2 Port. 286; Corbet v. Bank of Smyrna, 2 Harr. 235; Ware v. Street, 3 Head, 609; Scruggs v. Gass, 8 Yerg. 175; Morse on Banking, 421, 422. See *ante*, § 737 *et seq.*, vol. I.

40. Bayard v. Shunk, 1 Watts & S. 92. In this case the plaintiff's attorney received bank notes in payment of a judgment, both parties being ignorant of the failure of the bank which occurred several days previous. The notes were worthless, but the payment was held good, Gibson, C. J., saying: "The assertion that it is always an original and subsisting part of the agreement that a bank note shall turn out to have been good when it was paid away, can be conceded no further than regards its genuineness. That genuine notes are supposed to be equal to coin is disproved by daily experience, which shows that they circulate by the consent of the whole communities at their nominal value when notoriously below it. But why hold a payor responsible for a failure of the bank only when it has been ascertained at the time of the payment, and not for insolvency ending in an ascertained failure afterward? As the bank may have been actually insolvent before it chose to let the world know it, we must carry his responsibility back beyond the time when it ceased to redeem its notes, if we carry it back at all. Were it not for the conventional principle that the purchaser of a chattel takes it with its defects, the purchaser of a horse, with the seeds of mortal disease in him, might refuse to pay for him, though his vigor and usefulness were yet unimpaired; and if we strip a payment in bank notes of the analogous cash principle, why not treat it as a nullity, by showing that the bank was actually, although not ostensibly, insolvent at the time of the transaction? It is no answer to say the note of an unbroken bank may be instantly converted into coin by presenting it at the counter. To do that may require a journey from Boston to New Orleans, or between places still farther apart, and the

for goods or other bank notes.[41] When they are offered in payment, they are offered (and if received, receipted for) as money or cash. And the transferee takes them of his own free will, and

bank may have stopped in the meantime; or it may stop at the instant of presentation, when situated at the place where the holder resides. And it may do so even when it is not solvent at all, but perfectly able eventually to pay the last shilling. This distinction between previous and subsequent failure, evinced by stopping before the time of the transaction or after it, is an arbitrary and impracticable one. To such a payment we must apply the cash principle entire, or we must treat it as a transfer of negotiable paper, imposing on the transferee no more than the ordinary mercantile responsibility in regard to presentation and notice of dishonor. There is no middle ground. But to treat a bank note as an ordinary promissory note would introduce endless confusion, and a most distressing state of litigation. We should have reclamations through hundreds of hands, and the inconvenience of having a chain of disputes between successive receivers would more than counterbalance the good to be done by hindering the crafty man from putting off his worthless note to an unsuspecting creditor. No contrivance can prevent the accomplishment of fraud, and rules devised for the suppression of petty mischiefs have usually introduced greater ones. The case of a counterfeit bank note is entirely different. The laws of trade extend to it only to prohibit the circulation of it. They leave it, in all besides, to what is the rule both of the common and the civil law, which requires a thing parted with for a price to have an actual, or at least a potential, existence (2 Kent, 468), and a forged note, destitute as it is of the quality of legitimate being, is a nonentity. It is no more a bank note than a dead horse is a living one; and it is an elementary principle that what has no existence cannot be the subject of a contract. But it cannot be said that the genuine note of an insolvent bank has not an actual and legitimate existence, though it be little worth; or that the receiver of it has not got the thing he expected. It ceases not to be genuine by the bank's insolvency; its legal obligation as a contract is undissolved; and it remains a promise to pay, though the promisor's ability to perform it be impaired or destroyed. But as the stockholders of a broken bank are the last to be paid, it is seldom unable in the end to pay its note holders and depositors; and even where nothing is left for them, its notes may be parted with at a moderate discount to those who are indebted to it. We seldom meet with so bad a case as the present, in which everything like effects, and even the vestiges of the bank, disappeared in a few hours after the first symptoms of its failure. But, independent of that, the difference between forgery and insolvency in relation to the transfer of a bank note, is as distinctly marked as the difference between title and quality in relation to the sale of a chattel." Lowrey v. Murrell, 2 Port. 280.

41. In Edmunds v. Digges, 1 Gratt. 359, it appeared that Digges, the sheriff of Fauquier county, Virginia, was starting to Richmond to deposit $400 in notes of the Virginia banks, when Edmunds applied to him to exchange them for the same amount in notes of the Mechanics' Bank of Alexandria. Digges first objected, but finally consented. On that very day the Mechanics' Bank stopped payment. It was held, that Digges could not re-

with his eyes open. If he does not choose to take them, he may refuse to do so, or he may require that their payment shall be guaranteed. And if, under such circumstances, he receives them unconditionally, we can perceive no more propriety in allowing him to return them, if the bank is totally or partially insolvent, than in allowing the purchaser of goods to return them, and demand back his money or cash, when it turns out that their market price was much less than the price he paid, or that they were in fact without any market value at all.

§ **1678. Exception to general rule.**— There is properly excepted from these conclusions all cases in which the transferrer knows of the insolvency of the bank at the time of the transfer, and the transferee does not. And this exception does not arise from the contract of the parties, but is rather referable to considerations of fraud. To conceal from the transferee that the notes are wholly or partially worthless, when they are passed as money, would be in violation of good faith and fair dealing, and the transferee would justly be entitled to recover against the transferrer.[42] But in all other cases, the conclusion that the risk is upon the transferee seems to us clearly logical, and any other involves inextricable complications. The bank may be deemed insolvent, and yet may finally redeem its notes at par; or it may be only partially insolvent, and redeem them in part. Such cases differ essentially from the transfer of forged notes and counterfeit coin, which are nullities; for while it is true that the metal of counterfeit coin

cover from Edmunds, but must bear the loss, and said Baldwin, J.: "The court is of opinion that there is no implied warranty of the value of the current money of the country, passing from hand to hand in the course of trade, commerce, and business. This is true, not only of the money made by law a good tender in the payment of debts, and performance of contracts, but is equally so in regard to the notes of banks and bankers, payable to bearer, and circulated by delivery. These are not merely the representative of money, but in the course of business and by common usage are substantially employed and treated by most persons as actual money or cash. * * * Those who circulate them are not understood as thereby giving any assurance of the credit, punctuality, or solvency of the makers, in regard to all of which the receiver exercises his own judgment, or relies upon that of others in whom he has confidence. There is but a single guaranty which those who circulate the money of that or any other kind can be understood to give, to wit, that it is what it purports to be, genuine, and not counterfeit."

42. Thompson on Bills (Wilson's ed.), 123; Camidge v. Allenby, 6 B. & C. 373, 9 Dowl. & R. 391; Penn v. Harrison, 3 T. R. 759. See chapter XXII, on Transfer by Assignment, § 736, vol. I.

has, as has been suggested, some value,[43] such bogus currency never has any legal value as currency, whereas all genuine bank notes generally have some value as bank notes.[44] Nor is payment in bank notes analogous to payment in the promissory notes of an individual payable in future. The latter, when passed without indorsement for an antecedent debt, are regarded by some authorities as conditional payment only, and if not paid, they hold that the debt revives. Even if this be correct (and we think otherwise),[45] it is because they are not offered as cash, or its representative.[46] But bank notes are presumed to be offered as cash, and are legal tender unless objected to; and for this reason the very opposite presumption, that they were received in absolute payment, would arise.

§ **1679. Duty of transferee when transferrer warrants solvency of bank.**— Where the view obtains that the transferrer warrants the solvency of the bank which issued the note, that warranty is not regarded as so absolute and unconditional as to require no duty on the part of the transferee. If, for instance, the note would have been paid if punctually presented after the transfer, but the holder neglected for a considerable time to present it, and when he finally did so, the bank had failed, the loss would then fall on the transferee, who, by diligence, might have prevented it. The principle is, that the transferee must either put the note in circulation, or he must present it within a reasonable time at the counter of the bank, and notify the transferrer within a reasonable time if, by reason of insolvency, it is not paid; and what is "reasonable time" is a question for the court to determine under all the circumstances of the case.[47]

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43. Fogg v. Sawyer, 9 N. H. 365, Parker, C. J.; 2 Parsons on Notes and Bills, 193, note *m*.

44. Bayard v. Shunk, 1 Watts & S. 92, Gibson, C. J.

45. See § 740, vol. I.

46. Ibid.

47. In Camidge v. Allenby, 6 B. & C. 373, 6 Dowl. & R. 39, Bayley, J., said: "Then the question is, what was it the duty of the plaintiff to do in order to obtain payment of these notes (banker's cash notes)? They were intended for circulation. But I think that he was not bound immediately to circulate them, or send them into the bank for payment; but he was bound, within a reasonable time after he had received them, either to circulate them or to present them for payment. Now here it is conceded that, if there had not been any insolvency of the bankers, the notes should have been circulated or presented for payment on Monday" (the next business day after they were

§ **1679a. Rule in England.**— In England, the view is taken that if the bank be insolvent at the time of transfer, the loss is upon the transferrer; but the transferee must, in order to recover, present the notes at the bank immediately or pass them off in circulation.[48]

SECTION IV.

RIGHTS, DUTIES, AND REMEDIES OF THE HOLDER OR OWNER OF BANK NOTES.

§ **1680.** Mere ownership being sufficient *prima facie* evidence of *bona fide* ownership for value of a bank note, the holder may enforce its payment, unless his position as a *bona fide* holder be

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received). * * * "If presentment was unnecessary, he (the holder) had another duty to perform. * * * The law requires that the party on whom the loss is to be thrown shall have notice of nonpayment, in order to enable him to exercise his judgment whether he will take legal measures against other parties to the bill or note." 2 Parsons on Notes and Bills, 197.

48. Owenson v. Morse, 7 T. R. 64; Beeching v. Gower, Holt N. P. 313; Ward v. Evans, 12 Mod. 521; Camidge v. Allenby, 6 B. & C. 373; Williams v. Smith, 2 B. & Ald. 496; Timmins v. Gibbons, 18 Q. B. 722, 14 Eng. L. & Eq. 64; Rogers v. Langford, 1 Cromp. & M. 637; Turner v. Stones, 1 Dowl. & L. 122. The plaintiff in this case changed, late on Saturday, a five-pound note for defendant. The bank had then virtually stopped payment. Held, that the loss was the transferrer's. In England, this question has been presented in cases of bankers' cash notes, which differ from ordinary bank notes; and a distinction has been taken by Bayley, J., in Camidge v. Allenby, 6 B. & C. 373, between prior and contemporaneous debts. Corn was sold to defendant on the morning of September 10th; and in the afternoon the banker's cash notes were delivered, and proved bad, the bank having stopped payment. Bayley, J., said: "If the notes had been given to the plaintiff at the time when the corn was sold, he could have no remedy upon them against the defendant. The plaintiff might have insisted on payment in money. But if he consented to receive them as money, they would have been taken by him at his peril. Here the notes were given to him in payment subsequently, and the question is whether they operate as a discharge of the debt due to the plaintiff." The case seems to have been decided on the ground of laches in reporting that the notes were bad. But this distinction was not assented to. The other judges considering that, if the notes were money, they were payment; if common promissory notes, there was negligence. And Littledale, J., said: "I think that there is no guaranty implied by law in the party passing a note payable on demand to bearer that the maker is solvent at the time when it is so passed." Lord Campbell, in Timmins v. Gibbons, 18 Q. B. 722, says he could never see any distinction between the cases of prior and contemporaneous debts, for even in payments over the counter some time must elapse between the debt and payment, which makes the debt a precedent one.

successfully combated. It will not be a sufficient defense to show that the holder was negligent in inquiry when he received it, and that he took it under circumstances which would excite the suspicions of a man of ordinary prudence.[49] In the case of bills of exchange and negotiable promissory notes the same principle prevails; but when it is shown that such a bill or note was lost or stolen, or obtained by fraud or felony, the burden of proof is shifted upon the holder, who must show in answer that he acquired it *bona fide* in the usual course of business, and without notice.[50] But in favor of the holder of a bank note the law goes a step further, and to exonerate him from any such burden. And he can rest secure in its possession, as the evidence of his right to recover, until the defendant shows that he was in privity with the fraud, or acquired the note *mala fide,* or with notice.

This distinction between bank notes and other negotiable instruments is not admitted in England;[51] but in the United States it is upheld by high authority,[52] and seems to us clearly the correct doctrine. Bank notes pass as cash, and are seldom identified by any peculiar earmarks; and it is next to impossible for a trader to remember where, or when, or from whom, or for what consideration, he received any particular bank notes in his cash drawer. And to require him to do so would be an intolerable burden.

§ **1680a. The holder is, in fact, regarded as in effect the original promisee of the bank,** and not as taking by assignment only the title of the transferrer; and a payment to him by the bank will discharge the debt, unless it knows, or has reason to know, that he acquired the note by fraud,[53] or with notice of fraud on the part of his transferrer, which equally impeaches his title.[54]

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49. Raphael v. Bank of England, 17 C. B. 161, 33 Eng. L. & Eq. 276; Solomons v. Bank of England, 13 East, 135; Lowndes v. Anderson, 13 East, 130; City Bank v. Farmers' Bank, Taney C. C. Dec. 119.

50. See § 810 *et seq.*, vol. I.

51. De La Chaumette v. Bank of England, 9 B. & C. 208, where it was held, that the holder of a bank note which had been stolen must show that he had given value for it. See also Solomons v. Bank of England, 13 East, 135.

52. Worcester County Bank v. Dorchester, etc., Bank, 10 Cush. 488; Wyer v. Dorchester, etc., Bank, 11 Cush. 51; Louisiana Bank v. Bank of the United States, 9 Mart. 398. See Crawford v. Royal Bank, Ross Lead. Cas. 299; Morse on Banking, 416; 2 Parsons on Notes and Bills, 93, 281–283.

53. New Hope, etc., Bridge Co. v. Perry, 11 Ill. 467.

54. Olmstead v. Winstead Bank, 32 Conn. 278.

§ 1681. Usual course of business.— The bill-holder, in order to enjoy the full privileges of a *bona fide* holder for value, must have acquired the bills in the usual course of business; and if they have been pledged to him as collateral security by the bank, with the understanding that they are not to be put in circulation, they are not currency, and the holder stands merely in the position of an ordinary creditor.[55]

The holders of bank notes have no preferred claim to the assets of the bank over other creditors, unless it be accorded them by statute;[56] but this is sometimes done in order to stimulate their credit as a circulating medium.[57] But, in other cases, statutes specially provide that all creditors not having specific liens shall stand on the same footing and share the assets ratably.[58]

§ 1682. Amount of recovery.— The holder is entitled to recover of the bank the full amount of the bank note, or to receive a proportionate share of its assets, without regard to the amount which he gave for it.[59] Such seems to be the accepted doctrine and true principle of the question, in the absence of any statutory provision. But the view has been taken, in allotting the assets of an insolvent bank, that the bill-holders should receive amounts proportioned to the sums actually paid for the bills.[60]

The holder may also be entitled to recover interest. But interest does not run upon bank notes from their date,[61] which we have already seen is not a true index of the time at which they were issued; but only from the time at which demand of payment was made at the banking-house, or other place, if it were specified. For then alone did the bank become in default.[62] Such is the current of authority, and it matters not that the note is not expressed to be payable "with interest;"[63] but it has been held that

55. Davenport v. City Bank, 9 Paige, 12.

56. Cochituate Bank v. Colt, 1 Gray, 382.

57. Morse on Banking, 418.

58. Robinson v. Gardiner, 18 Gratt. 509; Exchange Bank v. Knox, 19 Gratt. 739.

59. Robinson v. Beall, 26 Ga. 17; Morse on Banking, 398.

60. Griffin v. Central Bank, 3 Kelly, 371; Collins v. Central Bank, 1 Kelly, 435.

61. Ringo v. Trustees, 8 Eng. 583.

62. Bank of Kentucky v. Thornsberry, 3 B. Mon. 519; Bank Commissioners v. Lafayette Bank, 4 Edw. Ch. 287.

63. Estate Bank of Pennsylvania, 60 Pa. St. 471.

interest runs from the date of suspense of specie payments when a bank has failed.[64] Incidental damages are not allowed.[65]

§ **1683. Bank notes do not become overdue.**— Bank notes do not grow stale by mere lapse of time, as do other species of negotiable instruments. Indeed, it is generally to the interest of the bank that they should remain in circulation, and they are designed for the very purpose of being a continuing circulating medium. Therefore, they do not become overdue or liable to any equities between the bank and subsequent holders, but the bank is absolutely bound to pay them on presentment by the bearer at any distance of time.[66] They are not barred (in general) like ordinary promissory notes, by Statutes of Limitation.[67] And they are not *functi officio* when once redeemed by the bank, but, unlike ordinary promissory notes, are designed to be reissued again and again.[68] These seem to us correct doctrines, and are sustained by the authorities cited. But it has been held that bank notes may be protested for nonpayment, and that a party acquiring them after dishonor, whether he knows of the dishonor or not, is subject to equities.[69]

§ **1684. How far Statutes of Limitation are applicable to bank notes.**— While the general rule is that Statutes of Limitation do not apply to bank bills, because they are by the consent of mankind and course of business considered as money, and that their date is no evidence of the time when they were issued, as they are being continually returned to and reissued by the bank; yet if the bills have ceased to circulate as currency, and have ceased to be taken in and reissued by the banks, they no longer have that distinctive character from other contracts, which excepts them from the operation of the Statutes of Limitation.[70]

§ **1685. Presentment and demand.**— Ordinarily the debtor must seek his creditor, and pay the debt; and if he does not, the latter may sue without any previous demand, the suit being deemed in itself a demand. The same principle (as has been held) prevails

64. Atwood v. Bank of Chillicothe, 10 Ohio, 526.

65. Bank of St. Mary's v. St. John, 25 Ala. 566.

66. Bullard v. Bell, 1 Mason, 243; Solomons v. Bank of England, 13 East, 135.

67. 2 Parsons on Notes and Bills, 95; Morse on Banking, 402.

68. 2 Parsons on Notes and Bills, 95.

69. Burroughs v. Bank of Charlotte, 70 N. C. 284.

70. Kimbro v. Bank of Fulton, 49 Ga. 419.

as to bank notes, which are generally made payable at the counter of the bank, or some one of its branches, at specified places; but if the bank tenders the amount in court, and shows that it was ready and willing to have paid at the place named, then it is not liable for interest or costs.[71] There is authority, however, for the doctrine that demand at the place named must be averred and proved to sustain a suit on a bank note.[72] And this doctrine is certainly reasonable and well founded, as is shown in a recent work on Bills and Notes.[73] When no place of payment is specified in the bank note, the demand should be made at the bank, where it is to be presumed that provision has been made for its payment; but if another place be specified, demand should be made there, and not at the bank.[74]

Demand should be made during the usual hours of business, according to the custom of banks; for at their termination the bank has a right to close its doors. But if bills were presented just before the end of business hours for redemption, the bank could not excuse itself by showing that there were so many that the transaction could not have been completed before the closing hour arrived.[75]

§ **1686.** Each bank note being a separate debt, the bank may treat it as such in determining in what description and denomina-

71. Haxtun v. Bishop, 3 Wend. 13; Bank of Niagara v. McCracken, 18 Johns. 495 (qualified in Jefferson Bank v. Chapman, 19 Johns. 322); Bryant v. Damariscotta Bank, 18 Me. 240; Caldwell v. Cassidy, 8 Cow. 271; State Bank v. Van Horn, 1 South. 382; Greer v. Perkins, 5 Humphr. 588.

72. Doughty v. Western Bank, 13 Ga. 287; Hinsdale v. Larned, 16 Mass. 68 (*semble*); Tower v. Appleton Bank, 3 Allen, 387 (*semble*); Bank of Memphis v. White, 2 Sneed, 482; Thurston v. Wolfborough Bank, 18 N. H. 391; Wilks v. Robinson, 3 Rich. 182. In Kentucky it must be made, but need not be averred. Bank of Kentucky v. Hickey, 4 Litt. 225.

73. In 2 Ames on Bills and Notes, 61, it is said: "It is a noteworthy fact that the notion that negotiable paper, payable on demand, is payable without a demand, is traceable to the decisions in Capp v. Lancaster, Cro. Eliz. 548; Rumball v. Ball, 10 Mod. 38; Collins v. Denning, 3 Salk. 227, in which cases, however, the instruments declared on were not negotiable, and where, accordingly, the rule that the debtor must seek the creditor was properly applied. The absurdity of applying this rule to any negotiable paper is sufficiently obvious, and in the case of bank notes is so glaring that the courts have felt obliged to make an exception to the rule, and to hold that a bank note is not payable without a demand."

74. King v. Dedham Bank, 15 Mass. 447; Ware v. Street, 2 Head, 609.

75. Suffolk Bank v. Lincoln Bank, 3 Mason, 1; People v. State Treasurer, 24 Ill. 433.

tions of coin payment may be legally tendered;[76] but the notes may be presented in packages by the holder, it not being necessary that he should make separate presentment of each note.[77] The demand being made, it is the duty of the bank to respond to it with reasonable promptness, without employing devices, such as the slow and minute inspection of each bill, or other unnecessary formalities, to secure delay; and if it be evident that such means are used to delay or evade payment, the bank will be regarded as having refused payment.[78]

§ **1687. Remedies against finder.**— Trover will lie against the finder of bank notes by the owner.[79] But assumpsit will not lie against the finder for money had and received, unless the bank notes found have been turned into money.[80] In England it has been held that assumpsit will lie for country bank notes, and checks even, which have been treated like money.[81] And when money may be presumed to have been actually received upon negotiable notes, or other securities, the action of assumpsit may in general be maintained.[82] The identity of the note must be clearly made out.[83] If the finder has passed the note to a *bona fide* transferee for value, the owner cannot recover against such transferee.[84]

§ **1688. Bank receiving its own counterfeit notes.**— If a bank receive in payment or on deposit counterfeit bank notes purporting to be of its own issue, the person who innocently pays or deposits them is not liable.[85] "The true rule is that the party re-

76. Boatman's Savings Institution v. Bank of Missouri, 33 Mo. 497.

77. Reapers' Bank v. Williard, 24 Ill. 433.

78. Ibid.; People v. State Treasurer, 4 Mich. 27; Suffolk Bank v. Lincoln Bank, 3 Mason, 1.

79. Noyes v. Price, Chitty on Bills [*524], 593; Mason v. Warte, 17 Mass. 560; 2 Parsons on Notes and Bills, 93, note.

80. Ainslie v. Wilson, 7 Cow. 662; Kellogg v. Budlong, 7 How. (Miss.) 340; Houx v. Russell, 10 Mo. 246; Muir v. Rand, 2 Ind. 291; Murray v. Pate, 6 Dana, 335; Mason v. Waite, 17 Mass. 560; Arms v. Ashley, 4 Pick. 71.

81. Spratt v. Hobhouse, 4 Bing. 173, 12 J. B. Moore, 395; Pickard v. Bankes, 13 East, 20. Perhaps the receipt of their value may be presumed. Longchamp v. Denny, 1 Doug. 137.

82. Spratt v. Hobhouse, *supra;* M'Lachlan v. Evans, Yonge & J. 380; Hatten v. Robinson, 4 Blackf. 479; Tuttle v. Mayo, 7 Johns. 132; Muir v. Rand, 2 Ind. 291.

83. Miller v. Race, 1 Burr. 452.

84. Miller v. Race, 1 Burr. 452; Anon., 1 Salk. 162.

85. United States Bank v. Bank of Georgia, 10 Wheat. 333.

ceiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent, and negligence will defeat his right of action. This principle will apply to all cases where forged notes have been received, but certainly with more strength when the party receiving them is the one purporting to be bound to pay. For he knows better than any other, whether they are his notes or not; and if he pays them or receives them in payment, and continues silent after he has sufficient opportunity to examine them, he should be considered as having adopted them as his own.[86]

SECTION V.

PAYMENT IN BANK NOTES, AND SET-OFF.

§ 1689. Nothing but money being a positive legal tender, bank notes are not by the common law a valid tender, even in payment of debts due to the bank itself, by their holder.[87] But, by statute in many of the States, the banks are required to receive their own notes in payment.[88] But although a statute may require that the bank shall receive its notes in payment of debts due to it, yet if the bank make an assignment to trustees of all its debts and assets for the equal benefit of its creditors, the weight of authority is to the effect that bank notes acquired after and with notice of the assignment, are not a valid tender to the assignee. The statute, as it is said, no longer applies, for the debt is then not due to the bank, but to the assignee.[89] But the contrary view has been taken in some cases, and impressed with a force of logic which seems to us unanswerable.[90]

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86. Gloucester Bank v. Salem Bank, 17 Mass. 133.

87. Coxe v. State Bank, 3 Halst. 172; Hallowell, etc., Bank v. Howard, 13 Mass. 235; Suffolk Bank v. Lincoln Bank, 3 Mason, 1; Morse on Banking, 397; 2 Parsons on Notes and Bills, 91.

88. Exchange Bank v. Knox, 19 Gratt. 746; Niagara Bank v. Roosevelt, 9 Cow. 409; Moise v. Chapman, 24 Ga. 249; Dunlap v. Smith, 12 Ill. 399; Union Bank v. Ellicott, 6 Gill & J. 363.

89. Exchange Bank v. Knox, 19 Gratt. 746; Housum v. Rogers, 40 Pa. St. 190; Saunders v. White, 20 Gratt. 327; Farmers' Bank v. Goddin, 19 Gratt. 739.

90. Blount v. Windley, 68 N. C. 2 (1873). In 1866, the assets of the Bank of Washington were placed by order of court in the hands of a commissioner for the benefit of creditors. The commissioner, Blount, obtained judgment against Reddett, and Windley, as his surety, for $1,735.50, and execution issued. Windley, subsequent to issue of execution, obtained bills of the bank, and tendered them in payment. It was held a good tender; that the bank

§ **1690.** The time when the bank is compellable to receive its own notes in payment, or to allow them as assets, ceases, according to the view of Mr. Morse, a discriminating writer,[91] when the note ceases to pass as current money, and are only subjects of traffic on special terms. And this criterion is supported by strong considerations; for the holder who receives them under such circumstances is conscious, from the mere fact of their depreciated value, that the bank is not regarded as solvent. Where the bank has closed its doors, and suspended business altogether, it is clear that the taker of its notes, with knowledge of such circumstances, could not avail of them as tender or as offsets;[92] but it has been held that the mere suspension of specie payments would not have the like effect, as it might indicate a mere temporary embarrassment, and not an absolute deficiency of assets.[93] When there has been an assignment made by the bank to trustees, the taker, with knowledge thereof, could not, as we have already seen by some authorities, plead the notes as offsets, or tender them in payment.[94]

§ **1691.** As long as a bank is solvent there is no doubt that a debtor is entitled to plead as offsets any of its notes of which he is the holder, according to principle, and to the weight of adjudicated cases,[95] although the contrary view has been taken in Massa-

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was bound by the very fact of issuing a currency to receive it in payment; that the Legislature could not deprive the holder of this right, which was part of the obligation of the contract of the bank, nor could the bank deprive him of it by an assignment of its effects, The court said, in the course of its opinion, per Pearson, C. J., that it would not "enter into a consideration of the point in respect to the law of set-off, whether the defendant must hold the 'mutual demand,' at the time of the assignment, or at the commencement of the action, or at the time of plea pleaded, or at the trial; for ours is not a question of set-off, but a question as to the right of a bill-holder to use the bills of the bank as a legal tender, equivalent to gold and silver coin, in satisfaction of a debt due to the bank." "The neglect of advertence to those diversities is the cause, as it seems to us, of the obscurity and confusion in which the question is involved in many of the cases. See Exchange Bank of Virginia, for Camp, Trustee v. Knox, 19 Gratt. 739; 3 Wend. 13; 8 Watts & S. 311; 1 Ohio, 381. It certainly is the main fallacy of the very labored argument of the plaintiff's counsel in this case." Bank of Charlotte v. Hart, 67 N. C. 264; Exchange Bank v. Tiddy, 67 N. C. 169.

91. Morse on Banking, 401, 402.

92. Diven v. Phelps, 34 Barb. 224.

93. Jefferson County Bank v. Chapman, 19 Johns. 322.

94. *Ante*, § 1689.

95. Exchange Bank v. Knox, 19 Gratt. 746.

chusetts, where it has been held that the debtor must get a judgment against the bank on his bills before he can avail himself of them as set-off.[96] When the bank is insolvent, the note-holder can set off the amount of notes held by him for their full face value, provided he came into possession of them prior to the insolvency.[97] And it is said that he may do this as long as the bank has control of its assets. As a general rule, however, it is considered that when a bank has become insolvent, and especially if it has made an assignment to trustees for the benefit of all its creditors, or a receiver has been appointed by court to take them in charge, its assets are regarded as being appropriated for *pro rata* distribution amongst them; and bank notes acquired after such assignment, or appointment of a receiver cannot be pleaded as offsets, for the reason that the assignees are *bona fide* holders of the subject in controversy for the purpose of making such distribution, and to allow offsets would create preferences.[98]

96. Hallowell, etc., Bank v. Howard, 13 Mass. 235.

97. Exchange Bank v. Knox, 19 Gratt. 746; Diven v. Phelps, 34 Barb. 224; Haxtun v. Bishop, 3 Wend. 13; Bruyn v. Receiver, 9 Cow. 413, note; Clarke v. Hawkins, 5 R. I. 219; *ante*, § 1689.

98. Finney v. Bennett, 27 Gratt. 379; Exchange Bank v. Knox, 19 Gratt. 746. In this case it appeared that by act of the Virginia General Assembly of February 12, 1866, the banks of the State being insolvent, were required to go into liquidation and to execute deeds conveying all their property, including debts, to trustees for the payment of their debts. It was held (1) that the act forbade all preferences of creditors; (2) that although the charters of the banks required them to take their notes in payment of debts due them, this did not authorize debtors of the bank to pay their debts with notes of the bank brought up after execution, and the recordation of the deeds; and (3) that a debtor of the bank could not set off notes of the bank brought up by him after execution, and recordation of the deed, and notice thereof to the creditor. Christian, J., delivering the opinion of the court, said: "It must not be forgotten that when, in conformity with the act of February, 1866, those banks executed their respective deeds of assignment, they had ceased to exist for the purposes for which they were created. A resumption of their operations as banks was simply impossible. The stockholders had no longer any interest in them. It only remained to wind them up for the benefit of their creditors. Robinson v. Gardiner, 18 Gratt. 509. In this view the grantees in said deeds were not trustees for the banks, but for the creditors only. Haxtun v. Bishop, 3 Wend. 13; Diven v. Phelps, 34 Barb. 224. The true principle I conceive to be this: These corporations being insolvent under the statute, and the deeds made in pursuance thereof, the rights of all the creditors attach equally to all their assets, and whoever takes their bills afterward (being indebted to such corporations) takes them subject to the right of all the creditors to share equally in their assets. His

§ **1692.** When the note is payable in bank bills, the holder is entitled to recover its face value;[99] but judgment and execution should express the fact that a payment in the notes of the bank will discharge it, inasmuch as process for money could not be so satisfied.[1]

SECTION VI.

LOST OR DESTROYED BANK NOTES.

§ **1693.** When the whole or part of a bank note has been lost or destroyed, the rights of the owner are purely of an equitable nature. The contract of the bank is to pay the amount upon surrender of the note, and when the rightful owner cannot comply with that condition, his claim can only address itself to equitable considerations. And in order to do justice, the courts will only permit him to recover when he can assure the bank against

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claim is upon the assets for his proportionate share. The statute, as well as the deeds of assignment, virtually secures to the creditors collectively the entire and exclusive right to all the assets. The debtor, therefore, must pay his debt and take his dividend for his claim arising from his ownership of the bills acquired under such circumstances. It is true that a bank, as long as it is solvent, or rather as long as it has control of its assets, is bound to take its own bills in payment of debts due to it. But when it becomes insolvent and goes into liquidation, making an assignment of all its assets for the benefit of its creditors, the rights of all its creditors attach equally, and a debtor then takes the bills of the bank subject to the rights of other creditors to enforce his obligation against him for the equal benefit of all. Diven v. Phelps, 34 Barb. 224, 9 Cow. 408, notes, 1 Paige, 585, 3 Wend. 13. But independently of the act of February 12, 1866, the obligation enforced, and the rights established under it, according to the construction I have given it, it must be conceded on general principles, that these notes of the banks, acquired after notice of the assignment, cannot be pleaded as set-offs in actions brought by the assignees of banks, unless the cases are taken out of the operation of the general and well-settled principles of law, in consequence of the provisions of the charters of these corporations, or of the general law regulating them. To this question I shall advert presently. It is a principle of law, too well settled to admit of doubt or argument now, that a set-off, as between original parties, acquired after the assignment for a *bona fide* purpose of the subject in controversy and notice thereof, cannot be set off against a holder for value." See also Farmers' Bank v. Goddin, 19 Gratt. 739; Saunders v. White, 20 Gratt. 327; Finney v. Bennett, 27 Gratt. 379; Haxtun v. Bishop, 3 Wend. 13; Bank of Niagara v. Roosevelt, 9 Cow. 409, 1 Hopk. Ch. 579.

99. Abbott v. Agricultural Bank, 11 Smedes & M. 405.

1. Morse on Banking, 403.

the possibility of a demand of payment by some one else, as securely as if he himself were to surrender the note.

(1) When the whole note has been lost, it is obvious that the owner cannot place himself within this rule. It is payable to bearer on demand, and passing by delivery, it may at once be found by some one else, and be again put in circulation. The owner cannot frame a clearly sufficient indemnity against its payment by the bank; for even though he be able to identify it by its number or other mark, the bank would still be bound to pay it to a *bona fide* holder who gave value for it, without notice of the loss. And a notice of the loss, even though published in the newspapers, would be unlikely to reach the general public; and it would be difficult, indeed next to impossible, to show that it reached a particular person. For these reasons, one who loses the whole of a bank note must bear the loss, and is without remedy against the bank.[2]

§ 1694. (2) When the whole note has been destroyed, it is obvious that the bank incurs no danger, as in the case of its loss, of paying it to another party. And, therefore, when the true owner produces clear proof of the destruction of a particular bank note, he is permitted to recover the amount of the original indebtedness from the bank. It will be necessary, however, that the owner should accurately identify the particular notes destroyed. It will not do to show that notes of a certain amount were destroyed, for this would not identify them, or enable the bank to protect itself by taking a bond of indemnity against their future appearance, in the event that the destruction was not fully accomplished.[3]

This bond of indemnity is usually required, even where there is distinct proof of destruction of specific notes, out of an abundance of caution to prevent imposition upon banks, which generally are without the means of disproving the destruction of the notes.[4] But there is authority to the effect that in such cases it is needless.[5]

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2. Hinsdale v. Bank of Orange, 6 Wend. 378. But see *contra*, Waters v. Bank of Georgia, Charlt. 193; Robinson v. Bank of Darien, 18 Ga. 65. See also 2 Parsons on Notes and Bills, 308.

3. Tower v. Appleton, 3 Allen, 387; Carey v. Green, 7 Ga. 79.

4. Wade v. N. O. Canal, etc., Co., 8 Rob. (La.) 142 (1844); Morse on Banking, 410. The same rule is applied to a certificate of deposit. Welton v. Adams, 4 Cal. 38.

5. Bank of Mobile v. Meagher, 33 Ala. 622.

§ 1695. When part of a bank note has been lost.—It has been held, in a number of cases, that when half of a bank note has been lost, no action at law can be maintained upon the retained half, but that suit must be brought in equity to establish the facts; and that then a bond of indemnity must be given "to secure the bank against future loss from the appearance and setting up of the other half of such note."[6] And Judge Story concurs in this view.[7] In others, it has been held that action at law may be maintained, the court having power to require a bond of indemnity, which, in such a case, is deemed necessary.[8] But Prof. Parsons says, as to the view that an indemnity is necessary: "From this conclusion, unless it be so directed by statute provision, we must dissent. For the payor will never be liable again, since the holder takes the missing half with notice of prior equities, and, therefore, no indemnity should be required."[9] Of course, if no indemnity were requisite, there could be no objection to an action at law. Payment in such an action would be a good plea against an action on the other half, as the holder would take it subject to any such defense; and the cases sustaining Prof. Parsons' view, which are quoted below, seem to us correct.[10] Lord Ellenborough held the contrary doctrine;[11] but his decision has been criticised as "an Homeric nod."[12] Mutilated notes

6. Bank of Virginia v. Ward, 6 Munf. 169 (1818); Farmers' Bank v. Reynolds, 4 Rand. 186 (1826).

7. Story on Bills, § 448.

8. Commercial Bank v. Benedict, 18 B. Mon. 311.

9. 2 Parsons on Notes and Bills, 313. See Byles on Bills (Sharswood's ed.) [*365], 543.

10. Union Bank v. Warren, 4 Sneed, 171 (1856); Hinsdale v. Bank of Orange, 6 Wend. 379 (1831); Patten v. State Bank, 2 Nott & McC. 464 (1820). In Bullet v. Bank of Pennsylvania, 2 Wash. C. C. 172 (1808), there was an action at law on half of a bank note, the other half being lost. The plaintiff offered indemnity. The court held that, as the holder of the other half would take it subject to equities, the recovery could be had, taking no notice in its opinion of the indemnity offered. This view was reaffirmed in Martin v. Bank of the United States, 4 Wash. C. C. 253 (1821), and applied, although the bank had given notice previously that, in such cases, they would not pay unless both parts were produced. See *ante*, § 1479.

11. Mayor v. Johnson, 3 Campb. 325 (1812), *nisi prius*.

12. Bank of the United States v. Sill, 5 Conn. 112 (1823). In this case action at law was brought on a half note, the other half having been lost. It does not appear that any indemnity was offered. Peters, J., said: "The case of Mayor v. Johnson, 3 Campb. 324, is directly in point. In that case judgment was rendered for the defendant, by Lord Ellenborough, on the

may always be enforced if enough of them remains to be identified.[13]

§ **1696.** To guard against the loss of bank notes sent by mail, the sender often cuts them in halves, and transmits the halves by different mails. This plan is practiced both in England and the United States, and, according to the principles of the text, is one which secures the true owner against loss.[14] He is entitled to recover when he shows himself entitled to both halves; and the bank cannot escape its responsibility by publishing notice that it will not be liable upon severed notes.

It has been said of such a notice: "It is as extraordinary as it is novel, and is probably the first instance of a debtor's undertaking to prescribe terms to his creditors."[15]

But courts of equity, notwithstanding the plaintiff may have an action at law, still entertain jurisdiction of suits on half bank notes.[16]

§ **1697.** The owner in these cases, it has been said, "does not recover in consequence of holding the half merely; but he must also satisfy the bank of the verity of the facts necessary to his case, that is, of the severance, the transmission by mail, and the loss, or else he must establish them by a judgment of the court. And, furthermore, the half notes sued on must be specifically and satisfactorily identified as the counterpart of the halves transmitted, or no recovery will be had."[17]

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ground that the lost half of a bank bill was negotiable, and would enable a *bona fide* holder to recover of the bank; which, with all due deference to an illustrious judge, I am bound to say, is not law. As well might a vignette, or any other fragment torn from a bill, be considered negotiable. The only apology I can make for his lordship is, that he was on the circuit, where business is done in haste, without time and means for investigation and consideration, and where the greatest judges frequently err. '*Quandoque bonus dormitat Homerus.*'"

13. Note Holders v. Bank of Tennessee, 16 Lea, 46.

14. Chitty on Bills [*259], 294; Morse on Banking, 415; 2 Parsons on Notes and Bills, 314; Williams v. Smith, 2 B. & Ald. 496; Commercial Bank v. Benedict, 18 B. Mon. 307; Redmayne v. Burton, 9 C. B. (N. S.), quoted in 2 Parsons on Notes and Bills, 313, note *k*.

15. United States Bank v. Sill, 5 Conn. 106; Martin v. Bank of the United States, 4 Wash. C. C. 253; 2 Parsons on Notes and Bills, 314.

16. Allen v. State Bank, 1 Dev. & Bat. Eq. 3 (1734), Gaston, J. See *ante*, § 1479.

17. 2 Parsons on Notes and Bills, 313; Bank of Virginia v. Ward, 6 Munf. 166.

CHAPTER LI.

CERTIFICATES OF DEPOSIT.

SECTION I.

DEFINITION, ORIGIN, AND NATURE OF CERTIFICATES OF DEPOSIT.

§ **1698. Definition.**— A certificate of deposit is a receipt of a bank or banker for a certain sum of money received upon deposit, and it is generally framed in such a form as to constitute a promissory note, payable to the depositor, or to the depositor or order, or to bearer.

§ **1698a. Origin and nature.**— It appears to have been at an early day the practice of the goldsmiths in England, who generally engaged in the business of banking, to give receipts to their customers for moneys deposited with them, in the form of promissory notes payable to the bearer on demand, or to the depositor or order.[1] And the Statute of Anne placed them, as other promissory notes, on the same footing as bills of exchange.[2] Thus originated the instrument now so commonly used, and called a certificate of deposit, which is, in short, generally a promissory note for the payment of an amount which it certifies to be deposited in bank. Such at least is our idea of its origin. Certainly it closely resembles the receipt given by the goldsmiths to their customers, and which was called a banker's cash note. Mr. Chitty says of such receipts: "They appear originally to have been given by bankers to their customers, as acknowledgments for having received money for their use," and that "in point of form they are similar to common promissory notes, and are stated in pleading as such." Also he says, "At present cash notes are seldom made except by country bankers, their use having been superseded by the introduction of checks."

1. Nicholson v. Sedgwick, 1 Ld. Raym. 180, 3 Salk. 67 (1698); Thompson on Bills (Wilson's ed.), 124; Chitty on Bills (13th Am. ed.) [*522], 591; Byles on Bills [*10], 81.

2. 3 & 4 Anne, chap. IX.

Now, when the depositor desires to have his funds ready to check on at any moment, he takes no certificate of deposit, but uses his own check as the mode of transfer. But when he wishes his funds to be running on interest, and to remain for any extended period in bank, he usually takes a certificate of deposit, which is the bank's receipt payable at a future day, or on demand, or upon ten days' notice, as the case may be. The very nature of the instrument and the ordinary modes of business show that a certificate of deposit, like a deposit credited in a pass-book, is intended to represent moneys actually left with the bank for safe-keeping, which are to be retained until the depositor actually demands them. And it is not dishonored until presented.[3]

§ 1699. Power of banks to issue certificates of deposit.— As to the power of banks to issue certificates of deposit, it is observed by Mr. Morse that "if a bank cannot issue its negotiable promissory note, neither can it issue a negotiable certificate of deposit of this description"— that is, payable otherwise than on demand. "If the note would be void, so likewise is the certificate. If, however, the bank is empowered to issue promissory notes, subject only to the restriction that it shall issue none which are designed to pass into circulation as currency, but only such as become necessary in the ordinary course and conduct of its affairs, and are strictly business paper, then it may issue certificates of deposit, whether payable on demand or otherwise, subject only to the same restrictions."[4]

In New York, where the statute law pronounced a draft or note issued by a bank payable at a certain time after date to be void, it was held that a certificate of deposit payable to the order of a particular person six months after date came within its prohibition and was void.[5] And it would not be valid even in the hands of a *bona fide* holder.[6] If the president of the bank give to the depositor his personal certificate, instead of that of the bank, parol proof is admissible to show the true state of facts and to bind the bank.[7] And where a certificate was signed by the cash-

3. National Bank of Fort Edward v. Washington County Nat. Bank, 5 Hun, 605; Smith v. Steen, 38 S. C. 361, 16 S. E. 1003; Telford v. Patton, 144 Ill. 611, 33 N. E. 1119.

4. Morse on Banking, 53; Hunt's Appeal, 141 Mass. 519.

5. Bank of Orleans v. Merrill, 2 Hill, 295; Edwards on Bills, 348.

6. Bank of Chillicothe v. Dodge, 8 Barb. 233.

7. Coleman v. First Nat. Bank, 53 N. Y. 388.

ier in his individual instead of his official capacity, the bank was held bound.[8]

If a third party signs his name on the back of a certificate of deposit to assure its credit, he is regarded in Vermont as *prima facie* a maker, nor would the addition of the word "surety" alter that presumption, parties to the instrument being regarded like those of other negotiable instruments.[9]

§ **1700.** A bank is chargeable with knowledge of its depositor's signature, and if it issue a certificate of deposit payable to his order, and his name be forged as indorser, and the bank pays the amount to a *bona fide* holder, it has been held that it cannot recover back such amount from him.[10] The fact that a certificate is signed by the bank president in his own name does not preclude the depositor from showing that the bank itself is bound.[11]

§ **1701. A certificate of deposit of a bank, if passed for a debt, is presumably conditional payment only**; and if refused payment the creditor may resort to the original consideration.[12] But if the party receiving the certificate makes use of it for his own purposes, not punctually requiring payment, it might be different.

In a Maryland case it appeared that on the 16th of October, 1860, Hoffman of Baltimore, being indebted to Bower of Cincinnati, deposited in a banking-house in Baltimore the amount due ($206.31), and took a certificate of deposit running: "Re-

8. Crystal Plate Glass Co. v. National Bank, 6 Mont. St. 304.

9. Ballard v. Burton, 64 Vt. 387, 24 Atl. 769. See § 1702.

10. Stout v. Benoist, 39 Mo. 277.

11. Coleman v. First Nat. Bank, 53 N. Y. 388. In South Carolina it has been held that where a depositor gives money to the president of a bank in the bank building, intending to deposit it in the bank, and the president so receives it, he is not required to see that it goes on the books of the bank to his credit. See Jumper v. Bank, 48 S. C. 430, 26 S. E. 765. But in the case of Bickley v. Commercial Bank, 39 S. C. 281, 17 S. E. 977, 39 Am. St. Rep. 721, it was held that the president of a bank has not ordinarily the right to receive deposits into his bank — and where a deposit was paid to the president, and the depositor sues the bank for its recovery, it is incumbent upon the plaintiff to show that the president had authority, express or implied, to receive the deposit, or that it was actually received by the bank as the plaintiff's money. Bickley v. Commercial Bank, 43 S. C. 528, 23 S. E. 886.

12. Lindsey v. McClelland, 18 Wis. 481. In Johnson v. Barney, 1 Clarke (Iowa), 531, where A., being indebted to B., inclosed him C. D.'s certificate of deposit for $945, and said in his letter, "Please collect and place amount to my credit," it was held that B. received it only as agent for collection, and, therefore, was not an indorsee, save in that limited sense.

ceived on deposit from V. Hoffman, Esq., $206.31, payable to the order of G. Bower, Esq., indorsed herein. (Signed) Josiah Lee & Co." Bower acknowledged receipt of the certificate on 18th of October, 1860, and then transferred it to other parties, who demanded payment on the 20th of November, 1860. Two days previous Josiah Lee & Co. had failed in business, and it was sought to make Hoffman liable for the amount. But the court said: "Though the money deposited by Hoffman was not deposited by the authority of Bower, or with his previous knowledge, yet upon his acknowledgment of receipt of the certificate, he sanctioned the deposit as a payment to himself, especially as he made use of the certificate for his own purposes, and thus made Josiah Lee & Co. his agents to hold the fund subject to his order. Bower thus assuming control of the fund, it must be regarded as a payment of the debt due to him by Hoffman." [13]

SECTION II.

THE TRANSFER AND NEGOTIABILITY OF CERTIFICATES OF DEPOSIT.

§ 1702. As to the transfer of certificates of deposit, it must be governed by the same rules which control other promissory notes, and which vary according to the instrument's form. If it be payable to bearer it may be transferred by delivery, but if payable to order it should be indorsed. And when payable to order, mere manual delivery without indorsement or proof of a valuable consideration would not be evidence of title.[14] The liability of an indorser is the same as upon the indorsement of any other promissory note.[15]

§ 1702a. Overdue certificates of deposit; certificate of deposit a continuing security.— If the certificate of deposit be transferred when overdue, the transferee takes it subject to equitable defenses.[16] But the certificate of deposit is not regarded as over-

13. Bower v. Hoffman, 23 Md. 264; Chase v. Brundage, 58 Ohio St. 517, 51 N. E. 31; Paxton v. State, 59 Nebr. 460, 81 N. W. 383.

14. Vastine v. Wilding, 45 Mo. 89.

15. Mills v. Barney, 22 Cal. 240; Coye v. Palmer, 16 Cal. 158; Ford v. Mitchell, 15 Spoon. 304; Cate v. Patterson, 25 Mich. 191; Hazelton v. Union Bank, 32 Wis. 35; Pardee v. Fish, 60 N. Y. 265; First Nat. Bank v. The Security Nat. Bank, 34 Nebr. 71, 51 N. W. 305, 33 Am. St. Rep. 618.

16. Coye v. Palmer, 16 Cal. 158; Tripp v. Curtenius, 36 Mich. 494; First Nat. Bank v. The Security Nat. Bank, 34 Nebr. 71, 51 N. W. 305, 33 Am. St. Rep. 618.

due and dishonored until actually presented for payment, when, as is usual, it is not payable at a particular time; and if the bank pay any portion of the amount due upon it to the original depositor without indorsing the credit on the certificate, a *bona fide* holder for value without notice may recover the whole sum from the bank. The certificate is regarded as a continuing security, and hence this doctrine arises. In New York it was applied to hold the bank liable to the holder where the certificate which bore interest was transferred seven years after it was issued.[17] An indorser of a certificate of deposit remains liable until an actual demand is made, and the holder is not chargeable with neglect for omitting to make such demand within any particular time, for the instrument is a continuing security between indorser and indorsee.[18]

§ **1703. As to the negotiability of certificates of deposit.**— It has been questioned whether or not certificates of deposit are negotiable. But we conceive that there can now be no doubt that they are negotiable when expressed in negotiable words. And this view is sustained by authority of experienced judicial writers as well as by adjudicated cases.[19] But there are cases to the

17. National Bank of Fort Edward v. Washington County Nat. Bank, 5 Hun, 605 (1875). *Contra*, Tripp v. Curtenius, 36 Mich. 497 (1877), and Gregg v. Union Nat. Bank, 87 Ind. 238. But see Birch v. Fisher, 51 Mich. 36, where the authority of Tripp v. Curtenius, *supra*, is denied; Paxton v. State, 59 Nebr. 460, 81 N. W. 383; Kirkwood v. First Nat. Bank, 40 Nebr. 484, 58 N. W. 1016, 42 Am. St. Rep. 683.

18. Pardee v. Fish, 60 N. Y. 271 (1875), citing Merritt v. Todd, 23 N. Y. 28. See *ante*, § 609. In Pardee v. Fish, the certificate bore interest. The plaintiff retained it from June 8, 1872, to December 24, 1872.

19. Miller v. Austen, 13 How. 218; Bank of Peru v. Farnsworth, 18 Ill. 563; Laughlin v. Marshall, 19 Ill. 390; Carey v. McDougald, 7 Ga. 84; Lynch v. Goldsmith, 64 Ga. 42; Kilgore v. Bulkley, 14 Conn. 362; Bank of Orleans v. Merrill, 2 Hill, 295; Johnson v. Barrey, 1 Iowa, 531; Drake v. Markle, 21 Ind. 433; Lafayette Bank v. Ringel, 51 Ind. 393; Bean v. Briggs, 1 Clarke (Iowa), 488; Fells Point Sav. Inst. v. Weedon, 18 Md. 528; Welton v. Adams, 4 Cal. 37; Brummagin v. Tallant, 29 Cal. 503; Mills v. Barney, 22 Cal. 240; Cate v. Patterson, 25 Mich. 191; Poorman v. Mills, 35 Cal. 118; Blood v. Northrup, 1 Kan. 28; Fultz v. Walters, 2 Mont. 165; Frank v. Wessells, 64 N. Y. 155; Howe v. Hartness, 11 Ohio St. 449; Bellows Falls Bank v. Rutland, 40 Vt. 377; Pardee v. Fish, 60 N. Y. 265; Tripp v. Curtenius, 36 Mich. 494; Edwards on Bills, 348; 1 Parsons on Notes and Bills, 26; Morse on Banking, 54; Dos Passos on Stockbrokers, 554; Lewis on Stocks, 66; Benjamin's Chalmers' Digest, 272; Curran v. Witter, 68 Wis. 16; Maxwell v. Agnew, 21 Fla. 154; Springfield M. & F. Ins. Co. v. Peck, 102 Ill. 260; Birch v. Fisher,

contrary.[20] The Supreme Court of the United States held a certificate of deposit in the following form to be negotiable: "I hereby certify that H. S. has deposited in this bank, payable twelve months from 1st of May, 1839, with five per cent. interest till due, $1,500 for the use of H. M., and payable only to his order upon the return of this certificate."[21] And the like decision was rendered in Connecticut, where the certificate ran: "I do hereby certify that W. T. & B. have deposited in this bank the sum of $10,608.75, payable on the first day of December next, to their order and the return of this certificate."[22] In California it was considered that the statute law had settled the question in favor of the negotiability of certificates of deposit; but it was thought that they were negotiable at common law.[23]

§ **1704.** A simple certificate of deposit containing no words of promise to pay the amount is nothing more than a receipt, and could not be the basis of an action against the bank, nor would it be a transferable security. Parol evidence would be admissible to explain it, in the same manner as in the case of any other receipt; the word "certify" adding no additional force to the instrument as purporting a contract.[24]

§ **1705.** In those cases where the certificate is payable to "A. B., or order," or to bearer, we think there is no doubt of its nego-

51 Mich. 36; Cassidy v. First Nat. Bank, 30 Minn. 87, a case of delivery without indorsement; Kirkwood v. First Nat. Bank, 40 Nebr. 485, 58 N. W. 1016, 42 Am. St. Rep. 683.

20. Patterson v. Poindexter, 6 Watts & S. 227; Charnley v. Dallas, 8 Watts & S. 353. See also Sibree v. Tripp, 15 M. & W. 23; Shute v. Pacific Nat. Bank, 136 Mass. 487; Dempsey v. Harm (Pa.), 12 Atl. 27.

21. Miller v. Austen, 13 How. 918.

22. Kilgore v. Bulkley, 14 Conn. 363. In Pardee v. Fish, 60 N. Y. 268 (1875), where the amount was expressed to be payable "on the return of this certificate," Miller, J., said: "Although a demand was necessary upon the bank before an action could be brought against it on the instrument, thus distinguishing the case from that of a promissory note, where the maker may be sued without any demand, I do not think that this fact takes away the negotiable character of the instrument under the decisions cited, and it must, therefore, be considered as possessing all the features of a negotiable promissory note."

23. Welton v. Adams, 4 Cal. 37.

24. Hotchkiss v. Mosher, 48 N. Y. 482 (1872); First Nat. Bank v. Clark, 134 N. Y. 368, 32 N. E. 38, citing text. But *contra*, Bickley v. Commercial Bank, 39 S. C. 281, 17 S. E. 977, 39 Am. St. Rep. 721; Jumper v. Commercial Bank, 39 S. C. 269, 17 S. E. 980.

tiability, and the cases cited bear us out in this view. But in Pennsylvania, Chief Justice Gibson, rendering the opinion of the court, held that a certificate running as follows, "I hereby certify that C. S. T. has deposited in this bank, payable twelve months from 1st May, 1839, with five per cent. interest till due, per annum, $3,691.93, for the use of R. P. & Co., and payable only to their order upon the return of this certificate," was not a negotiable note, but "a special agreement to pay the deposit to any one who should present the certificate and the depositor's order."[25] And in England, where the form was, "Memorandum: Mr. Sibree has this day deposited with me £500 on the sale of £10,000 3*l.* per cent. Spanish, to be returned to demand," the court said that it was not intended to be, nor was it, a promissory note, either at common law or under the Statute of Anne, but the evidence of an agreement respecting the deposit.[26] This latter decision does not militate against the negotiability of certificates drawn in negotiable form. And the true rule seems to us to be that expressed by a learned annotator, who says that "an instrument merely acknowledging a deposit upon whatsoever special terms, cannot be a promissory note;" and considers only such certificates to be notes as contain evidence that "the matter continues to deposit, or is converted into a loan, or that a present debt is created, accompanied by an undertaking to pay."[27]

§ 1706. **Requisites of negotiability.**—In order, however, to be negotiable a certificate of deposit must possess the requisite features of certainty in respect to parties, and time and mode of payment; and the same causes which deprive bills and notes of negotiability would affect it in like manner. Thus, if payable "in currency," it would not be negotiable according to the principles which prevail as to bills and notes;[28] though it has been held otherwise.[29] So if payable in "United States six per cent. in-

25. Patterson v. Poindexter, 6 Watts & S. 227; confirmed in Charnley v. Dallas, 8 Watts & S. 353. See also Lebanon Bank v. Mangan, 28 Pa. St. 452; London Sav. Society v. Savings Bank, 36 Pa. St. 498.

26. Sibree v. Tripp, 15 M. & W. 23.

27. 1 Am. Lead. Cas. 307.

28. Huse v. Hamblin, 29 Iowa, 501; Rindskoff v. Barrett, 11 Iowa, 172; Lindsay v. McClelland, 18 Wis. 481; Ford v. Mitchell, 15 Wis. 304; London S. C. v. Hagerstown Sav. Bank, 12 Casey, 498.

29. Drake v. Markle, 21 Ind. 433. See vol. I, § 55 *et seq.;* Pardee v. Fish, 60 N. Y. 265; Klauber v. Biggerstaff, 47 Wis. 551; Kirkwood v. First Nat. Bank, 40 Nebr. 484, 58 N. W. 1016, 42 Am. St. Rep. 683.

terest-bearing bonds," it is a mere contract to deliver such bonds, and not negotiable.[30]

§ 1706a. Whether negotiable in States where there are certain statutory tests of negotiability.—In some of the States the general principles of the law merchant which determine negotiability do not apply, and peculiar words are necessary to make notes negotiable. The words "value received" are essential to the negotiability of a note in Missouri, and a certificate of deposit without such words has been held there to be not negotiable.[31] Whether or not in those States where it is essential to the negotiability of a note, that it be payable at a bank (as is the case in Virginia and Indiana), a certificate of deposit in the usual form would be held negotiable, is a question as yet undecided in any case within our knowledge. But as a check is regarded as payable at the bank on which it is drawn, so a bank certificate of deposit is a note payable at the bank by which it is issued, and it would, as it seems to us, come within the meaning of "a note payable at a bank." But this view has been possibly rebutted by the argument that where a statute makes notes payable at a bank negotiable, it means notes expressed in so many words to be so payable; and in Alabama, since the last edition of this work, it was held accordingly.[32]

§ 1707. Conflicting decisions as to whether a certificate of deposit is payable without previous demand; when Statute of Limitations begins to run.— Where the certificate states that the amount is payable "on the return of this certificate," or on "the presentment of this certificate," or uses some similar phrase, it has been held that such language does not alter the legal effect of the instrument; that the holder is not under any obligation to present it for payment before suit upon it; and that it is the bank's duty, like the maker of any other note, to find out the payee and pay it.[33] But where a certificate was given to A., "payable to order of himself on presentation of this certificate, properly indorsed," it was considered so far like an ordinary deposit that A. could

30. Easton v. Hyde, 13 Minn. 90.

31. International Bank v. German Bank, 3 Mo. App. 367.

32. Renfro v. Merchants' Bank, 83 Ala. 425 (1887).

33. Cate v. Patterson, 25 Mich. 191; Hunt v. Divine, 37 Ill. 137; Bellows Falls Bank v. Rutland County Bank, 40 Vt. 377, affirming Smilie v. Stevens, 39 Vt. 315.

not sue the bank upon it without a previous demand.[34] It has been held in Maryland that where a certificate of deposit is expressed to be payable "on return of the same," the Statute of Limitations only runs from the time of actual demand and notice.[35] It is considered, however, in some cases, that if the certificate be payable on demand (which is substantially the same as "on return of this certificate"), the Statute of Limitations begins to run from its date, and no special demand is necessary to put the statute in motion.[36]

§ 1707a. **True principles applicable to the question.**— Certificates of deposit are designed to subserve with convenience the purpose of temporary investments of money, and whether the expression used in them as to payability be "on the return of this certificate," or "on presentation of this certificate," or "on return or surrender of this certificate properly indorsed," the substantial meaning is the same; that is to say, that the certificate is payable when payment is demanded by the party entitled to receive the money, and who avouches the fact by producing the instrument with evidence of title.[37] If the Statute of Limitations begins to run at once, suit must, of course, be maintainable at once, and, therefore, no prior demand would be necessary. But such is not the usual contemplation of either the depositor or the bank. The former seeks an indefinite investment of his funds. The bank is not expected, according to the usage and practice of such institutions, to seek him and offer payment, as in the ordinary case of a demand loan. And the better opinion seems to us to be that the Statute of Limitations only begins to run when there is an actual demand of payment in due form, and that such demand must precede a suit.[38] The bank may, indeed we think

34. Bellows Falls Bank v. Rutland County Bank, 40 Vt. 377; Hillsinger v. Georgia Railroad Bank, 108 Ga. 357, 33 S. E. 985, 75 Am. St. Rep. 42, note.

35. Fells Point Sav. Inst. v. Weedon, 18 Md. 320. For illustration to a promissory note, but designated on its face to be a certificate of deposit, see Baker v. Leland, 9 App. Div. 365, 41 N. Y. Supp. 399.

36. Brummagin v. Tallant, 29 Cal. 503; Tripp v. Curtenius, 36 Mich. 499; Mitchell v. Eaton, 37 Minn. 335.

37. *Ante*, §§ 45, 47; McGough v. Jamison, 107 Pa. St. 336; Riddle v. First Nat. Bank, 27 Fed. 505, citing the text.

38. Munger v. Albany City Nat. Bank, 85 N. Y. 587; Payne v. Gardiner, 29 N. Y. 146; Pardee v. Fish, 60 N. Y. 265. See also Howell v. Adams, 68 N. Y. 314; Boughton v. Flint, 74 N. Y. 476; Bellows Falls Bank v. Rutland County Bank, 4 Vt. 377; Fells Point Sav. Inst. v. Weedon, 28 Md. 320. See *ante*, § 1685, and note; McGough v. Jamison, 107 Pa. St. 336; Long v. Straus (Ind.), 4 West. Rep. 35.

has the right to, pay a demand certificate at any time, for the reason that the policy of the law interdicts a perpetual loan; and while the creditor holding the certificate cannot regard the bank as in default, and is not himself in default, until a demand has been made, yet these circumstances should not prevent the operation upon certificates of deposit of the ordinary principle, that the debtor owing a demand loan has the right to pay at any time. The ordinary principles applicable to debts due on demand are only modified to fit the nature of the case, the policy of the law, and the intention of the parties to the contract.

CHAPTER LII.

CERTIFICATES OF STOCK; AND OTHER QUASI NEGOTIABLE INSTRUMENTS.

SECTION I.

CERTIFICATES OF STOCK.

§ 1708. **The certificates of stock** issued to shareholders by incorporated companies are not regarded as coming within the classification of negotiable instruments,[1] although they generally inure, subject to certain rules, to the benefit of the bearer.[2] Very frequently by application of the principles of estoppel, and to effectuate the ends of justice, and the intention of the parties, the courts decree a better title to the transferee than actually existed in his transferrer; and as the result reached in many cases is the same as would be reached if the certificate were negotiable, certificates of stock may be classed amongst instruments *quasi* negotiable. The phrase "*quasi* negotiable" has been termed an unhappy one;[3]

1. Pierce on Railroads, 111; Dos Passos on Stockbrokers, 596; Biddle on Stockbrokers, 149, 156; Lewis on Stocks, 64, 71, 72 *et seq.;* 1 Edwards on Bills and Notes, § 22, p. 61; Schouler on Personal Property, 606, note; 2 Ames on Bills and Notes, 784; Shaw v. Spencer, 100 Mass. 383; Bank v. Lanier, 11 Wall. 377; Railroad Co. v. Howard, 7 Wall. 415; Mechanics' Bank v. N. Y. & N. H. R. Co., 13 N. Y. 599; Jarvis v. Rogers, 13 Mass. 105; Sewall v. Boston Water Power Co., 4 Allen, 277; London, etc., Banking Co. v. London & River Platte Branch, 38 Eng. Rep. 635; Clark v. Am. Coal Co., 86 Iowa, 436, 53 N. W. 291.

2. Railroad Co. v. Howard, 7 Wall. 415; Supply Ditch Co. v. Elliot, 10 Colo. 327; Graves v. Mining Co., 81 Cal. 325; Barstow v. Savage Mining Co., 64 Cal. 388; Schlandecker's Appeal (Pa.), 14 Atl. 234.

3. Lewis on Stocks, 82. For a clear statement of the status of certificates of stock, see case of Knox v. Eden Musee Co., 148 N. Y. 441, 42 N. E. 988, 51 Am. St. Rep. 700. In this case, Chief Justice Andrews said the owner of shares may transfer his title by delivery of the certificate with a blank power of attorney indorsed thereon, signed by the owner of the shares named in the certificates. Such delivery transfers the legal title to the shares as between the parties to the transfer, and not a mere equitable right. (McNeil v. Tenth Nat. Bank, 46 N. Y. 325.) The transferee in good faith and for value holds

and certainly it is far from satisfactory, as it conveys no accurate, well-defined meaning. But still it describes better than any other shorthand expression the nature of those instruments which, while not negotiable in the sense of the law merchant, are so framed and so dealt with, as frequently to convey as good a title to the transferee as if they were negotiable.

In a case before the United States Supreme Court it was said: "Written contracts are not necessarily negotiable simply because by their terms they inure to the benefit of the bearer. Doubtless the certificates were assignable, and they would have been so if the word "bearer" had been omitted, but they were not negotiable instruments in the sense supposed by the appellants. Holders might transfer them, but the assignees took them subject to every equity in the hands of the original owners."[4]

§ 1708a. Nature of certificates of stock.—A share in the capital stock of a corporation is not a debt, nor money, nor a security for money, but it is a species of incorporeal personal property.[5] The capital stock of the corporation is so much money, or property assessed at money valuation, which is divided into a number of shares, which shares are the holder's interest in the corporate estate. The stock of the corporation is generally raised by mutual subscription of the members in the first instance, and its amount is regulated by the statutory provisions by or under which the corporation is chartered. The persons interested in

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his title from latent equities between prior parties in the line of transmission. Under the doctrine of implied agency and the application of the principle of estoppel to the satisfaction, the true owner is in many cases precluded from asserting his title. The case of McNeil v. Tenth Nat. Bank is a leading case on the subject and marks the limit to which the court has hitherto gone in subordinating the rights of the true owner of a stock certificate to the title of a transferee derived under one who, being in the possession of a certificate by the consent of a true owner, has transferred it in fraud of his rights. That case holds that an agent to whom the owner has delivered a certificate of stock duly indorsed for transmission, with a limited power of disposition for a special purpose, may bind the title thereto as against the true owner, by transferring it to a *bona fide* transferee who has no notice of the limitations of the agent's authority, although the transfer was made for an unauthorized purpose and with the intention on the part of the agent to commit a fraud upon his principal. See also Jarvis v. Manhattan Beach Co., 148 N. Y. 652, 43 N. E. 68, 51 Am. St. Rep. 727; Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32.

4. Railroad Co. v. Howard, 7 Wall. 415.

5. Allen v. Pegram, 16 Iowa, 173, Dillon, J.; Lewis on Stocks, 19.

the corporation are termed shareholders, or stockholders; and certificates of stock are generally issued to them by the corporate authorities of the muniments of their title to a proportionate part of the profits of the corporation, and as evidence of their right to participate in its concerns. Unless otherwise provided by statute, the shares in the corporation are generally deemed personal estate.[6]

The certificate of stock is the customary and convenient evidence of the holder's interest in the corporation which issues it; but in the absence of legal provisions requiring it, no certificate of stock is necessary to attest the rights of the shareholder.[7] If the corporation issues certificates to its shareholders, as is usual to do, any shareholder may compel it by legal proceedings to issue to him a certificate for the number of shares to which he is entitled.[8] Certificates of stock are generally deemed choses in action,[9] and as the holder may be driven to an action to recover the proportionate part of the corporate property or assets, or the interests therein which his shares entitle him to, they are properly within the classification of "choses in action." As said in Massachusetts by Shaw, C. J.: "A certificate of stock is a muniment

6. Hutchins v. State Bank, 12 Metc. (Mass.) 421; Arnold v. Ruggles, 1 R. I. 165; Denton v. Livingston, 9 Johns. 100; Johns v. Johns, 1 Ohio St. 350; Payne v. Elliot, 54 Cal. 339; Lewis on Stocks, 18; Dos Passos on Stockbrokers, 142, 587, 589; Biddle on Stockbrokers, 142.

7. Chester Glass Co. v. Dewey, 16 Mass. 94; Agricultural Bank v. Burr, 24 Me. 256; Angell & Ames on Corporations, § 565; Biddle on Stockbrokers, 266; Dos Passos on Stockbrokers, 582; Thompson on Stockbrokers, § 106.

8. Angell & Ames on Corporations, § 565.

9. City of Utica v. Churchill, 33 N. Y. 161; Driscoll v. West Bradley & C. M. Co., 59 N. Y. 105; The King v. Capper, 5 Price, 264; Humble v. Mitchell, 11 Ad. & El. 205; Haseltine v. Siggers, 1 W., H. & G. 856; Hutchins v. State Bank, 12 Metc. (Mass.) 421, Shaw, C. J.: "If a share in a bank is not a chose in action, it is in the nature of a chose in action, and, what is more to the purpose, it is personal property." In Schouler on Personal Property, p. 32, it is said: "If I own bank stock and draw regular dividends, is not the stock a *chose in possession*, since I occupy and enjoy it to the fullest extent? No, is the reply, for this is never anything more than a *chose in action*." Dos Passos on Stockbrokers, 586, 762; Biddle on Stockbrokers, 145. "It is really nothing more than a chose in action, and trover will not lie for it, though it might for the certificate." Lewis on Stocks, 19; Acraman v. Cooper, 10 M. & W. 585; Neiler v. Kelley, 19 P. F. S. 403. *Contra*, that trover will lie for stock as such. See Boylan v. Huguet, 8 Nebr. 245; Kuhn v. McAllister, 1 Utah, 273, cited in Biddle on Stockbrokers, 146, note; Buffalo German Ins. Co. v. Third Nat. Bank, 29 App. Div. 137, 51 N. Y. Supp. 667.

of title of the same nature with the note or bond of a private person, ordinarily called a 'chose in action,' or of a State or United States bond, or certificate of debt." [10]

In the United States the stockholder's interest in the corporation is generally deemed liable to attachment, and execution at the suit of such stockholder's creditor, and to legal process of the like kind,[11] and the usual method of levy is by leaving a copy of the writ with the proper officer of the corporation in which the shares are held, with notice that such shares are levied upon.[12]

§ **1708b. The transfer of certificates of stock.**— Certificates of stock represent so great a portion of the wealth of the country, and the transactions in them are so numerous, that all questions bearing upon their validity, and upon the forms and effect of transfers, are highly important. The full discussion and elucidation of such questions, however, belong rather to the treatises on corporations and on stockbrokers than to a work on negotiable instruments; and only an outline of the general principles affecting the negotiation of stock certificates seems pertinent here.

(1) As between the transferrer and transferee of a stock certificate, it is very well settled that, in the absence of statutory restrictions, the beneficial interest passes by assignment, and delivery of the certificate, as in the case of any other species of personal property, or chose in action, no particular formality being necessary to invest the transferee with the right and title of the transferrer, as between the parties to the transfer.[13] The equitable title passes as between the immediate parties, whatever may be the rights of others in the premises.[14] And, as a general rule, statutory restrictions do not affect the immediate parties to the transfer, being designed for other purposes.

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10. Hutchins v. State Bank, 12 Metc. (Mass.) 421.

11. Chesapeake & Ohio R. Co. v. Paine, 29 Gratt. 502; Foster v. Potter, 37 Mo. 525; Howe v. Starkweather, 17 Mass. 243; Lewis on Stocks, 20; Dos Passos on Stockbrokers, 589; Pierce on Railroads, 110.

12. Freeman on Executions, § 262*a*.

13. Biddle on Stockbrokers, 268; Dos Passos on Stockbrokers, 591, 623, 628; Angell & Ames on Corporations, §§ 354, 564; Morawetz on Private Corporations, § 326.

14. Gilbert v. Iron Mfg. Co., 11 Wend. 628; Utica Bank v. Smalley, 2 Cow. 770; Johnson v. Underhill, 52 N. Y. 203; Johnston v. Laflin, 103 U. S. 804; Farmers' Bank v. Wasson, 48 Iowa, 338.

§ 1708c. **(2) As between the corporation and the transferee of a certificate of its stock,** the rights acquired by the latter depend upon the charter and general laws which control the matter; a corporation being the creature of statute law and regulated for the most part by it. It is frequently provided by the charter or general statute under which the corporation is organized that the stock shall be transferable only in a prescribed manner, and upon certain conditions. A provision of this nature not only limits the transferability of the shares, but constitutes a part of the agreement between the shareholders, and the mutual consent necessary to a change of this agreement can only be satisfied by compliance with its conditions. Accordingly, it has been held by the Supreme Court of the United States that where a banking corporation had by its charter a lien upon the shares of its stockholders for debts due the bank, it could not be deprived of this lien by an assignment of the shares which was not entered upon the books of the bank in the manner required by law, Justice Story saying: "No person can acquire a legal title to any shares except under a regular transfer, according to the rules of the bank, and if any person takes an equitable assignment it must be subject to the rights of the bank under the act of incorporation, of which he is bound to take notice."[15] And for the like reason, as the transferee of the stock would, in such a case, acquire only the equitable interest, and not become a stockholder until the conditions of transfer were complied with, the corporation, it has been held, could not claim a lien upon the shares on account of the indebtedness of such transferee.[16]

§ 1708d. **Right of corporation to claim a lien on stock against a transferee for debt due by transferrer.**— When the charter of the corporation creates a lien on its stock for debts due by stockholders, such lien can, as we have already seen, be maintained against any transferee.[17] The corporation may assert or waive it ac-

15. Union Bank v. Laird, 2 Wheat. 390. See also Brent v. Bank of Washington, 10 Pet. 596; Rogers v. Huntingdon Bank, 12 Serg. & R. 73; German Security Bank v. Jefferson, 10 Bush, 328; Farmers' Bank v. Iglehart, 6 Gill, 50; Angell & Ames on Corporations, § 571 *et seq.;* Buffalo German Ins. Co. v. Third Nat. Bank, 29 App. Div. 137, 51 N. Y. Supp. 667.

16. Helm v. Swiggett, 12 Ind. 194.

17. § 1708*c;* Mohawk Nat. Bank of Schenectady v. Schenectady Bank, 78 Hun, 90, 28 N. Y. Supp. 1100.

cording to its interest and pleasure.[18] But in the absence of some legal creation no such lien exists by implication in favor of the corporation by the common law. And if it grants credit to a stockholder it has no prior legal claim upon his stock to satisfy the debt; and it is under obligation, notwithstanding such debt, to enter on its books the transfer of such stock in pursuance of an assignment duly made.[19]

Whether a corporation without express authority by statute (and when no statutory lien is created) has the power to adopt by-laws creating a lien on stock for debts and liabilities of the stockholders, and to refuse to transfer the stock upon its books until such debts and liabilities are satisfied, is a question upon which the courts differ. General authority given to corporations by statute to adopt by-laws prescribing the manner in which stock shall be transferred, and for the regulation of business, has been considered not broad enough to authorize a prohibition upon, or an abridgment of, the right of transfer; but simply to direct the manner in which it shall be made; and it has been held accordingly that a by-law unauthorized by statute which gives the corporation a lien on the stock of members would not affect a *bona fide* purchaser of the stock without notice, the policy of the law being opposed to secret liens.[20] And the United States Supreme Court has adopted these views, and applied them to stock in the national banks.[21]

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18. Reese v. Bank of Commerce, 14 Md. 271; Hill v. Pine River Bank, 45 N. H. 300; Angell & Ames on Corporations, § 571; Morawetz on Corporations, § 337; Morse on Banking, 444.

19. Steamship Co. v. Heron, 52 Pa. St. 280; Farmers' Bank v. Wasson, 48 Iowa, 336; Bates v. New York Ins. Co., 3 Johns. Cas. 238; Driscoll v. West Bradley & C. M. Co., 59 N. Y. 96; Sargent v. Franklin Ins. Co., 8 Pick. 90; Massachusetts Iron Co. v. Hooper, 7 Cush. 183; Heart v. State Bank, 2 Dev. Eq. 111; People v. Crockett, 2 Cranch C. C. 188; Dana v. Brown, 1 J. J. Marsh. 306; Farmers' Bank v. Wasson, 48 Iowa, 336; Bryon v. Carter, 22 La. Ann. 98; Angell & Ames on Corporations, §§ 355, 569; Dos Passos on Stockbrokers, 629; Biddle on Stockbrokers, 176; Morawetz on Corporations, § 332; Field on Corporations, p. 345, § 310; Pierce on Railroads, 129; Morse on Banking, 442; Schouler on Personal Property, 637; Proffat's note, 11 Am. Dec. 581.

20. Driscoll v. West Bradley & C. M. Co., 59 N. Y. 96. See also Waln v. Bank, 8 Serg. & R. 73; Farmers' Bank v. Wasson, 48 Iowa, 338; Evansville Nat. Bank v. Metropolitan Nat. Bank, 2 Biss. 527; Dos Passos on Stockbrokers, 630; Green's Brice's Ultra Vires (2d ed.), 15, note *a*; Mohawk Nat. Bank of Schenectady v. Schenectady Bank, 78 Hun, 90, 28 N. Y. Supp. 1100.

21. Schouler on Personal Property, 490; Bullard v. Bank, 18 Wall. 589. In this case it appeared that under the National Banking Act of 1863, no stock-

That the stockholders may agree amongst themselves that such a lien shall exist; that they may adopt, or authorize the adoption of, by-laws prohibiting the transfer of stock until the debts and liabilities of the stockholder are discharged; and that such a by-law will be effectual as between the stockholder and the corporation, and all persons who have notice of its existence, are propositions which seem to us to rest on sound principles, and to be sustained by creditable authority.[22] When the certificate of stock expresses on its face the reservation of such a lien, a purchaser would be put upon inquiry, and constructively notified if any debt existed as a lien upon the stock; and in such cases the lien should be recognized.[23] And it is said in Angell & Ames on Corporations that "a by-law of a bank giving to the institution a lien upon the shares of a stockholder for debts due from him to the bank is a reasonable and valid by-law."[24] Charter and statutory provisions that stock shall only be transferable upon the books of the corporation are chiefly designed for the protection of the

holder in a national bank could sell any share held by him in his own right so long as he was indebted to the bank; but the Act of 1864 abolished this provision and declared that no national banking association should make any loan or discount on the credit of the shares of its own capital stock. The Act of 1864 also provided that such associations might adopt by-laws not inconsistent with its provisions to define and regulate the manner in which stock should be transferred and its general business conducted. The Supreme Court of the United States decided that no authority was given a national bank by the provisions quoted to adopt a by-law giving it a lien on stock of its debtors; and that such a by-law was not "a regulation of the business of the bank, or a regulation for the conduct of its affairs," nor such regulation as a national bank might make under the Act of 1864, to the spirit of which such by-law was opposed.

22. Leggett v. Bank of Sing Sing, 24 N. Y. 183; Bank of Attica v. Manufacturers' Bank, 20 N. Y. 501; Driscoll v. West Bradley & C. M. Co., 59 N. Y. 105–109 (*semble*); Tuttle v. Walton, 1 Ga. 43; Morgan v. Bank of North America, 8 Serg. & R. 73; Child v. Hudson's Bay Co., 2 P. Wms. 207; Morse on Banking, 442; Green's Brice's Ultra Vires (2d ed.), 15, note *a;* Field on Corporations, p. 346, § 311; Angell & Ames on Corporations, § 355.

23. Van Sands v. Middlesex County Bank, 26 Conn. 144; Driscoll v. West Bradley & C. M. Co., 59 N. Y. 96; Proffat's note, 11 Am. Dec. 582.

24. Angell & Ames on Corporations, § 355, p. 380; Pierce on Railroads, 129; Morse on Banking, 442; Green's Brice's Ultra Vires (2d ed.), note *a*. See also Lockwood v. Mechanics' Nat. Bank, 9 R. I. 308; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513; St. Louis Perpetual Ins. Co. v. Goodfellow, 9 Mo. 149; Pendergast v. Bank of Stockton, 2 Sawy. 108; McDowell v. Bank, 1 Harr. 27, 369; *In re* Dunkerson, 6 Biss. 227.

corporation; and when authorized to adopt by-laws regulating the transfer of stock it would seem that a regulation made creating the lien for debts due the institution would be a reasonable exercise of such authority. A purchaser acquires by proper transfer of the certificate of stock all the rights of the transferrer. He can protect himself from possible loss by inquiry as to the status of the stock; and there are well-considered authorities which sustain the view that the corporation when authorized to regulate the transfer of stock has an incidental power to pass a by-law fixing a lien upon its stock for debts due by the stockholder.[25] But the weight of authority is in favor of the doctrine that a purchaser for value in the usual course of business without notice is not affected by a secret lien of the corporation on the stock.[26]

§ 1708e. **(3) As between the transferee of a certificate of stock and a creditor of the transferrer,** it would seem that any *bona fide* assignment of the stock for value would effectually pass the transferrer's interest therein, so far as to supersede the right of an attachment or execution creditor to levy upon it for a debt due by the transferrer. For whether such assignment vest the legal or equitable interest of the assignor in the assignee, no property right of the assignor remains that is subject to legal process; and the provisions of corporate charters that no transfer of stock shall be valid or effectual until entered or registered upon the books of the corporation, are manifestly designed for the security of the corporation itself, and of third persons taking transfers of stock without notice of any prior equitable transfer, and are not made with reference to the rights of creditors of a stockholder.[27] This is in accordance with the general principles applicable to all manner of equitable assignments of personal property; but there are cases which hold that there can be no valid transfer of stock as

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25. Farmers' Bank v. Wasson, 48 Iowa, 338, and cases cited *supra*.

26. Farmers' Bank v. Wasson, 48 Iowa, 338, and cases cited *supra*.

27. Black v. Zacharie, 3 How. 483; Western v. Bear River, etc., Co., 6 Cal. 425; Newberry v. Detroit, etc., Iron Co., 17 Mich. 141; Commonwealth v. Watmough, 6 Whart. 139; Bank of Utica v. Smalley, 2 Cow. 770; Stebbins v. Phœnix Ins. Co., 3 Paige, 350; Gilbert v. Manchester Mfg. Co., 11 Wend. 627; Farmers' Bank v. Iglehart, 6 Gill, 50; Sargent v. Essex Marine R. Co., 9 Pick. 202; Continental Nat. Bank v. Eliot Nat. Bank, cited in 37 Am. Rep. 353; Dos Passos on Stockbrokers, 624, 628, and cases cited; Angell & Ames on Corporations, § 354; Plankinton v. Hilderbrand, 89 Wis. 209, 61 N. W. 839.

against a creditor of the transferrer, unless the regulations provided by the charter or general statutes are complied with.[28]

§ **1708f. (4) As between the transferee of a certificate of stock and a third party** who has purchased the shares, the better opinion is that a *bona fide* transfer of the certificate carries with it the transferrer's interest in the stock, and that a subsequent purchaser who simply relies on the books of the corporation for information as to who are stockholders, and who buys the shares without taking the certificate, does so at his peril. The certificate is the muniment of title. It is generally dealt with as the representative of the proportionate interest it assures; and if not in possession of the party offering to sell the shares, a purchaser would be put upon inquiry to ascertain the true condition of things. And on the other hand, a purchaser of the certificate from one whom it testifies to be a shareholder, would have a right to suppose that no one would have bought the shares without taking the customary evidence of title.[29] If the corporation should actually transfer the shares upon its books to a subsequent purchaser without surrender of the certificate, it would act wrongfully and would be bound to issue certificates to the prior purchaser, who had acquired the stock by transfer of the certificate in due course.[30]

§ **1708g. Usual method of transferring stock; transfers under powers of attorney in blank.**— Commercial corporations generally encourage the assignment of their shares, as their value is increased by the facility of transfer; and it is generally provided on the face of their certificates of stock by virtue of their charters, by-laws, or regulations, that the shares "are transferable on the books of the company, in person or by attorney, on the surrender of this certificate." And on the back of the certificates there is generally a printed form of sale and assignment, with an irrevocable power of attorney in blank, authorizing the

28. Sabin v. Bank of Worcester, 21 Me. 353; Pinkerton v. Manchester & L. R. Co., 42 N. H. 424; Foster v. Essex Bank, 5 Gray, 373 (but see Sargent v. Essex Marine R. Co., 9 Pick. 202); People's Bank v. Gridley, 91 Ill. 457.

29. Driscoll v. West Bradley & C. M. Co., 59 N. Y. 96. See also Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Bank v. Lanier, 11 Wall. 369; Dos Passos on Stockbrokers, 629. This does not seem to be the view taken in England. See Shropshire Union R. & C. Co. v. The Queen, L. R., 7 H. L. Cas. 496.

30. Cushman v. Thayer Mfg. Co., 76 N. Y. 267; Smith v. American Coal Co., 7 Lans. 317.

unnamed person to do all things requisite to perfect the transfer on the books of the corporation. When such formal assignment, and power of attorney in blank, is signed by the shareholder, and the certificate is delivered therewith, an apparent ownership in the shares represented is created in the holder. And the general principle sustained by the great weight of authority, as well as of reason, is that when the owner of a certificate of stock with such a power of attorney in blank thereon written, or thereunto attached, intrusts it to an agent with power to deal therewith, a *bona fide* purchaser for value without notice will be protected in his acquisition of the certificate, although the agent to whom it has been intrusted has diverted it from the purposes for which it was put in his charge, or has been guilty of a fraud or breach of trust in reference thereto.[31] This doctrine does not rest upon

31. Johnston v. Laflin, 103 U. S. (13 Otto) 800; Burton's Appeal, 93 Pa. St. 214; Wood's Appeal, 92 Pa. St. 379; Cushman v. Thayer Mfg. Co., 76 N. Y. 371; Burrall v. Bushwick R. Co., 75 N. Y. 220 (*semble*); Moore v. Metropolitan Nat. Bank, 55 N. Y. 41; McNeil v. Tenth Nat. Bank, 46 N. Y. 325; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Commercial Bank v. Kortright, 22 Wend. 348; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616 (*semble*); Leitch v. Wells, 48 N. Y. 585; Moore v. Moore, 112 Ind. 151, citing the text; Chase v. Whitmore, 68 Cal. 547; Ambrose v. Evans, 66 Cal. 74; Prall v. Tilt, 28 N. J. Eq. 480; Bridgeport Bank v. New York, etc., R. Co., 30 Conn. 275; Mount Holly Turnpike Co. v. Ferree, 2 C. E. Green, 117; Duke v. Cahawba County, 10 Ala. 82; Thompson v. Toland, 48 Cal. 99; Fraser v. Charleston, 11 S. C. (N. S.) 486; Dos Passos on Stockbrokers, 600 *et seq.*; 2 Ames on Bills and Notes, 784; Lewis on Stocks, 43 *et seq.* In Taylor v. Great Ind. P. R. Co., 5 Jur. (N. S.) 1087, the blank transfers were blank as to the value and number of the shares, and on account, as it would seem, of their defective character, the doctrine of the text was not applied. In Rumball v. Metropolitan Bank, 2 Q. B. 194, 20 Moak's Eng. Rep. 279, a similar doctrine was applied where the scrip inured to bearer. The National Safe Dep. Sav. & Trust Co. v. Gray, 12 App. D. C. 276. In this case it was held that where a stock certificate, with a written transfer and power of attorney thereon in blank, signed by the person to whom the certificate was issued, is pledged by a person in possession thereof to secure an advance of money made to him at the time, and also to secure pre-existing debts, the pledgee is not chargeable with notice of any equities existing between the original owner and the pledgor, but the original owner of the pledge is entitled, under such circumstances, to redeem it by payment of the money advanced when the pledge was made, regardless of the pre-existing debts due the pledgee from the pledgor, unless the pledgee shows he changed his position to his prejudice in relation to such pre-existing debts on the faith that the pledgee was the real owner of the certificate. Where certificates of stock are transferred by owner thereof by signing blank forms of assignment with marginal note, giving assignee thereof authority to sell the stock if necessary to meet any indebtedness of the assignor, held,

the idea that the certificate of stock is a negotiable instrument; but upon the equitable principle that where a person confers upon another all the *indicia* of ownership of property, with comprehensive and apparently unlimited powers in reference thereto, he is estopped to assert title as against a third person, who, acting in good faith, acquires it for value from the apparent owner.[32]

The like principles would apply if the certificates of stock were issued in favor of the bearer, and were intrusted to an agent who transferred them in breach of his trust.[33]

And where the owner of a certificate executes on the back of it absolute power to sell or transfer, and delivers it to a broker as collateral security and the broker surrenders it, takes out a new certificate in his own name, and pledges such new certificate for value to one who has no knowledge of the real ownership, such pledgee acquires a good title against the true owner.[34]

But if the certificate of stock were lost or stolen with a blank assignment and power of attorney, not being a negotiable instrument, a purchaser could not acquire title against the true owner.[35] The doctrine of *lis pendens* has no application to corporate stock.[36]

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that having received this stock under said assignment, executed in blank, and conferring only a power to sell, the defendant was upon its inquiry as to the right of assignee to pledge the stock for his own debt, and must, therefore, be charged with full notice of the contract by which they held same. See German Sav. Bank of Baltimore City v. Renshaw, 78 Md. 475, 28 Atl. 281.

32. Moore v. Moore, 112 Ind. 151, citing the text; Neuhoff v. O'Reilly, 93 Mo. 764; Lee v. Turner, 89 Mo. 489.

33. In Rumball v. Metropolitan Bank, 2 Q. B. Div. 194, 20 Moak's Eng. Rep. 279, it appeared that scrip of the Anglo-Egyptian Banking Company had been issued, certifying that after payment of certain instalments per share, the bearer would be entitled to be registered as the holder of ten shares. After paying one instalment the plaintiff put the scrip in the hands of a stockbroker for certain purposes; and the broker fraudulently diverted them, and deposited them with the defendant as security for a loan. It was held that plaintiff could not recover his scrip in an action against the lender who took it as security, on the ground as stated by Miller, J., that "if a party possessed of a security purporting on the face of it to be transferable by delivery, chooses to leave such security in the hands of a third party, and the latter makes it over to a *bona fide* holder for value, the true owner must be taken to have brought about his own loss and cannot recover it back.

34. Westinghouse v. German Nat. Bank, 196 Pa. St. 249, 46 Atl. 380.

35. Bereich v. Marye, 9 Nev. 312; Burton's Appeal, 93 Pa. St. 214 (*semble*); Dos Passos on Stockbrokers, 601, note 1; Barstow v. Savage Mining Co., 64 Cal. 388.

36. Holbrook v. New Jersey Zinc Co., 57 N. Y. 627.

We have not considered the questions which arise when blank powers of attorney are executed under seal. They are elaborately discussed in the treatises on stocks.[37]

§ **1709.** The corporation should require the surrender of the certificate issued to a shareholder before entering a transfer of the shares upon its books, in order to avoid liability to a *bona fide* transferee of such certificate without notice.[38] The United States Supreme Court has held that a bank whose certificates of stock declared the stockholders entitled to so many shares of stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise, and which suffers a stockholder to transfer to anybody on the books of the bank his stock, without producing and surrendering the certificates thereof, is liable to a *bona fide* transferee for value of the same stock, who produces the certificates with properly executed power of attorney to transfer; and this is so, although no notice has been given to the bank of the transfer. The equities in this case were not allowed to be set up by the bank, because by its own act it had given implied assurance that there were none.[39]

SECTION II.

OTHER QUASI NEGOTIABLE INSTRUMENTS.

§ **1710.** Bills of lading constitute the most important of all varieties of documents of title which possess a *quasi* negotiable quality, and a special chapter is devoted to their consideration.[40] There are a few other instruments which, except when so declared by statute, are not negotiable; and indeed do not approximate negotiability to the same extent as bills of lading or certificates of stock. But the tendency of modern usage is to increase the facility for their transfer, and a few words as to their general nature may not be out of place in this work.

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37. See Lewis on Stocks, 46, 51.

38. Cushman v. Thayer Mfg. Co., 76 N. Y. 367; Dos Passos on Stockbrokers, 618; Bank of Atchison County v. Durfee, 118 Mo. 431, 24 S. W. 133, 40 Am. St. Rep. 396.

39. Bank v. Lanier, 11 Wall. 369. See Schouler on Personal Property, 631, 632, 633, 634; Hubbard v. Manhattan Tr. Co., 30 C. C. A. 520, 87 Fed. 51.

40. § 1727.

§ **1710a. As to dividend warrants.**— In England, it has been held, that a dividend warrant in the form of a check drawn by the Bank of England upon its cashier, payable to the plaintiff, but containing no words of negotiability, was not at law assignable; and that whatever might be the effect of an immemorial custom in a particular place, that the custom and usage of bankers and merchants, approved for sixty years, could not alter the law by which such an instrument conferred no right of action on an assignee.[41]

§ **1711. Checks for baggage** issued by common carriers are not of the character of bills of lading and the like *quasi* negotiable instruments; and the persons receiving them are not presumed to know that they contain the terms upon which the property is carried.[42]

§ **1711a. Savings banks' pass-books** are not negotiable by delivery; nor will the possession of one by a stranger justify a bank in paying away its depositors' funds to such stranger. The book itself is nothing more than evidence of the bank's liability to the depositor, and imports merely an agreement to repay moneys, when, and to whom, he shall direct.[43]

§ **1712. Delivery orders.**— In regard to delivery orders, by which are meant orders given by a vendor on a bailee, who holds possession as his agent, it has been held in England, that delivery of the goods is not complete until the bailee has attorned to the buyer, and thus become his agent.[44] It has also been decided that such an order differs in effect from a bill of lading; that the indorsement of it by a vendee to a sub-vendee was unavailing to oust the possession of the original vendor, and that his lien remained unaffected, when neither the first buyer, nor the sub-vendee had procured the acceptance of the order, nor taken actual possession of the goods before the order was countermanded.[45] Where the defendants sold to B. & Co. one hundred tons of zinc,

41. Partridge v. Bank of England, 9 Q. B. 396.

42. Blossom v. Dodd, 43 N. Y. 264. See Buller v. Heane, 2 Campb. 415.

43. Smith v. Brooklyn Sav. Bank (N. Y.), 1 Cent. 801; Crawford v. West Side Bank, 100 N. Y. 54; Farmer v. The Manhattan Sav. Inst., 60 Hun, 462, 15 N. Y. Supp. 235; Kummel v. Germania Sav. Bank, 127 N. Y. 488, 28 N. E. 398; Clark v. Saugerties Sav. Bank, 62 Hun, 346, 17 N. Y. Supp. 215.

44. Benjamin on Sales, 613.

45. Cent. Dict.; Am. & Eng. Encyc. of Law (1st ed.), vol. III, p. 282.

and gave them four documents to the following effect: "We hereby undertake to deliver to your order indorsed hereon, twenty-five tons merchantable zinc off your contract of this date;" and upon the faith of these documents the plaintiffs bought of B. & Co., and paid for fifty tons of the zinc, and B. & Co. failed, without having paid for it themselves, whereupon the defendants refused to deliver it to the vendees — it was held that the delivery orders or undertakings did not estop them from setting up as against the vendees of B. & Co. their right as unpaid vendors to withhold delivery.[46]

§ **1712a. Clearing-house associations.**—A "clearing-house" has been well defined to be, a place or institution where the settlement of mutual claims, especially of banks, is effected by the payment of differences called balances. A clearing-house association, therefore, has for its object the daily exchanges between the banks composing the association, and the payment of the balances resulting from such exchanges.[47]

"The clearing-house system appears to have been originated in Edinburgh; at least the bankers of that place claim the credit of establishing the first clearing-house; but the earliest one of whose transactions we have any record is that of London, which was founded in 1775, or perhaps earlier, as the record is not altogether clear on the subject. The ale-house was in those times, as it still is, the general resort of persons about starting new enterprises, and it was there that the messengers or clerks held their meetings; but as the system grew to be of such utility as to make it indispensable, the association procured rooms in Lombard street, for the convenience of exchanging checks and other securities, and reducing the amount of actual money used in the settlement of their accounts. This was the beginning of the clearing-house system. The New York clearing-house was established in 1853, Boston established one in 1856, Philadelphia, Baltimore, and Cleveland in 1858, Worcester in 1861, Chicago in 1865, and since that date the system has spread throughout the country, so that it is said by Mr. Bolles in his book on practical banking, published in 1884, page 217, there were then thirty-one clear-

46. Crane v. Clearing-House Association, 2 Pa. Dist. Rep. 509.

47. See Abbott's Law Dict., titles Clearing, and Clearing-House; O'Brien v. Grant, 146 N. Y. 166, 40 N. E. 871; Cent. Dict., Clearing-House; Bouvier's Law Dict., Clearing-House.

ing-houses known to exist in this country; and they also exist in Australia, France, Germany, Switzerland, Italy, and generally throughout the continent of Europe.[48]

§ **1712b. Scheme and mode of operation.**— As has been indicated, the clearing-house system as existing among banking institutions is a method adopted for the common exchange of checks, drafts, or other obligations payable on demand, held by each member of the association against every other member, and a settlement of the resulting differences, the object being to avoid the inconvenience and labor involved of each bank sending to all the others to make presentment of the paper it may hold.

Clerks from each bank attend the clearing-house with checks and drafts, usually called exchanges, on the other banks belonging to the clearing-house. These exchanges are distributed by messengers among the clerks of the banks that must pay them. Each bank, in turn, receives from all the other banks the exchanges they have received drawn on it, and which it must pay. The exchanges which a bank takes to the clearing-house are called creditor exchanges; the exchanges which it receives from the other banks represented there are called debtor exchanges. If the creditor exchanges of a bank exceed its debtor exchanges, it is a "creditor bank" and must be paid the balance; if the reverse is the case, it is a "debtor bank," and must pay the balance. The balances are paid by the debtor banks to the clearing-house for the creditor banks.[49]

§ **1712c. Clearing-house certificates.**— A clearing-house certificate is a device of clearing-house associations to save inconvenience and labor incident to the settling of balances between the members of the association. They are sometimes called "clearing-house due-bills." These certificates or due-bills are issued, instead of the actual payment of money, by one member of the association to another. For instance, where a depositor in one bank holds a draft on another, the proceeds of which he desires

48. Dutton v. Merchants' Nat. Bank, 16 Phila. 94; Grant's Law of Banking; Morse's Banks and Banking; Bolles' Banks and their Depositors; Philler v. Patterson, 168 Pa. St. 468, 32 Atl. 26, 47 Am. St. Rep. 896; Crane v. Fourth Street Nat. Bank, 173 Pa. St. 566, 34 Atl. 296; Philler v. Yardley, 17 U. S. App. 647, 62 Fed. 645; O'Brien *et al.*, Receivers, v. Grant, Receiver, 146 N. Y. 163, 40 N. E. 871.

49. McEwan v. Smith, 2 House of Lords Cases, 309; Griffiths v. Perry, 1 El. & El. 680, 28 L. J. Q. B. 208.

to deposit, he may receive therefor a clearing-house due-bill or certificate, which will be treated as cash by the bank, in which he wishes to make the deposit. A clearing-house certificate or due-bill is not a mere certificate of deposit creating a contract of bailment, but is as negotiable an instrument as a check payable to bearer, or as a promissory note payable to order, or bearer.[50]

§ 1713. Dock warrants and warehouse-keepers' receipts for goods, independent of statute law, are of modern invention, and do not rest like bills of lading upon ancient mercantile custom, imparting to them a *quasi* negotiability. "These documents," says Blackburn, J., "are generally written contracts, by which the holder of the indorsed document is rendered the person to whom the holder of the goods is to deliver them, and in so far they greatly resemble bills of lading; but they differ from them in this respect, that when goods are at sea, the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship, and requiring him to attorn to his rights; but when the goods are on land, there is no reason why the person who receives a delivery order, or dock warrant, should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is, therefore, a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore."[51]

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50. Farmelœ v. Bain, 1 Com. Pleas Div. 445 (1876).

51. Blackburn on Sales, 297; Benjamin on Sales, 613; Farina v. Home, 16 M. & W. 119. Earlier cases took a different view. See Lucas v. Dorrien, 7 Taunt. 268; Zwinger v. Samuda, 7 Taunt. 265; Keyser v. Suze, Gow. 58. See also Benjamin on Sales, 616. In negotiable warehouse receipts, issued for certain imported goods, stored in defendant's warehouses, the warehouses were designated in the receipts as "free warehouses," meaning that the internal revenue tax on the goods stored therein had been paid. The receipts were transferred to plaintiff as security for loans. In an action to recover the value of the goods, it appeared that the warehouses were bonded warehouses, and the defendants refused to deliver the goods without payment of the internal revenue tax. Held, that the plaintiff was a *bona fide* holder for value and was not affected by knowledge on the part of the owners of the goods who received the receipts, that the goods were still bound for the internal revenue tax, or by the fact of the parties to whom they transferred them, transferred to the plaintiff in fraud of the rights of the first holders. Further held, that defendants were responsible to the plaintiff for the goods, as free

§ 1713a. Warehouse receipts; nature of; who may issue.— Warehouse receipts cannot be based upon the property of the warehouseman — such receipts can only be issued against the property of another, stored with the keeper of the warehouse. It is only persons who pursue the calling of warehousemen by receiving and storing goods in a warehouse as a business for profit,

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goods. First Nat. Bank of Chicago v. Dean, 137 N. Y. 110, 32 N. E. 1108. In Dean v. Driggs, 137 N. Y. 274, 33 Am. St. Rep. 721, held, that a warehouseman is estopped by his warehouse receipt only when it amounts to a representation as to a fact, which was, or in the ordinary course of business ought to have been, within his knowledge, and which a third party, acting reasonably, would have a right to rely and act upon. Further held, that it is no part of the duty of a warehouseman to open packages delivered to him, for the purpose of determining their contents, and he is not chargeable with knowledge of their contents when they are not visible and open to inspection. It appears from the facts of this case that a party deposited with the defendant certain barrels described as and marked "Portland Cement." The warehouse receipt was pledged as security for a loan. It subsequently developed that the barrels did not contain portland cement, but a worthless material. In the case of Willets v. Hatch, 132 N. Y. 41, 30 N. E. 251, it is held, that in case of deposit of goods with warehousemen and issuance of warehouse receipts, that the transaction is a bailment for the mutual benefit of the parties, and that they have an equal interest and duty in the preservation of the property. And the warehouseman is liable to the holder of a warehouse receipt for goods lost or destroyed through accident or crime, or negligence on his part. See Kaiser v. Latimer, 40 App. Div. 149, 57 N. Y. Supp. 833. Under the Maryland Code, which provides that warehouse receipts shall be negotiable instruments, the Court of Appeals of Maryland holds that where goods are consigned generally to a party who is clothed with the *indicia* of title, and the goods are by that party stored in a warehouse, the warehouseman upon the faith of such *indicia* of title issuing receipts, a *bona fide* assignee of such receipts is entitled to the goods, although the consignee was not the owner thereof, and was not authorized to sell the same. And further held, that where such warehouse receipts are pledged to a third party for advances, the purchaser thereunder without actual notice of the equities between prior parties acquires a good title. And further held, that when the question is whether the act of an agent is within the scope of his authority or not, a third party may show as against the agent's principal, that authority was expressly conferred or that it might be inferred from the course of dealing or that the act of the agent was subsequently ratified. See Farmers' Packing Co. v. Brown, 87 Md. 1, 39 Atl. 625; Commercial Bank of Selma v. Hurt, 99 Ala. 130, 12 S. E. 508, 42 Am. St. Rep. 38; State Nat. Bank v. Bryant & Mathers, 49 La. Ann. 467, 22 So. 89; Chambers v. Hubbard & Co., 51 La. Ann. 887, 25 So. 536.

who have power to issue a technical warehouse receipt, the transfer of which is a good delivery of the goods represented by it.[52]

In order to constitute a warehouse receipt, a transfer of which will pass title and give constructive possession of goods stored thereunder, there must be something on the face of the instrument to indicate that a contract of storage has been entered into; and hence it has been decided that mere weighing tags given by a company that makes no charge for storing, and which only show the weight and number of sacks of beans weighed on the company's scales for the person named therein, are not warehouse receipts, and a transfer of such weighing tags to a pledgee thereof, does not transfer title to, and the possession of, the beans, and they may be attached by a creditor of the pledgor. But the transfer of a warehouse receipt by a debtor to a creditor to hold the goods covered thereby as security for the debt, operates as a delivery of the goods, and places them beyond the control of the debtor in so far as debtor and creditor are concerned, and no notice of such transfer is necessary to the warehouseman.[53]

It is not always essential, however, that a warehouse receipt should be duly indorsed in order to transfer title to the goods stored — *i. e.,* if the warehouse receipt states that the goods stored are "subject to the presentation of this receipt only." In such case, the legal effect is to transfer title to the goods by mero delivery of the receipt itself and without indorsement, and is analogous to a negotiable instrument payable to bearer — this is undoubtedly true if such be the intention of the parties. In such case the warehouseman becomes the bailee of the person receiving the certificate. even though the former has no notice of the transfer.[54]

§ **1714.** There are statutory enactments in England which greatly enlarge the effect of such instruments.[55] In Virginia, by

52. Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 49 N. E. 592, 63 Am. St. Rep. 302; Sinsheimer v. Whitely, 111 Cal. 378, 43 Pac. 1109, 52 Am. St. Rep. 192.

53. Friedman, Keller & Co. v. Peters, 18 Tex. Civ. App. 11, 44 S. W. 572; Sinsheimer v. Whitely, 111 Cal. 378, 43 Pac. 1109, 52 Am. St. Rep. 192; New York Security & Trust Co. v. Lipman, 157 N. Y. 551, 52 N. E. 595.

54. Citizens' Banking Co. v. Peacock & Carr, 103 Ga. 171, 29 S. E. 752.

55. See Benjamin on Sales, 607, and the factors' acts there cited. In Planters' Rice Mill Co. v. Merchants' Nat. Bank, 78 Ga. 582, Bleckley, J., speaking of the nature and effect of warehouse receipts, said: "Warehouse receipts,

recent act of Assembly, warehouse receipts (for produce) are made negotiable under certain rules and regulations,[56] and in Minnesota they are negotiable by indorsement and delivery.[57] And so in Ohio.[58]

In Rhode Island a warehouse receipt was given to C. F. A. & Co., subject to the order of the Fifth National Bank for 390 cases of eggs to be delivered according to the indorsement thereon, but only on the surrender and cancellation of the receipt and on demand of the charges payable thereon. Across its face was the word "negotiable." The depositor borrowed money on the receipt from the Fifth National Bank; and then himself got the cases of eggs mentioned in the receipt from the

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pure and simple, with only the incidents annexed to them by law, and none superadded by special contract, conduct, or representation, are no more obligatory in the hands of *bona fide* holders for value, than in the hands of the bailor of the property stored; but, if warehouse receipts of a special form and character be adopted and issued in due course of business, for the express purpose of being pledged as security to obtain money, and if, as a part of the regular system of using them, the warehousemen acknowledge in writing on each receipt notice of assignment by the pledgor to the pledgee before the latter advances his money thereon, the pledgee, after advancing his money in good faith, is entitled to stand on the terms of the pledged receipt. Thus, though in fact no goods had been received for storage, the recital in the special receipt being utterly false, nevertheless the recital will have the same effect in protecting such *bona fide* pledgee, as if the goods had been received and stored." In the case of Hanover Nat. Bank v. The American Dock & Trust Co., 148 N. Y. 612, 43 N. E. 72, 51 Am. St. Rep. 721, held, that if a bank in good faith makes a personal loan to an officer of a warehouse company, having express authority to sign and issue negotiable warehouse receipts for goods deposited by persons other than himself, but having no such authority to sign or issue certificates in his own favor, upon the transfer to it (the bank) as collateral security, of a warehouse certificate, issued and signed by such officer in his own favor, and giving on its face a purchaser thereof such notice as should put a prudent person upon inquiry in regard to the officer's authority, and the bank, in order to maintain an action against the company on the certificate, must show that implied authority had been conferred upon the officer to issue certificates to himself for goods that he had actually deposited.

56. See Acts of Assembly of 1874, p. 233.

57. State v. Loomis, 27 Minn. 521; National Exch. Bank v. Wilder, 34 Minn. 149. So in New York. Brooks v. Hanover Nat. Bank, 26 Fed. 301.

58. Cleveland v. Sherman, 40 Ohio St. 176. In Missouri, goods in the hands of the warehouseman may be pledged by a transfer of the warehouse receipt. Conrad v. Fisher, 37 Mo. App. 367. So of a "cotton note," which is a species of warehouse receipt. Fourth Nat. Bank v. Cotton Compress Co., 11 Mo. App. 341. Also in Wisconsin. See Geilfuss v. Corrigan, 95 Wis. 651, 70 N. W. 306, 60 Am. St. Rep. 143.

warehouseman. The bank sued for the value of the eggs, and the Supreme Court held that it could recover, the extent of the damages being the loan upon the receipt with interest. The fact that the eggs have no distinguishing mark upon them and that the depositor had other eggs in the same warehouse was not regarded as material, the particular eggs in question being packed in cases.[59]

A shipping ticket has been held not a warehouse receipt, and, therefore, not negotiable.

59. Fifth Nat. Bank v. Providence Warehouse Co., 17 R. I. 114, 20 Atl. 203. See also Hall v. Milwaukee Dock Co., 29 Wis. 482; Stewart v. Insurance Co., 9 Lea, 104; Goodwin v. Scannell, 6 Cal. 541.

CHAPTER LIII.

BILLS OF CREDIT.

§ 1715. Constitutional prohibition upon the emission of bills of credit by the States.— The tenth section of the first article of the Constitution of the United States contains certain prohibitions and restrictions upon the power of the States; and the first clause of the section reads as follows: "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money, EMIT BILLS OF CREDIT; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Herein, we are only concerned in the prohibition against the emission of bills of credit; but that prohibition it is important to consider, as negotiable instruments to which the States are parties are frequently impugned as coming within its pale; and sometimes a question of nicety is involved in determining whether they do or not. Every word of the prohibition, "No State shall emit bills of credit," is pregnant with significance. In the *first* place, the prohibition is upon the States only; and corporations chartered by the States may be authorized to issue bills which the State itself cannot issue.[1] In the *second* place, the word "emit" is appropriately selected, because it is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use.[2] And in the *third* place, the term "bills of credit" is used in a sense well understood when its history is adverted to. We propose to consider (1) What are bills of credit, and (2) What are not bills of credit.

SECTION I.

WHAT ARE BILLS OF CREDIT.

§ 1716. Definition.— A bill of credit is a negotiable paper designed to pass as currency and circulate as money. Such a bill of credit as comes within the constitutional prohibition is a nego-

1. Briscoe v. Bank of Kentucky, 11 Pet. 433 (1837).
2. Craig v. State of Missouri, 4 Pet. 328 (1830).

tiable paper issued by the sovereign power of one of the United States, and designed to pass as currency and circulate as money.

§ **1717.** The nature of this class of negotiable instruments, and the object and spirit of the constitutional restriction, first received a judicial exposition in the case of Craig v. State of Missouri.[3] In that case it appeared that the State of Missouri, with a view to relieve the necessities of the times, established loan offices to loan certain sums to citizens, taking security by mortgage redeemable in instalments. The loan was in certificates in the following form:

"This certificate shall be receivable at the Treasury, or any of the loan offices of the State of Missouri, in the discharge of taxes or debts due the State for the sum of $——, with interest for the same at the rate of two per centum per annum from this date, the —— day of ———, 182–."

They were signed by the auditor and treasurer, were not to exceed in amount two hundred thousand dollars, and were to be of denominations not over ten dollars nor less than fifty cents.

They were also made receivable in payment of salt at the salt springs, and by all public officers, civil and military, in discharge of their salaries and fees of office. The proceeds of the salt springs, the interest accruing to the State, and all estates purchased, and all debts due the State, were constituted a fund for their redemption. Chief Justice Marshall, rendering the opinion of the majority of the court, said: "In its enlarged, and perhaps its literal sense, the term 'bill of credit' may comprehend any instrument by which a State engages to pay money at a future day, thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word 'emit' is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes in common language denominated 'bills of credit.' To 'emit bills of credit' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes as money, which paper is redeemable

3. 4 Pet. 411 (1830).

at a future day. This is the sense in which the terms have been always understood." And considering that the instruments in question, though calling themselves "certificates," were of the character above indicated, they were adjudged bills of credit and void.

§ **1718. That instruments bear interest does not render them the less bills of credit.**—In the same case,[4] Mr. Justice Johnson dissenting, considered that a sufficient reason why the papers should not be regarded as bills of credit, was found in the fact that they bore interest, and consequently varied in value every moment of their existence. This, he said, "disqualifies them for the uses and purposes of a circulating medium, which the universal consent of mankind declares should be of a uniform and unchanging value, otherwise it must be the subject of exchange, and not the medium." The opinion of the court does not notice this argument; but it strikes us as without force — indeed as self-destructive. The very object of the constitutional provision was to inhibit the issue of a paper currency which would vary in value every moment of its existence, and was not of a uniform and unchanging value. Hence, these very qualities made them all the more bills of credit.

§ **1719. It is not necessary that a bill of credit should be a legal tender.**— It was contended further, in the same case, that these certificates, although deemed bills of credit in the common acceptation of the term, were not so in the sense of the Constitution, because they were not made a legal tender But the prohibition is general. It extends to all bills of credit, not to bills of a particular description; and there is no just foundation for this distinction.[5]

§ **1720.** It has been urged, upon the basis of more recent historical light on the subject, that no instrument is a bill of credit, within the meaning of the Federal Constitution, unless it be made a legal tender in payment of debts, and this was the opinion of as great a statesman as James Madison. It does not seem that this information was afforded in the cases decided by the Supreme Court of the United States, which take an adverse view; and it has been thought by that able publicist, R. M. T. Hunter, of Vir-

4. Craig v. State of Missouri, 4 Pet. 438, 444, Thompson and McLean, JJ., dissenting.

5. Craig v. State of Missouri, 4 Pet. 434.

ginia, that had it been supplied a different result might have been anticipated. Militating strongly against his opinion on the question is the fact that the very succeeding phrase of the Constitution contains an express prohibition against the States making anything but "gold and silver coin" a legal tender, which would alone be sufficient to interdict bills of credit, if Mr. Madison's and Mr. Hunter's conceptions are correct. This subject is of such extended interest that we append extracts from a recent report of Mr. Hunter, as treasurer of Virginia, submitting a financial scheme with arguments in support of it.[6]

6. In one of the documents accompanying the annual message of the Governor of Virginia, made December 2, 1874, is published Mr. Hunter's "Plan of a Constitutional Currency," communicated to Governor Jas. L. Kemper. It is briefly this: "Let the State issue $3,000,000 in bills of the denomination of $1, $5, $10, $20, and in fractions of a dollar, with a provision that the holder may at pleasure convert these notes into bonds, in sums of $100, or multiples of $100, to draw interest from the State at the rate of 4 per cent. per annum, in specie. In addition to which the holder of this bond shall be allowed to reinvest into bills of the like denomination as at first; which bills shall bear no interest, but shall be convertible and reconvertible as originally provided. The interest on these bonds shall be paid semi-annually, unless the holder should convert them into currency, at a shorter period, when interest shall be paid for the period of its existence as a bond. Until the sum of $3,000,000 has been issued, any holder of Virginia State bonds shall be allowed to exchange them for these bills at the market price in Richmond when sold for legal tenders. And when once issued these bills may be received at par in payment for half the taxes of any person or corporation who may owe the State for taxes." In the course of his argument Mr. Hunter says: "The privilege of paying half the taxes in these bills would add greatly to their credit, and consequently afford great relief to our people. Nor would the State run any risk if it should not exceed the limit of $3,000,000 — for every bill thus issued a corresponding value, and possibly a much larger amount in State stock would be secured. In following the provisions of the law, no bill would be issued except in exchange for State stock at the market rate. It may be supposed that such an issue would subject the State to the tax of the United States upon the amount, but a reference to the law will show that the tax is imposed only upon the notes of any person, State bank, or State banking association, used for circulation. A description and enumeration of issues which does not include such an emission of bills by the State as is herein described. If it did, the United States would doubtless relieve the State from any tax upon such an issue designed to build up a sinking fund for a State so deeply indebted as Virginia, and one in which such an issue would perform so useful a function for currency purposes amongst a people so deeply depressed as ours. It has been objected that the provision herein proposed falls within the constitutional prohibition to the States to emit bills of credit. But a careful examination of the question, it is believed, will

§ **1721. The name is immaterial.**—The chief justice, in answer to the argument that the instruments in Craig v. State of Missouri were certificates of debt, not bills, continued: "Had they been termed 'bills of credit' instead of 'certificates,' nothing would have been wanting to bring them within the prohibitory words of the Constitution. And can this make any real difference? Is the proposition to be maintained, that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new

remove this objection. It has been a matter of much difficulty to decide what is a 'bill of credit,' within the meaning of the Constitution. Judge Marshall, in the case of Craig v. The State of Missouri, 4 Pet. 431, 432, which was decided by four out of seven judges, said, that to 'emit bills of credit conveys to the mind the idea of issuing of paper intended to circulate through the community for its ordinary purposes as money, which paper is redeemable at a future day. This is the sense in which the terms have always been understood.' Judge McLean, in Briscoe v. Bank of Kentucky, 11 Pet. 314, says: 'The definition which does include all classes of bills of credit emitted by the colonies or States, is a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money.' Mr. Madison, in a letter hereafter to be quoted, says the Constitution meant such bills as were issued with a provision that they should be received as a legal tender. In the opinion of Marshall and McLean, the bills were not only to circulate as money, but to contain a pledge of the faith of the State to redeem them at some future time with money. Both attributes were necessary to lead to the mischiefs enumerated by Mr. Madison in the forty-fourth number, p. 207, of the 'Federalist,' and both must have existed to render the bills unconstitutional. The last was especially necessary. It was not until there was an overissue of these bills, and the State became unable to pay them in money, or in some mode satisfactory to the holder, that the mischiefs began. Then, indeed, when the bills became irredeemable, they became worthless as a medium of exchange and a nuisance to society. Could the State have redeemed them in some satisfactory mode, no harm would have ensued. The plan here proposed is liable to no such objection, and does not come within the mischief sought to be prevented. There is no promise to pay this bill; the holder is to be allowed to fund it in a convertible bond of the State, which may always be done." Mr. Hunter appends Mr. Madison's letter, dated Montpelier, February 2, 1831, and found on page 210 of "Selections from Private Correspondence of James Madison, from 1813 to 1836," published by J. C. McGuire, exclusively for private circulation, wherein Mr. Madison says: "The evil which produced the prohibitory clause in the Constitution of the United States was the practice of the States in making bills of credit, and in some instances appraised property, a legal tender."

name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act are as entirely bills of credit as if they had been so denominated in the act itself."

§ **1722.** It was contended also that these instruments were not bills of credit, because they were not promises to pay, but promises to receive. But they were made receivable for official salaries and fees, and were designed to be used as currency, and thus were bills of credit.

§ **1723. Being bottomed on a fund does not render the instrument any less a bill of credit.**— In the same case, Mr. Justice Thompson, dissenting, thought that the natural and literal meaning of the term "bills of credit" imported bills drawn on credit merely, and not bottomed upon any real or substantial fund for their redemption. But although secured by a fund, the bill is nevertheless issued upon, and received upon, the credit of the State — the belief and faith that the State will pay them. Should the fund fail, or be diverted, the credit of the State would still be pledged to their redemption; and even if the fund were mainly the source of the creditor's reliance, he would still look to the State, and credit it, to make faithful appropriation.[7] The circumstance, however, that a fund was appropriated to their redemption, has been adverted to, amongst others, in subsequent cases, as decisive of the question that such bills were not bills of credit.[8]

In Louisiana, papers of the character indicated in the subjoined opinion of the court were adjudged bills of credit.[9]

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7. Story on the Constitution, § 1368, vol. II.

8. Darrington v. Alabama, 13 How. 16.

9. In City Nat. Bank v. Mahan, 21 La. Ann. 753 (1869), Ludeling, C. J., said: "Section 1 of the Act of 1866 provides 'that it shall be the duty of the governor, and he is hereby empowered to issue, on behalf of the State, from time to time, for the purpose of paying the current expenses of the State, in accordance with appropriations therefor, according to law, a sum not exceeding two millions of dollars in certificates of indebtedness.'" "That they were issued on the faith of the State is apparent on the face of the certificates:

"'NEW ORLEANS, LOUISIANA, May 23, 1866.

"'It is hereby certified that five dollars is due by the State of Louisiana to bearer, and the State Treasurer is hereby directed to pay the same twelve months after date.

"' (Signed) H. PERALTA, Auditor.

"'Approved: ADAM GIFFEN, Treasurer.'"

"*Indorsement.*— 'This certificate is receivable in payment of all State dues and for sale of public lands, and is fundable, at the option of the holder, in

SECTION II.

WHAT ARE NOT BILLS OF CREDIT.

§ 1724. The States only prohibited from emitting them; corporations and private parties may do so.— We have already defined bills of credit, as they are understood within the meaning of the Constitution. The inhibition contained in that instrument is limited to the States; and, although the bill may be designed to circulate as currency, if it be not emitted by a State, it is as free from impeachment, as in violation of the Constitution, as any other negotiable paper. A State may, therefore, grant acts of incorporation authorizing banks or other associations to issue that description of paper to answer the purposes of money, and it may be issued by private persons and partnerships. This was determined by the United States Supreme Court in a case involving an act of the Legislature of Kentucky, which incorporated the "Bank of the Commonwealth of Kentucky," in behalf of the Commonwealth, the president and directors of which were chosen by the Legislature.[10] The bank was authorized to issue negotiable notes to the amount of three millions of dollars, which were declared to be receivable at the treasury and by public officers in payment of taxes, debts, and county levies, and in discharge of executions of *fieri facias*. They were in denominations of from one to one hundred dollars. It was contended that these notes were bills of credit emitted by the Commonwealth of Kentucky,

State bonds bearing six per cent. interest per annum, payable semi-annually, in accordance with the provisions of an act of the legislature approved ninth February, 1866.'" "That they were designed to circulate as money is manifested by the act of the legislature as well as by the certificates themselves. The act aforesaid declares the certificates are to be issued 'for the purpose of paying the current expenses of the State.' Section two declares that the governor shall determine the denomination and form of the certificates; that they shall be printed and engraved under his direction and control, etc., and that they shall be receivable for all State taxes or other public dues, as well as for the sale of public lands.' They were issued in sums of five, ten, and twenty dollars, in the similitude of ordinary bank bills, and they were actually circulated as money. We are constrained, therefore, to declare that said certificates were bills of credit, and that the act number five of the General Assembly of the State of Louisiana, entitled 'An Act to authorize the issue of certificates of indebtedness and of bonds for the funding of the same,' is null and void, being a contravention of section ten of article one of the constitution of the United States."

10. Briscoe v. Bank of Kentucky, 11 Pet. 328, Story, J., dissenting.

and that the paper medium of the country was intended to be embraced in the constitutional inhibition. But the court held otherwise, McLean, J., saying: "If this argument be correct, and the position that a State cannot do indirectly what it is prohibited from doing directly, be a sound one, then it must follow, as a necessary consequence, that all banks incorporated by a State are unconstitutional. This doctrine is startling, as it strikes a fatal blow against the State banks, which have a capital of nearly four hundred millions of dollars, and which supply almost the entire circulating medium of the country. * * * The Federal government is one of the delegated powers. All powers not delegated to it, or inhibited to the States, are reserved to the States, or to the people. A State cannot emit bills of credit, or, in other words, it cannot issue that description of paper to answer the purposes of money which was denominated, before the adoption of the Constitution, bills of credit. But a State may grant acts of incorporation for the attainment of those objects which are essential to the interests of society. This power is incident to sovereignty; and there is no limitation in the Federal Constitution on its exercise by the States in respect to the incorporation of banks."

§ **1725.** In subsequent cases this view has been reaffirmed; and it is decided that, although a State may supply the whole capital of the bank, may be its only stockholder, select the directory, and receive the profits, if any be realized, and may make the bills receivable for debts and taxes, the bills of the bank cannot be called bills of credit issued by the State, not being made payable by the State, but by the bank only.[11] And the doctrine has been carried to the extent of holding such instruments valid, even though the State may pledge its faith for their ultimate redemption. In a case of this kind the Supreme Court said: "It is impossible to say that bills of this kind come within the definition of bills of credit;" and the reasons assigned were, that upon the face of the bills there was no promise to pay by the State, but an express promise by the bank; that the bank had an ample fund for their redemption; that the guaranty of eventual payment of the notes by the bank was remote and contingent, and merely formal, if the bank were properly conducted; and that because the State re-

11. Woodruff v. Trapnall, 10 How. 203 (1850). See also Curran v. Arkansas, 15 How. 304 (1853).

ceived the profits, it could be no more said that it issued the notes than that a private stockholder issued the notes of his bank.[12]

§ **1726.** Not every promissory note, however, issued by the State constitutes a bill of credit. Bonds of the States are frequently issued with coupons attached for instalments of interest. They are not bills of credit, because not issued to circulate as money, but to pay actual indebtedness in a convenient form.[13] And the fact that they are made receivable for due to the State does not make them bills of credit.[14]

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12. Darrington v. Alabama, 13 How. 15–17 (1851). To same effect, see Owen v. Branch Bank, 3 Ala. 258.

13. McCoy v. Washington County, 3 Wall. Jr. 389. See next note, and *ante*, § 1491.

14. Antoni v. Wright, 22 Gratt. 833; Wise v. Rogers, 24 Gratt. 169; Maury v. Rogers, 24 Gratt. 169. See chapter XVI, on Governments as Parties to Negotiable Instruments, § 449, vol. I.

CHAPTER LIV.

BILLS OF LADING.

SECTION I.

DEFINITION AND NATURE OF BILLS OF LADING.

§ **1727.** Bills of lading are generally classed among negotiable instruments, and are frequently spoken of as negotiable, like bills of exchange, by text-writers and by jurists of high reputation and authority.[1] But while they are assignable, and possess certain capacities of negotiation, which assimilate them quite closely in some respects to negotiable instruments, they are not negotiable in the same sense as bills of exchange or negotiable promissory notes.[2] And it is more correct to speak of them as *quasi* negotiable instruments, since they are rather like than of them.[3] This close resemblance to instruments strictly negotiable, and the frequent use made of them in commercial transactions, in connection with bills of exchange, sufficiently identifies them with the subject of this treatise to render a consideration of their leading characteristics desirable.

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1. Lickbarrow v. Mason, 2 T. R. 63; Berkling v. Watling, 7 Ad. & El. 22; Bell v. Moss, 5 Whart. 189.

2. Gurney v. Behrend, 3 El. & Bl. 622, 23 L. J. Q. B. 265; Barnard v. Campbell, 55 N. Y. 462, 1 Smith's Lead. Cas. 890; Raleigh & Gaston v. Lowe, 101 Ga. 320, 28 S. E. 867; Louisville & Nashville R. Co. v. Barkhouse, 100 Ala. 543, 13 So. 534; Knight v. St. Louis, etc., Ry. Co., 141 Ill. 110, 30 N. E. 543; Pollard v. Reardon, 13 C. C. A. 171, 65 Fed. 848.

3. Schouler on Personal Property, 410, 605; Davenport Nat. Bank v. Homeyer, 45 Mo. 145; Blanchard v. Page, 8 Gray, 297; National Bank v. Merchants' Nat. Bank, 91 U. S. (1 Otto) 98. As to negotiability by statute, see § 1747*a*. There is quite a comprehensive and interesting article on bills of lading in the Cent. L. J. for Jan. 13, 1882, p. 24, vol. XIV, No. 2. In Cox v. Central Vermont R. Co., 170 Mass. 129, 49 N. E. 97, 68 Am. St. Rep. 409, the court said: "A bill of lading is not a negotiable instrument in the ordinary sense of those words; and an indorsement and delivery of it for value operates to transfer the title to the goods described in it, but not as an assignment of the contract, except by force of some statute."

§ 1728. As to their definition and nature.— A bill of lading may be defined to be a written acknowledgment by the master of a ship, or the representative of any common carrier, that he has received the goods therein described for the voyage or journey stated, to be carried upon the terms and delivered to the persons therein specified. It is at once a receipt for the goods which renders the carrier responsible as their custodian, and an express written contract for their transportation and delivery.[4] And to facilitate commercial transactions, it has grown to be regarded as the symbolical representative of the goods which it describes; and its transfer carries with it such rights as the party in possession of the goods could transmit by actual corporeal transfer of the goods themselves.

§ 1729. Bill of lading is prima facie evidence of quantity and quality of goods received.— The bill of lading is clearly a receipt for the goods, accompanied with a promise to redeem them to the bailor, or according to his order.[5] And while the master of the ship, or the agent of the carrier, has no authority to sign bills of lading for a greater quantity, or different quality, of goods than is actually received, yet the bill of lading is sufficient *prima facie* evidence of the truth of its contents as against the master or owner of the ship, or other carrier, not only as to the reception of the merchandise, but also as to any material fact stated, respecting the quantity, or quality, or any other element in the description of the goods.[6] And very clear proof would be required

4. See on the subject, Schouler on Personal Property, 408; Redfield on Carriers, § 247; 1 Smith's Lead. Cas. 879 *et seq.;* Benjamin on Sales, 656; Manufacturing Co. v. Railway Co., 121 N. C. 514, 28 S. E. 474, 61 Am. St. Rep. 679. See Hull v. Missouri Pacific Ry. Co., 60 Mo. App. 593; Neill v. Produce Co., 41 W. Va. 37, 23 S. E. 702; Cavallaro v. Texas & Pacific Ry. Co., 110 Cal. 348, 42 Pac. 918.

5. Knox v. The Nivella, Crabbe, 534.

6. Leggett on Bills of Lading, 108; Nelson v. Woodruff, 1 Black, 156; The J. W. Brown, 1 Biss. 76; O'Brien v. Gilchrist, 34 Me. 554; May v. Babcock, 4 Ohio (O. S.), 346 (1829); Clark v. Barnwell, 12 How. 272; Rich v. Lambert, 12 How. 347; Great Western R. Co. v. McDonald, 18 Ill. 172; The Lady Franklin, 8 Wall. 325; Redfield on Carriers, §§ 247, 259; Bates v. Todd, 1 Moody & R. 106; Dickerson v. Seelye, 12 Barb. 102; Wayland v. Mosely, 5 Ala. 430; Wolfe v. Myers, 3 Sandf. 7; Greenleaf on Evidence, § 305; Abbe v. Eaton, 51 N. Y. 410; Meyer v. Peck, 28 N. Y. 590; Berkley v. Watling, 7 Ad. & El. 29; Hubbersty v. Ward, 8 Exch. 330; Campion v. Colvin, 3 Bing. N. C. 17. A shipper is conclusively bound when he signs. Kellerman v. Kansas City R. Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828.

to show that the goods receipted for were not in fact received.[7] The law applicable to this question, in so far as it relates to the condition of the goods received, has been well stated in Massachusetts by Shaw, C. J.[8] The acknowledgment of the bill of lading does not extend so as to bind the carrier beyond the external condition of the goods as received, and does not extend to their condition or particular mercantile quality as might be disclosed by examination of the package. To ascertain such matters is not within the duty of the master of the ship.[9]

§ 1729a. How far, and as against whom, a bill of lading is conclusive evidence of the quantity of the goods received.— As between the immediate parties to the bill of lading, and in so far as it is a receipt for the goods defining their quantity, quality, etc., it is open to explanation and contradiction by parol evidence or otherwise;[10] though its contracting terms are like those of any

7. Little Miami, etc., R. Co. v. Dodds, 1 Cin. (Ohio) 47.

8. In Hastings v. Pepper, 11 Pick. 43, Shaw, C. J., said: "It may be taken to be perfectly well established that the signing of a bill of lading, acknowledging to have received the goods in question in good order, is *prima facie* evidence that as to all circumstances which were open to inspection and visible, the goods were in good order; but it does not preclude the carrier from showing, in case of loss or damage, that the loss proceeded from some cause which existed, but was not apparent, when he received the goods, and which, if shown satisfactorily, will discharge the carrier from liability. But in case of such loss or damage the presumption of law is, that it was occasioned by default of the carrier, and of course the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible." See Nelson v. Woodruff, 1 Black, 160; Clark v. Barnwell, 12 How. 272; Rich v. Lambert, 12 How. 347; Farra v. Adams, Buller N. P. 69; *post*, § 1742.

9. Clark v. Barnwell, 12 How. 272; Cox v. Bruce, 18 Q. B. 147; Iron Mountain R. Co. v. Knight, 122 U. S. 86; Miller v. Hannibal & St. Joseph R. Co., 90 N. Y. 430, 43 Am. Rep. 179.

10. The Lady Franklin, 8 Wall. 325; The Delaware, 14 Wall. 579; Grace v. Adams, 100 Mass. 505; Sears v. Wingate, 3 Allen, 103; Abbe v. Eaton, 51 N. Y. 410; Meyer v. Peck, 28 N. Y. 590; Bissel v. Campbell, 54 N. Y. 356; Dickerson v. Seelye, 12 Barb. 102; Cox v. Peterson, 30 Ala. 608; Bates v. Todd, 1 Moody & R. 106; Wharton on Evidence, § 1070; Waydell v. Adams, 23 App. Div. 508, 48 N. Y. Supp. 635. It is competent to show by parol that the carrier by oral agreement undertook to carry the articles shipped to a point beyond the point of destination named in the bill of lading. See Saltsman v. N. Y., L. E. & W. R. Co., 65 Hun, 448, 20 N. Y. Supp. 361; Manufacturing Co. v. Railway Co., 121 N. C. 514, 28 S. E. 474, 61 Am. St. Rep. 679; Higley & Co. v. B., C. R. & N. Ry. Co., 99 Iowa, 503, 68 N. W. 829. See the Gulf, Colorado & Santa Fe R. Co. v. Nelson, 4 Tex. Civ. App. 345, 23 S. W. 732;

other contract subject to the general principle that a written contract cannot be varied or contradicted by parol testimony.[11]

As against the master of the ship the bill of lading is conclusive evidence, in favor of a consignee who has advanced money upon the faith of its statements as to the quantity and condition of the property of which it acknowledges the receipt, so far as from the whole instrument and the usage of trade the facts may be regarded as absolute statements from the master's own knowledge;[12] but it is not conclusive against the owners of the ship as to property not actually received, because it is not within the scope of the master's authority from the owners to sign bills of lading for any property but such as is put on board.[13] When the master of the ship,

Kellerman v. Kansas City R. Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; Planters' Fertilizer & Mfg. Co. v. Elder, 42 C. C. A. 130, 101 Fed. 1001; The Lakeshore, etc., Ry. Co. v. National Bank, 178 Ill. 506, 53 N. E. 326. See Wolfurt v. Pittsburg, etc., R. Co., 44 Mo. App. 330.

11. York County v. Central R. Co., 3 Wall. 107; The Lady Franklin, 8 Wall. 325; Cincinnati, etc., R. Co. v. Pontius, 19 Ohio St. 221; Bank of Kentucky v. Adams Express Co., 93 U. S. 174; Kirkland v. Dinsmore, 62 N. Y. 171; Dorr v. New Jersey, etc., Co., 11 N. Y. 485; Grace v. Adams, 100 Mass. 505; Wharton on Evidence, § 1070; *post*, § 1740; Holloway v. Wabash Ry. Co., 62 Mo. App. 53. The parties to a bill of lading must be deemed to have contracted with the understanding that well-known usages and customs might be imported into the instrument to explain what its terms had left doubtful, and to effect the object, which the parties had in view when it had not been expressed, and parol evidence is admissible for this purpose. Donovan v. Standard Oil Co., 155 N. Y. 112, 49 N. E. 678. It has likewise been held in New York that if the carrier issues to consignor, bill of lading, acknowledging the receipt on board their vessel of a specific quantity of wheat, subject to charges, and the wheat was weighed into the vessel under the supervision and control of the carriers, and the bill of lading contained the clause "all the deficiency in cargo to be paid by the carrier and deducted from the freight and any excess in the cargo to be paid for to the carrier by the consignee," the carriers were estopped from questioning the correctness of their acknowledgment and were bound to account for the precise quantity admitted in the bill of lading. Rhodes v. Newhall, 126 N. Y. 574, 27 N. E. 947, 22 Am. St. Rep. 859. See Patterson v. Kansas City, etc., R. Co., 56 Mo. App. 657.

12. Sears v. Wingate, 3 Allen, 103. See *post*, § 1733; see also Brown v. Powell Coal Co., L. R., 10 C. P. 562.

13. Sears v. Wingate, 3 Allen, 103; The Loan, 7 Blatchf. 244. In Sears v. Wingate, 3 Allen, 107, Hoar, J., said: "We think that the rules which must govern the case at bar are these: *First.* The receipt in the bill of lading is open to explanation between the master and the shipper of the goods. *Second.* The master is estopped as against a consignee who is not a party to the contract, and as against an assignee of the bill of lading, when either has taken it for a valuable consideration upon the faith of the acknowledgments which it

or agent of the carrier, issues a bill of lading without receiving the goods at all, the same principle is deemed applicable, as is hereafter shown.[14]

But if the carrier or its authorized agent issues the bill of lading containing the words "quantity guaranteed," the carrier will be responsible for the quantity specified to the consignee, the terms of the bill being conclusive.[15]

§ 1730. How the effect of a bill of lading is analogous to that of a negotiable instrument; when right of stoppage in transitu is defeated.— The idea that bills of lading are negotiable arose from the use to which they were appropriated in the transfer of goods purchased, before they were delivered to the purchaser, or before they were paid for; but it will be seen that their peculiar properties are attributable rather to a liberal application of the doctrine of equitable estoppel for the benefit of trade, than to any custom or statute which placed them upon the footing of negotiable instruments,[16] for both of these sources of negotiability are wanting. The consignor of goods shipped takes from the master of the ship a bill of lading, and sending it to the consignee who has ordered the goods, draws upon him by bill of exchange for the purchase money. Before the goods reach their destination the consignor, who in the case instanced is the vendor of the goods, learns that the vendee is insolvent; and to prevent the injustice which would be done, if, in consequence of the vendee's insolvency, and while the price is yet unpaid, they were to be seized upon in satisfaction of his liabilities, the law confers upon the vendor the right to stop the goods *in transitu,* and to retain them until the whole purchase money is paid.[17]

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contains, to deny the truth of the statements to which he has given credit by his signature, so far as those statements relate to matters which are, or ought to be, within his knowledge. *Third.* When the master is acting within the limits of his authority, the owners are estopped in like manner with him; but it is not within the general scope of the master's authority to sign bills of lading for any goods not actually received on board." N. Y., L. E. & W. R. Co. v. National Steamship Co., 137 N. Y. 23, 32 N. E. 993.

14. See *post,* § 1733.

15. Bissel v. Campbell, 54 N. Y. 353.

16. 1 Smith's Lead. Cas. 897; Security Bank v. Lutgen, 29 Minn. 366, citing the text; Louisville & Nashville R. Co. v. Barkhouse, 100 Ala. 543, 13 So. 534.

17. Gibson v. Carruthers, 8 M. & W. 336; Snee v. Prescott, 1 Atk. 246; D'Aquila v. Lambert, 2 Eden, 95, Amh. 39. And surrendering all the bills of lading for the acceptance of the vendee does not destroy vendor's right of stoppage *in transitu.* See Ainis v. Ayres, 62 Hun, 376, 16 N. Y. Supp. 905.

But suppose the consignee has received the bill of lading of the goods, deliverable to him or his assigns, or indorsed to him or his assigns, by the consignor, and has assigned the bill by indorsement to a *bona fide* third party, then the vendor's right to stop the goods *in transitu* and hold them as security for the purchase money is defeated, and the assignee of the bill acquires as perfect a title to the goods, although they have not reached the buyer's hands, as if they had actually passed through his hands and been delivered bodily to him. This was decided in the leading case of Lickbarrow v. Mason,[18] and may now be regarded as the settled law of England and of the United States.[19] But this

18. In 1 Smith's Lead. Cas. 895, 896, it is said by the learned American annotators in the course of their masterly comments on Lickbarrow v. Mason: "It would seem evident from what has been said, that Lickbarrow v. Mason should not be considered as going beyond the only point which it actually determines, that the right of a vendor to stop *in transitu* may be defeated by a sale made by the vendee, accompanied by a transfer of the bill of lading, and not treated as giving bills of lading the character of negotiable instruments, which was wholly unnecessary for the purposes of the decision. For, as the property passes under such circumstances by the sale, the indorsement of the bill has no other effect than that of defeating the right of the vendor to reclaim it, by operating as a constructive and symbolic delivery. The utmost, therefore, that the decision establishes, is an exception to the rule, that an unpaid vendor has a right to stop *in transitu*, an exception and a rule which have nothing in common with the negotiability, either of the bill of lading or of the property which it represents. Nothing can, in fact, be a greater departure from the principles and analogies of the common law, than to treat bills of lading or other documentary evidences of title to chattels personal as negotiable instruments. Instruments which represent choses in action may be negotiable, because the right cannot be separated from the instrument, and has no distinct or actual physical existence. And even there, negotiability only exists in the cases of absolute promise for the payment of money, a thing negotiable in itself, and which cannot be reclaimed by the true owner from any one who has received it *bona fide* and in exchange for a valuable consideration. But chattels personal are wholly insusceptible of negotiation in themselves, and it is manifestly inconsistent to give the documents which represent them a different character. * * * The result of the cases, therefore, as a whole, seems to be that, while, on the one hand, the possession of bills of lading or other documents of the same nature may be evidence of title, and equivalent for some purposes to actual possession, yet, that on the other, it does not constitute title, nor dispense with the rule *nemo plus juris ad alium transferre patest, quam ipse habet.*"

19. Newhall v. Central P. R. Co., 51 Cal. 345; Emery v. Irving Nat. Bank, 25 Ohio St. 360; Dows v. Greene, 24 N. Y. 641; Gurney v. Behrend, 2 El. & Bl. 622; Kemp v. Falk, 35 Eng. Rep. 395; McDonald v. McPherson, 12 Canada Sup. Ct. Rep. 420; 2 Redfield on Railroads, 160, 161; Becker v. Hallgarten, 86 N. Y. 167.

capacity of the bill of lading for transferring the right of property, under these circumstances, does not imply that it is a negotiable instrument to all intents and purposes.[20] The assignee of the bill of lading is protected because the vendor of the goods has placed in the hands of his assignor a muniment of title, clothing him with apparent ownership of the goods, and it is inequitable that a secret trust should be enforced in favor of the vendor, who has issued such muniment of title against a person who has taken an assignment of it for valuable consideration, and without notice of such circumstances as render it not fairly and honestly assignable.[21]

§ 1730a. When right of stoppage in transitu ceases.— If the goods had actually reached the consignee, and he were to sell them to a third party, although they might be unpaid for, such third party would acquire a perfect title against the world.[22] But a sale of goods not yet received by the vendee, without a transfer of the bill of lading, would not divest the right of stoppage *in transitu*.[23] And after goods have reached the consignee, the right of stoppage *in transitu,* as its very terms import, is at an end.[24] To stop them while *in transitu* is an equitable remedy, first applied by courts of equity in order to prevent injustice to the vendor; but, on the other hand, it is considered that if the vendor has chosen to transmit to his vendee the documentary evidence of title to the goods, accompanied with authority (which a bill of lading imports) to vest the same in his assignee, and he has done so before the goods have reached their destination, then the equitable right to stop them must yield to the broader and more commanding equity of the *bona fide* purchaser of the bill of lading to hold them as his own.[25]

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20. See Shaw v. Railroad Co., 101 U. S. (11 Otto) 564, and *post*, § 1750*a*.

21. Brewster v. Sime, 42 Cal. 130; Newhall v. Central Pac. R. Co., 51 Cal. 345; Midland Nat. Bank v. Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521.

22. Ilsey v. Stubbs, 49 Mass. 65; Winslow v. Norton, 29 Me. 419; Nathan v. Giles, 5 Taunt. 588; Becker v. Hallgarten, 86 N. Y. 167; St. Louis Roller Mill Co. v. Despatch Co., 27 Fed. 435.

23. Craven v. Ryder, 6 Taunt. 433; Holmes v. Crane, 2 Pick. 606.

24. Edwards v. Brewer, 2 M. & W. 375; Nicholls v. Lefevre, 2 Bing. N. C. 83; Turner v. Trustees, 6 Eng. L. & Eq. 515; Sturtevant v. Orser, 24 N. Y. 539; Louisville & Nashville R. Co. v. Barkhouse, 100 Ala. 543, 13 So. 534.

25. 1 Smith's Lead. Cas. 891.

§ 1731. Transfer of bill of lading passes title to property in same manner as a delivery of the goods.— Thus the bill of lading passes the property, when it is indorsed and intended so to operate, in the same manner as a direct delivery of the goods would do if so intended, and it operates no further.[26] It constitutes a symbolic and constructive delivery of the goods,[27] being the proper substitute for the actual delivery of goods at the time at sea *en route* to the consignee, and the arrival and delivery of which the consignor has placed it in his power by the bill of lading to anticipate.[28]

Delivery of the bill without indorsement, has been held sufficient to pass the title where the person to whom it was delivered, was recognized upon the face of the bill, as the person entitled to the ultimate possession of the goods.[29]

§ 1731a. When bill of lading becomes functus officii.— The bill of lading being the substitute and symbolic representative of the goods, not physically delivered at the time it is issued, continues to represent them until they have reached the hands of the party entitled to their possession. It becomes *functus officii* as soon as

26. Newsom v. Thornton, 6 East, 41; Gardner v. Howland, 2 Pick. 599; Mears v. Waples, 3 Houst. 582; Empire Trans. Co. v. Steele, 70 Pa. St. 190; Mower v. Peabody, 13 N. Y. 121; Indiana, etc., Bank v. Colgate, 4 Daly, 41; Emery v. Irving Nat. Bank, 25 Ohio St. 360; Newhall v. Central Pac. R. Co., 51 Cal. 345; Dows v. Greene, 24 N. Y. 638; First Nat. Bank of Starksville v. Meyer & Co., 43 La. Ann. 1, 8 So. 433. See Midland Nat. Bank v. Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505; Landa v. Lattin Bros., 19 Tex. Civ. App. 246, 46 S. W. 48; Union Pac. R. Co. v. Johnson, 45 Nebr. 57, 63 N. W. 144, 50 Am. St. Rep. 540.

27. Mechanics, etc., Bank v. Farmers, etc., Bank, 60 N. Y. 47, Miller, J.: "The delivery of the bill of lading to the plaintiff was a good symbolical delivery of the grain, and the plaintiff thereby acquired a lien upon it, or title to it, and was fully authorized to hold it until the loan was paid." Forbes v. Boston & Lowell R. Co., 133 Mass. 154; Commercial Bank v. Pfeiffer, 108 N. Y. 250; Colgate v. Pennsylvania R. Co., 102 N. Y. 120; National Bank v. Atlanta, etc., R. Co., 25 S. C. 216; Union Nat. Bank v. Rowan, 23 S. C. 339; Brent v. Miller, 81 Ala. 309; Conrad v. Fisher, 37 Mo. App. 367; Missouri Pac. R. Co. v. McLiney, 32 Mo. App. 175; Traer v. Mullaly, 12 Mo. App. 568; Garden Grove Bank v. Railroad Co., 67 Iowa, 526; First Nat. Bank v. McAndrews, 5 Mont. 325; Union Pac. R. Co. v. Johnson, 45 Nebr. 57, 63 N. W. 144, 50 Am. St. Rep. 540; Neill v. Produce Co., 41 W. Va. 37, 23 S. E. 702; Lewis v. The Springville Banking Co., 166 Ill. 311, 46 N. E. 743.

28. Pratt v. Parkman, 24 Pick. 42. See Herbert v. Winters *et al.*, 15 Mont. 552, 39 Pac. 906.

29. Schouler on Bailments, 179; Campbell v. Alford, 57 Tex. 161.

the goods are landed and delivered to the person entitled to possession; and if they are landed and warehoused in the name of the holder, it seems that he is then possessed of the goods in the eye of the law, and that he derives his power over them thereafter, not from the bill of lading, but from such possession.[30] But it has been held in England that under the statute of 11 & 12 Victoria, c. 18, which is known as the Sufferance Wharves Act, the bill of lading continues to represent the goods at a sufferance wharf until replaced by the wharfinger's warrant.[31] In brief, the bill of lading is not exhausted, and does not become *functus officii* until there is a delivery of the goods; and there can be no complete delivery of the goods until they come into possession of some person who has the right of possession under it.[32] The indorsement and delivery of a bill of lading while current to a bank as collateral security for paper discounted on its faith and credit operates the same as a delivery of the goods; and the bank can hold them so far as necessary to pay the discounted paper as against the consignee or any other person.[33]

§ 1732. As to who may issue a bill of lading.—This may be done by any common carrier, as well by one which carries by land as by water, though the term "bill of lading" seems to have had its origin from the act of "lading" vessels, which in the early days of commerce were the most frequent vehicles of trade. Rail-

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30. Hatfield v. Phillips, 9 M. & W. 467; Mottram v. Heyer, 5 Den. 632.

31. In Meyerstein v. Barber, L. R., 2 C. P. 661, 36 L. J. C. P. 361, Martin, B., said: "For many years past there have been two symbols of property of goods imported; the one the bill of lading, the other the wharfinger's certificate or warrant. Until the latter is issued by the wharfinger the former remains the only symbol of property in the goods." In New York the Factors Act of 1830 protects one who makes advances upon the faith of documentary evidence of title furnished by a warehouseman keeper's receipt of imported goods procured by a factor by his being intrusted with an invoice of the goods, although the invoice shows that the goods belonged to the shipper. Cartwright v. Wilmerding, 24 N. Y. 521; First Nat. Bank of Syracuse v. N. Y. C. & H. R. R. Co., 85 Hun, 160, 32 N. Y. Supp. 604; Matter of Non-Magnetic Watch Co., 89 Hun, 196, 34 N. Y. Supp. 1017; Louisville & Nashville R. Co. v. Barkhouse, 100 Ala. 543, 13 So. 534.

32. Heiskell v. Farmers, etc., Bank, 89 Pa. St. 155; Meyerstein v. Barber, L. R., 2 C. P. 661, 36 L. J. C. P. 361; Leggett on Bills of Lading, 315; Benjamin on Sales, 622.

33. First Nat. Bank v. Kelly, 57 N. Y. 34. See *post*, § 1734*a*. But see Hipp & Co. v. So. R. Co., 50 S. C. 129, 27 S. E. 623.

road corporations,[34] express companies,[35] and all other common carriers may issue such a bill.

The bill of lading must be issued by the carrier or its representative. If the paper be signed by the consignor only, it is not a bill of lading.[36]

The obligation of the carrier to give on receiving goods a bill of lading, extends only to acknowledging the receipt of the goods, and expressing the promise to carry and deliver them. He is not bound to specify the freight.[37]

§ 1733. Whether carrier is bound by bill of lading issued by master of ship, or other agent, when the goods are not in fact received.— Although the bill of lading is signed by the master of the ship, or other agent of the carrier who undertakes the transportation of the goods, the subscription is as agent for the carrier, and the contract, in so far as it is within the scope of the agency, is binding upon the carrier.[38] But according to the English authorities, and to the weight and general current of the American authorities also, the master of the ship, or other shipping agent of the carrier, has no implied authority to grant a bill of lading unless the goods are actually received by him for transportation. He is an agent with limited authority, and parties dealing with the bill of lading are chargeable with notice of the limitation. And if the master of the ship or other shipping agent, transcend his authority and issue a bill of lading for goods which are not actually shipped, the shipowners or other carriers, represented by the master or other shipping agent, will not be bound by the bill of lading, although it be transferred to a *bona fide* holder for value

34. Stevens v. Boston, etc., R. Co., 8 Gray, 262; Illinois Cent. R. Co. v. Owens, 53 Ill. 391; Lawrence v. New York, etc., R. Co., 36 Conn. 63; Steinweg v. Erie R. Co., 43 N. Y. 123; Worden v. Bemis, 32 Conn. 268; Lewis v. The Springville Banking Co., 166 Ill. 311, 46 N. E. 743.

35. Grace v. Adams, 100 Mass. 505; Lachner Bros. v. Adams Express Co., 72 Mo. App. 13.

36. Gage v. Jaqueth, 1 Lans. 207. Informality of the instrument does not destroy its character as a bill of lading, and the consignor and the consignee may sign by an agent. Donovan v. Standard Oil Co., 155 N. Y. 112, 49 N. E. 678.

37. The May Flower, 3 Ware, 300. See St. Louis, etc., Ry. Co. v. Edwards, 24 C. C. A. 300, 78 Fed. 745.

38. Ferguson v. Coppeau, 6 Harr. & J. 394.

without notice.[39] The United States Supreme Court, following the English cases, has adopted these views; and in a recent case reaffirms its previously expressed conclusion to this effect.[40] If the goods were actually received alongside the ship by the ser-

39. See *ante*, § 1729*a*; Grant v. Norway, 20 L. J. C. P. 93, 2 Eng. L. & Eq. 337, 10 C. B. 665. See also Hubbersty v. Ward, 18 Eng. L. & Eq. 551; Coleman v. Riches, 29 Eng. L. & Eq. 323; McLean v. Fleming, L. R., 2 S. App. 128; Union, etc., R. Co. v. Yeager, 34 Ind. 1; Hall v. Mayo, 7 Allen, 456; Louisiana Bank v. Laveille, 52 Mo. 380; Sears v. Wingate, 3 Allen, 103; Hunt v. Mississippi C. R. Co., 29 La. Ann. 449; Fellows v. Steamer Powell, 16 La. Ann. 316; Baltimore & Ohio R. Co. v. Wilkens, 44 Md. 11; Dean v. King, 22 Ohio St. 136; Second Nat. Bank v. Walbridge, 19 Ohio St. 419; Robinson v. Memphis, etc., R. Co., 9 Fed. 129; Mackenzie on Bills of Lading, 9; Leggett on Bills of Lading, 27. But in Maryland it has been decided that where an agent had signed bills of lading, acknowledging receipt of cotton, it was competent for him to prove that the cotton had not in fact been delivered and to explain the circumstances under which he was induced to sign the bill. See Lazard v. Merchants & Miners' Transportation Co., 78 Md. 1, 26 Atl. 897. It is proper to observe that the decision in this case was based upon a construction of the provisions of the Maryland Code. Section 1, article 14 of the Code provides that "All bills of lading, if executed in this State, or being executed elsewhere, shall provide for the delivery of goods within this State, shall be negotiable instruments in the same sense as bills of exchange and promissory notes, unless it be provided in express terms to the contrary on the face of the bills." The court commenting upon and construing the section referred to says: "And as the bills of lading in question were not executed in this State, but issued by the defendant's agent at Savannah, Ga., the only question upon the demurrer is whether they provide for the delivery of the cotton in this State within the meaning of the statute? And this depends upon the construction and meaning of the bills of lading themselves, and upon the construction of the statute as to what constitutes a delivery of goods in this State." Miller v. The Chicago & Alton R. Co., 62 Mo. App. 252.

40. The Schooner Freeman v. Buckingham, 18 How. 182; Pollard v. Vinton, U. S. S. C., 1882, Miller, J., saying: "Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying this we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment, the contract of carriage had commenced and the evidence of it in the form of a bill of lading would be binding. But without such a delivery there was no contract of carrying, and the agents of defendant had no authority to make one." See also The Delaware, 14 Wall. 602; The Joseph Grant, 1 Biss. 193; The Bark Edwin, 1 Sprague, 480; Friedlander v. Texas Pac. R. Co., 130 U. S. 416.

vants of the shipowners, and the master thereupon signed the bills of lading, this would suffice to bind the shipowners.[41]

And if the goods were not so received as to bind the carrier, the master or other agent issuing the bill of lading would be liable for the consequences of his misrepresentation to a person advancing money upon the faith of his statements therein.[42]

§ 1733a. Conflicting authorities; cases maintaining that bill of lading is conclusive evidence against carrier as to receipt of goods.— The decisions which exonerate the carrier from liability when the bill of lading is issued by his shipping agent without actual receipt of the goods, have met with strong opposition in some cases; and the carrier has been held liable on the ground that the act of issuing the bill is within the scope of general authority conferred upon the agent, and that if he violates instructions, or in bad faith issues the bill when not in actual receipt of the goods, the principal should be bound to those who act on the faith of the representation contained in it, upon the principle that where one of two innocent parties must suffer, he who has enabled a third person to occasion the loss must sustain it.[43] The master of a ship is generally separated from his principals, and beyond their supervision and control. Roving the seas in commercial enterprises, and often thousands of miles apart from those who trust him, the policy of the law might well shield his principals from responsibilities, which were he in a position under their inspection, and subject to their superintendence, it might withhold. And in respect to railroad corporations, express companies, and other carriers by land, whose agents are within view of superior officers, and subject to speedy removal for delinquencies, it might be well contended that their shipping agents, when acting within the apparent scope of authority, would bind their principals, although in the particular case violating actual authority, and com-

41. McLean v. Fleming, L. R., 2 H. L. 128; Bryans v. Nix, 4 M. & W. 775, 8 L. J. Exch. 137; British Columbia Mill Co. v. Nestleship, L. R., 3 C. P. 499; Pollard v. Vinton, U. S. S. C. 1882; Mackenzie on Bills of Lading, 9.

42. Lickbarrow v. Mason, 2 T. R. 75; Sears v. Wingate, 3 Allen, 103; Mackenzie on Bills of Lading, 9; *ante*, § 1729*a*; Smith v. Missouri Pac. Ry. Co., 74 Mo. App. 48, citing text.

43. Bank of Batavia v. N. Y., L. E. & W. R. Co., 106 N. Y. 199; Brooke v. N. Y., L. E. & W. R. Co., 108 Pa. St. 543; American Nat. Bank v. Georgia R. Co., 96 Ga. 665, 23 S. E. 898, 51 Am. St. Rep. 155. See Minter Bros. v. South Kansas Ry. Co., 56 Mo. App. 282. See Sawyer v. Cleveland Iron Co., 16 C. C. A. 191, 69 Fed. 211.

mitting a breach of trust. These do not appear to be the grounds of dissent from the doctrines heretofore stated in the text. And the cases which maintain the liability of the carrier when the bill of lading is issued by the shipping agent without receipt of the goods, rest upon the broader grounds above set forth, and upon public policy in reference to commercial transactions of this kind. In New York, where the agent of a railroad company in Chicago, upon delivery to him of a forged warehouse receipt, issued to M. two bills of lading, each stating the receipt of a quantity of lard consigned to plaintiffs at New York, to be transported and delivered to them there, it appeared that the agent was informed that M. intended to use the bills of lading at bank. M. drew sight drafts on the plaintiffs in New York, attaching to them the bills of lading; and delivered the drafts to a bank in Chicago, which forwarded them to New York for collection, and there the plaintiffs paid them on presentation upon the faith and credit of the bills of lading attached. In an action by the drawees of the drafts against the railroad company upon the bills of lading, it was held that the company was bound by the act of its agent, the same being within the apparent scope of his authority, that it was estopped to deny the actual receipt of the lard, and that the plaintiffs were entitled to recover.[44]

44. Armour v. Michigan Central R. Co., 65 N. Y. 111 (1875), overruling 3 Jones & S. 563. Gray, Commissioner, said: "The well-recognized principle that a party who by his admissions has induced a third party to act in a particular manner, is not permitted to deny the truth of his admission, if the consequence would be to work an injury to such third party, applies to and governs this case." Dwight, Commissioner, said: "Street (the agent), having power to issue bills direct to consignees for goods actually in the possession of the defendant (the railroad company), and the present bills being in no ways distinguishable in form from those which were usually employed, he must be considered as having the necessary authority as to the plaintiffs acting in good faith. * * * Grant v. Norway has been subject to much and severe criticism, as being adverse to the general view prevailing in the courts of this State, where confidence has been reposed in an agent, an apparent authority conferred upon him, that the principal must suffer from an actual exercise of authority not exceeding the appearance of that which is granted when one of two innocent persons must suffer, in such a case that person must bear the loss who reposed the confidence. So far as Grant v. Norway stands in the way of this doctrine, it must be deemed to be overruled (remarks of Davis, J., in New York, etc., R. Co. v. Schuyler, 34 N. Y. 73)." To same effect, see Sioux City & P. R. Co. v. First Nat. Bank, 10 Nebr. 556, and Savings Bank v. Atchison, etc., R. Co., 20 Kan. 519. Compare Relyea v. N. H. R. M. Co., 42 Conn. 579.

§ 1733b. Liability of the carrier for delivery of the goods without production of the bill of lading.— The carrier should not deliver the goods either to the consignee or to any other person, without the production of the bill of lading. This rule is necessary, both for the protection of the consignee and that of *bona fide* transferees of the bill of lading; and if the carrier violate it by delivery of the goods without production of the bill to any person not authorized by possession of the bill to receive them, it will be liable for their value to the consignee or transferee of the bill, as the case may be.[45] But the carrier can only require the production of the bill. He is not entitled to the possession of it.[46]

SECTION II.

BILLS OF LADING ACCOMPANYING BILLS OF EXCHANGE DRAWN ON SHIPMENTS.

§ 1734. Effect of bill of lading sent to consignee with bill of exchange drawn for purchase money of goods.— Sometimes a bill of lading for the goods shipped in pursuance of orders of the consignee, with a bill of exchange drawn by the shipper upon the consignee for the purchase money, are sent in one inclosure to the consignee. In such cases the bill of exchange must be honored by the consignee, otherwise the bill of lading cannot be retained; and if it is retained the consignee has no right to the goods.[47] In case of a series of shipments for which separate bills of lading are taken, the consignee who accepts bills of exchange drawn thereon, must apply the proceeds of each shipment to each draft; and if they are insufficient to discharge the same, he must rely upon the responsibility of the drawer alone, to pay any deficiency. The transactions are separate, and cannot be run into a general account.[48]

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45. The Thames, 14 Wall. 98; National Bank of Chester v. Atlanta R. Co., 25 S. C. 216; Boatman's Sav. Bank v. Western Atl. R. Co., 81 Ga. 221; North Penn. R. Co. v. Commercial Bank, 123 U. S. 727; Bass v. Glover, 63 Ga. 745; Union Stock Yards Co. v. Westcott, 47 Nebr. 300, 66 N. W. 419; Walters v. Western & A. R. Co., 14 C. C. A. 267, 66 Fed. 862.

46. Dwyer v. Railroad Co., 69 Tex. 709; Southern Ry. Co. v. Kinchen & Co., 103 Ga. 186, 29 S. E. 816.

47. Shepherd v. Harrison, L. R., 4 Q. B. 197, 5 H. L. 116; Marine Bank v. Wright, 48 N. Y. 1; First Nat. Bank v. Ege, 109 N. Y. 120; Indiana, etc., Bank v. Colgate, 4 Daly, 41; Leggett on Bills of Lading, 363; Willman Mercantile Co. v. Fussy, 15 Mont. 511, 39 Pac. 738, 48 Am. St. Rep. 698.

48. First Nat. Bank v. Ege, 109 N. Y. 120; Dodge v. Meyer, 61 Cal. 417.

§ 1734a. Effect of bill of lading indorsed to payee of bill drawn on vendee for purchase money.— Frequently the consignor of the goods takes a bill of lading from the carrier, draws a bill payable on demand upon the vendee for the price, and delivers the bill of exchange with the bill of lading attached to an indorser for value of the bill of lading. In such cases the consignee upon the receipt of the goods, takes them subject to the right of the holder of the bill of lading to demand payment of the bill of exchange;[49] and the consignee cannot retain the price of the goods on account of a debt due to him from the consignor.[50] If the goods be deliverable by the terms of the bill of lading to the consignee, or his order, the person to whom it is transferred by the consignor would be charged with notice of the rights of the consignee; and on the other hand, if the bill of lading be drawn to the use of the consignor, or his order, the consignee would be charged with notice of the rights of those to whom the bill of lading may have been transferred. But in either case the question is open to inquiry as to what such rights may be, and can be determined only by inquiry into the real nature and character of the transaction.[51] If the consignor draw a draft and procure an advance upon the faith of the shipment, without indorsing or delivering the bill of lading to the lender, the latter will be entitled to a lien upon the proceeds of the cargo as against other creditors of the consignor, upon the principle that a bill of exchange drawn upon a particular fund operates as an assignment thereof.[52]

In a case before the United States Supreme Court, it appeared that McLaren & Co., of Milwaukee, Wis., purchased and paid for wheat on account of Smith & Co., of Oswego, N. Y., and took bills of lading describing themselves as shippers, deliverable to

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49. Emery v. Irving Nat. Bank, 25 Ohio St. 360; Heiskell v. Farmers, etc., Bank, 89 Pa. St. 155; Dows v. National Exchange Bank, 91 U. S. (1 Otto) 631; National Bank v. Merchants' Bank, 91 U. S. (1 Otto) 98; First Nat. Bank of Starksville v. Meyer & Co., 43 La. Ann. 1, 8 So. 433; Dickson v. Merchants' Elevator Co., 44 Mo. App. 498; The Commercial Bank v. Chicago, etc., Ry. Co., 160 Ill. 401, 43 N. E. 756.

50. Emery v. Irving Nat. Bank, 25 Ohio St. 360. *Contra*, Johnson v. Clark, 20 Ind. App. 247, 50 N. E. 762; First Nat. Bank v. Crabtree, 86 Iowa, 731, 52 N. W. 559, citing the text.

51. Emery v. Irving Nat. Bank, 25 Ohio St. 360. See Dows v. National Exchange Bank, 91 U. S. (1 Otto) 631.

52. Flour City Nat. Bank v. Garfield, 37 N. Y. S. C. 580; Morse v. Chicago, R. I. & Pac. R. Co., 73 Iowa, 233; Cahn v. Pocketts, etc., Co., 2 Q. B. 61 (1898).

Fitch, cashier of Merchants' Bank, Watertown, N. Y. McLaren & Co. presented drafts drawn on Smith & Co., with the bills of lading attached thereto, to the National Exchange Bank of Milwaukee, which discounted the drafts, and by indorsement on the bills of lading directed the wheat to be delivered to Smith & Co. upon payment of the drafts, and they sent invoices of the shipment to Smith & Co. It was held that McLaren & Co. remained owners of the wheat, notwithstanding their transmission of invoices to Smith & Co.; that as owners they had a right to transfer it, and the bills of lading representing it, to the National Exchange Bank, as a security for the acceptance and payment of the drafts drawn for the price; that the bills of lading unexplained were almost conclusive proof of an intention to reserve to the shipper the *jus disponendi,* and prevent the property in the wheat from passing to the drawees of the drafts; and that the bank which discounted the drafts, with the bills of lading attached, directing Fitch, the agent, to deliver the wheat upon their payment, acquired a special property in the goods, and a complete right to hold them as security for acceptance and payment of the drafts.[53]

In a New York case it appeared that V., at Chicago, transferred to the Marine Bank a bill of lading for corn shipped to Wright in New York, the bank discounting a draft at sight drawn on the faith and credit of the bill of lading. Hunt, Commissioner, giving the opinion of the court, said: "The transfer of the bill of lading to the plaintiff (the bank) under the circumstances stated, transferred also the title to the corn described in it. The transfer was conditional and limited, to wit: to provide for and until the acceptance of the draft. The title would then pass to the acceptor as their security, and the plaintiffs' security would be transferred to the personal liability of the defendants as acceptors. The defendants having refused to accept the draft, the title of the plaintiff to the corn remained unimpaired." [54]

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53. Dows v. National Exchange Bank, 91 U. S. (1 Otto) 618. See also Jenkins v. Brown, 14 Q. B. 496; Turner v. Trustees of the Liverpool Docks, 6 Exch. 543; Schorman v. Railroad Co., L. R., 2 Ch. App. 336; Ellerslaw v. Magniac, 6 Exch. 570; Security Bank v. Lutgen, 29 Minn. 364; Neill v. Produce Co., 41 W. Va. 37, 23 S. E. 702.

54. Marine Bank v. Wright, 48 N. Y. 1. In Kelly v. Scripture, 9 Hun, 283, it appeared that K. & Co. consigned to S. certain malt for sale on their account; and after they were in possession of the goods drew a bill of exchange for $1,000 in favor of a third person, as an advance on anticipated realizations

§ 1734b. Effect of bill of lading deliverable to order attached to draft sent to agent for collection.— In some cases the consignor of the goods sends the bill of lading to the consignee, and awaits a future settlement of the purchase money. And in others still the consignor retains the bill of lading drawn deliverable to his own order, and indorses it to an agent, accompanied with a bill of exchange drawn on the vendee for the purchase money of the goods, and with instructions to the agent to hold the bill of lading until the bill of exchange is paid. An acceptance of the bill of exchange, in such cases, will not entitle the vendee to the goods. It must be paid before title to the goods vests in him; and if the carrier deliver the goods to the consignee, the consignor, or the party duly deriving title to the bill of exchange and bill of lading as its security, may recover them from him, or from any person to whom he has pledged or sold them — such delivery being unauthorized by the terms of the bill of lading, and not passing property in the goods.[55]

But if there be an agreement between the consignor of the goods and the drawees of the bill of exchange, drawn on time for the purchase money, that the bill of lading shall be surrendered on acceptance of the bill of exchange, a holder of the bill of lading who has become such by indorsement of the bill of lading, and by discounting the draft drawn against the property consigned, can acquire no greater rights than the consignor. He has the same

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from the sale. S. sold the malt and neglected to pay the draft, which the drawers were compelled to take up. It was held that the consignors who drew and paid the draft could follow the proceeds of the sale of the malt and recover them from S., the consignee, and that S. did not cease to be a factor or agent of the consignors upon acceptance of the draft. Brady, J., who delivered the opinion of the court, distinguished and explained the cases of F. & N. Nat. Bank v. Sprague, 52 N. Y. 605, and German Bank v. Edwards, 53 N. Y. 541. As to the New York Factors Act (§ 3, chap. 179, Laws of 1830), see First Nat. Bank v. Shaw, 61 N. Y. 283; M. & T. Bank v. F. & M. Bank, 60 N. Y. 41; Cartwright v. Wilmerding, 24 N. Y. 521. Compare Chemical Co. v. Lackawanna Line, 70 Mo. App. 274.

55. Heiskell v. Farmers, etc., Bank, 89 Pa. St. 155. See also Dows v. National Exchange Bank, 91 U. S. (1 Otto) 631; Stollenwerck v. Thacher, 115 Mass. 224; Aldermen v. Eastern R. Co., 115 Mass. 233; Brandt v. Bowlby, 2 B. & Ad. 932; Seymour v. Norton, 105 Mass. 272; Skyles v. Bollman, 12 Mo. App. 597; Leggett on Bills of Lading, 356; Willman Mercantile Co. v. Fussy, 15 Mont. 511, 39 Pac. 738, 48 Am. St. Rep. 698; Bank v. Cummings, 89 Tenn. 609, 18 S. W. 115, citing text; Dickson v. Merchants' Elevator Co., 44 Mo. App. 498. See Ramish v. Kirschbraun, 107 Cal. 659, 40 Pac. 1045.

rights that the consignor has to demand acceptance of the accompanying draft, and no more; and if the consignor cannot require such acceptance without surrendering the bill of lading, neither can the holder of the bill of exchange.[56] And if a bill of exchange drawn on time be sent to an agent for collection, without special instructions, and with a bill of lading for the goods sold attached thereto, and deliverable to order, there is no implied obligation upon the agent to do more than to require acceptance of the bill of exchange before delivering the bill of lading.[57]

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56. National Bank v. Merchants' Bank, 91 U. S. (1 Otto) 93.

57. St. Paul Roller Mill Co. v. Despatch Co., 27 Fed. 435; National Bank v. Merchants' Bank, 91 U. S. (1 Otto) 94, Strong, J., saying: "The fundamental question in this case is, whether a bill of lading of merchandise deliverable to order, when attached to a time draft, and forwarded with the draft to an agent for collection, without any special instructions, may be surrendered to the drawee on his acceptance of the draft, or whether the agent's duty is to hold the bill of lading after acceptance for the payment. * * * It seems to be a natural inference, indeed a necessary implication, from a time draft accompanied by a bill of lading indorsed in blank, that the merchandise (which in this case was cotton) specified in the bill was sold on credit, to be paid for by the accepted draft, or that the draft is a demand for an advance on the shipment, or that the transaction is a consignment to be sold by the drawee on account of the shipper. It is difficult to conceive of any other meaning the instrument can have. If so, *in the absence of any express agreement to the contrary*, the acceptor, if a purchaser, is clearly entitled to the possession of the goods on his accepting the bill, and thus giving the vendor a completed contract for payment. * * * If the inference to be drawn from a time draft accompanied by a bill of lading is, not that it evidences a credit sale, but a request for advances on the credit of the consignment, the consequence is the same. Perhaps it is even more apparent. It plainly is, that the acceptance is not asked on the credit of the drawer of the draft, but on the faith of the consignment. * * * Nor can it make any difference that the draft with the bill of lading has been sent (as in this case) 'for collection.' That instruction means simply to rebut the inference from the indorsement that the agent is the owner of the draft. It indicates an agency. Sweeney v. Easter, 1 Wall. 166. It does not conflict with the plain inference from the draft and accompanying bill of lading, that the former was a request for a promise to pay at a future time for goods sold on credit, or a request to make advances on the faith of the described consignment, or a request to sell on account of the shipper. By such a transmission to the agent he is instructed to collect the money mentioned in the draft, not to collect the bill of lading; and the first step in the collection is procuring acceptance of the draft. The agent is, therefore, authorized to do all which is necessary to obtaining such acceptance. If the drawee is not bound to accept without the surrender to him of the consigned property, or of the bill of lading, it is the duty of the agent to make that surrender; and

§ 1734c. It follows from the foregoing statement of principles applicable to the questions under consideration: *First:* That the indorsee of a bill of lading attached to a draft which he acquires upon the faith and credit of the bill of lading, takes it subject to the agreement between the consignor and consignee of the goods; and that if the consignor has the right to withhold the bill of lading until the draft is paid, the *bona fide* holder of the draft has the same right.[58] *Second:* That in the absence of a special agreement, a time draft with a bill of lading for the goods, for or on account of which it is drawn, indicates that the bill of lading is to be surrendered to the drawee of the draft upon its acceptance; and that the holder of the draft cannot withhold its delivery when the acceptance is given, unless the shipper of the goods had a right to do so.[59] *Third:* That where a bill of exchange is drawn upon a shipment, on time, with the bill of lading attached, the holder cannot (at least in the absence of proof of a local usage to the contrary, or of the imminent insolvency of the drawee) require the drawee to accept the bill of exchange, except on the delivery of the bill of lading; and when in consequence of the refusal of the holder to deliver the bill of lading,

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if he fails to perform this duty, and in consequence thereof acceptance be refused, the drawer and indorsers of the draft are discharged." In his learned and comprehensive opinion, Justice Strong cited, in support of his views, Lanfear v. Blossom, 1 La. Ann. 148, and Wisconsin M. & F. Fire Ins. Co. v. Bank of British N. A., 21 Up. Can. Q. B. 284, which are in point; and also Shepherd v. Harrison, L. R., 4 Q. B. 493, 5 H. L. 133; Coventry v. Gladstone, L. R., 4 Eq. 493; Schuchardt v. Hall, 36 Md. 590; Marine Bank v. Wright, 48 N. Y. 1; Cayuga Bank v. Daniels, 47 N. Y. 631; Gurney v. Behrend, 2 El. & Bl. 622, and other cases. And he distinguished and explained Seymour v. Newton, 105 Mass. 272; Gilbert v. Guignon, L. R., 8 Ch. 16; Newcomb v. Boston, etc., R. Co., 115 Mass. 230; Stollenwerck v. Thacher, 115 Mass. 224, and Bank v. Bayley, 115 Mass. 228. See Moore v. Louisiana Nat. Bank, 44 La. Ann. 99, 10 So. 407, 32 Am. St. Rep. 332; The Commercial Bank v. Chicago, etc., Ry. Co., 160 Ill. 401, 43 N. E. 756. But it has been held that where the bill is drawn at three days sight with a bill of lading attached, indorsed in blank, it is the duty of the bank to require the draft paid before delivering the bill of lading. McArthur Co. v. National Bank, 122 Mich. 223, 81 N. W. 92.

58. Heiskell v. Farmers, etc., Bank, 89 Pa. St. 155; Dows v. National Exchange Bank, 91 U. S. (1 Otto) 618; Emery v. Irving Nat. Bank, 25 Ohio St. 360; Marine Bank v. Wright, 48 N. Y. 1; First Nat. Bank of Starksville v. Meyer & Co., 43 La. Ann. 1, 8 So. 433.

59. National Bank v. Merchants' Bank, 91 U. S. (1 Otto) 93; Marine Bank v. Wright, 48 N. Y. 1.

acceptance is refused, and the bill of exchange is protested, the protest will be without cause, and the drawer will be discharged.[60] *Fourth:* That the drawee of the bill of exchange attached to the bill of lading is not entitled to the bill of lading or the property therein described except upon acceptance, or payment of the bill of exchange according to the nature of the case, and the agreement with the shipper of the goods who drew the draft.[61] *Fifth:* That a party discounting a bill of exchange on the faith of the indorsement of a bill of lading for goods as security for the draft as he would acquire if the goods themselves were delivered to him instead of the bill of lading.[62]

§ 1734d. Genuineness of bill of lading accompanying bill of exchange.— It is not the duty of a party discounting a bill of exchange to inquire into the genuineness of a bill of lading accompanying it in order to hold another bound by a letter of credit which authorizes the bill of exchange to be drawn upon the letter writer provided it be accompanied by the bill of lading; and if the letter writer pay the bill of exchange, and afterward discovers that the bill of lading is forged, he cannot recover back the money on the ground of mistake of fact.[63] And the acceptor of a bill of

60. Lanfear v. Blossom, 1 La. Ann. 148; National Bank v. Merchants' Bank, 91 U. S. (1 Otto) 100.

61. Bank v. Bayley, 115 Mass. 228; National Bank v. Merchants' Bank, 100 Mass. 104; Marine Bank v. Wright, 48 N. Y. 1. A merchant in Rochester, N. Y., gave an order to a produce dealer in North Carolina to make shipment of a car of choice potatoes. The purchaser, in a telegram, said: "Will give three delivered choice, draft B. L. if accept answer." The produce dealer telegraphed back that three twenty-five was the lowest price, to which the Rochester merchant replied by wire, saying: "Will accept car at your price if stock fine; ship immediately." The potatoes were shipped with bill of lading indorsed to be delivered to the purchaser, attached to which was a draft, which the purchaser declined to pay unless he was allowed first to inspect the potatoes at the freight office in Rochester. This the railroad company refused to allow unless the purchaser produced the bill of lading. Held, that the promise to pay the draft "B. L." meant that the purchaser would pay the amount of the draft upon presentation of the bill of lading properly indorsed and that the purchaser had no right to an inspection of the potatoes before accepting the draft. Whitney v. McLean, 4 App. Div. 449, 38 N. Y. Supp. 793.

62. First Nat. Bank v. Kelly, 57 N. Y. 34; *ante*, § 1731*a*; Hathaway v. Haynes, 124 Mass. 311; Heiskell v. Farmers' Bank, 89 Pa. St. 155. But see on this subject Mears v. Waples, 4 Houst. 62.

63. Ulster Bank v. Synatt, 5 Irish Eq. 595; Woods v. Thiedeman, 1 Hurl. & C. 478; Lehman v. Young, 63 Ala. 519.

exchange, discounted by a bank, with a bill of lading attached which the acceptor and the bank regarded as genuine at the time of acceptance, but which was, in fact, a forgery, has been held bound to pay the bill at maturity.[64]

SECTION III.

THE ELEMENTS OF A BILL OF LADING.

§ 1735. As to the form and contents of bills of lading.— Bills of lading are usually signed in sets of three, one of which is retained by the freighter or consignor, one sent to the consignee, and one kept by the master for his own use.[65] But sometimes they are granted in sets of four,[66] or there may be only a single bill.[67] The bill retained by the carrier ("the ship's bill," as it is called when goods are shipped on a vessel), is designed only for its own information and convenience, not for evidence as between the parties of what their agreement was. And if it differs from the others, they must be considered as the true and only evidence of the contract.[68]

§ 1736. In whose favor drawn.— It is usual for the name of the consignee of the goods to whom, or to his assign, they are to be delivered, to be mentioned. But the bill is sometimes made out for delivery to the consignor or his assigns; and sometimes "to ———— order, or ———— assigns," which form imports an engagement to deliver to the person whom the consignor shall nominate, and his assigns.[69] Or it may be made out to bearer.[70] If negotiable words be contained in the bill of lading, they only indicate the intention of the shipper as to the person for whose use the consignment is made; and the bill is transferred by delivery whether negotiable words be inserted or not.[71] The consignee's title is complete if the bill contain his name, and is sent to him; and the goods are his, subject only to the consignor's right

64. Goetz v. Bank of Kansas City, 119 U. S. 556.
65. Mackenzie on Bills of Lading, 3.
66. Lickbarrow v. Mason, 2 T. R. 63.
67. Dows v. Perrin, 16 N. Y. 325.
68. The Thames, 14 Wall. 98. See Kellerman & Son v. Kansas City, etc., R. Co., 68 Mo. App. 255; Costello v. Laths, 44 Fed. 105.
69. Smith's Mercantile Law, 377.
70. Allen v. Williams, 12 Pick. 297.
71. Emery v. Irving Nat. Bank, 25 Ohio St. 360.

to stop them *in transitu* for breach of the conditions of sale. If the consignor be himself consignee also, and sends the bill of lading to a third party, indorsed to him in full or in blank, the effect is the same as if such party were named in the bill as consignee.[72] If the consignee advance money on the faith of the bill of lading he becomes the owner of the bill to the extent of reimbursing himself, and as to the residue in trust for the former owner.[73]

§ **1737. Several bills of lading.**— Where there are several bills of lading, each is a contract in itself as to the holder, but there is but one contract as to the masters and owners. Therefore, if the several numbers of the set of bills of lading be indorsed to different persons, and there be competition for the goods, the rule is, that if the equities be equal, the property passes by the bill first indorsed.[74] For the principle is settled, that if the same goods are sold to two different persons by conveyances equally valid, he who first lawfully acquires possession has priority.[75] And if a party makes advances on faith of a shipment, one who afterward with notice of the fact, though before the first bill of lading is delivered, receives a second bill of lading for the goods, is not entitled to its benefit.[76]

§ **1738. Contents of bills of lading.**— The bill of lading should contain the quantity and marks of the merchandise; the names of the shipper, of the consignee, and of the master of the ship; the places of departure and discharge; and the price of the freight. Sometimes it states also the condition of the goods. And from early times it has been the custom to express as a limitation of the contract to carry and deliver the goods, "the dangers of the sea excepted." In later times, the exception has been usually extended to the acts of God, public enemies, fire, and all other dangers and accidents of the seas, rivers, and navigation.[77] Other clauses are

72. Walley v. Montgomery, 3 East, 585.

73. Haille v. Smith, 1 Bos. & P. 563; Armour v. Michigan Cent. R. Co., 65 N. Y. 120.

74. Caldwell v. Ball, 1 T. R. 205; Meyerstein v. Barber, L. R., 2 C. P. 661, 36 L. J. C. P. 361, 3 Kent Comm. 284; First Nat. Bank v. Ege, 109 N. Y. 120.

75. Lamb v. Durant, 12 Mass. 54, 1 Smith Lead. Cas. 891.

76. Stevens v. Boston, etc., R. Co., 8 Gray, 262.

77. 3 Kent Comm. 282, Lect. XLVII. See Stanard Milling Co. v. White Line, etc., Co., 122 Mo. 258, 26 S. W. 704. *Contra,* Myers v. Diamond Joe Line, 58 Mo. App. 199; The Carlton Steamship Co. v. Castle, etc., Co., L. R., App. Cas. 486 (1898).

sometimes inserted in the bill of lading, according to the nature of the contract between the parties to it, to provide, for instance, for the payment of demurrage (by which is meant the allowance or payment for detention of the ship) by the consignee, the effect of which is to bind the consignee to pay it if he receive the goods — for the acceptance of goods by the consignee, in pursuance of a bill of lading whereby the shipper makes payment of freight or demurrage a condition precedent to delivery, is evidence of an undertaking by the consignee to pay such demand.[78] Where the bill contains the words, "demurrage $10 a day after four days," its meaning is, that the vessel is entitled to demurrage after four days from her arrival at the specified place, and her master notifies the consignee of arrival. This cannot be varied by proof of usage that such a clause means four days after the vessel obtains a berth, though such evidence may be proper where the master has liberty to choose a landing place.[79] Where the bill contains no provision for the payment of demurrage, the consignee, or his assignee, is not liable therefor, even if he receives the cargo, much less where he assigns the bill before delivery of the cargo.[80]

§ 1739. How far shipper and carrier bound by terms of the bill of lading.— A clause in a bill of lading providing that the goods, immediately upon delivery by the carrier, shall be at the risk of the shipper, constitutes a valid special contract. But it must be reasonably construed, and no obligation otherwise resting on the carrier is thereby removed, except such as is expressed or reasonably implied. He must notify the consignee of the arrival of the goods, proffer a delivery at a reasonable and proper time, and afford the consignee's agents an opportunity to identify and receive them. These things done, his liability ceases, unless his

78. Scaife v. Tobin, 3 B. & Ad. 523; Pioneer Fuel Co. v. McBrier, 28 C. C. A. 466, 84 Fed. 495. See Good & Co. v. Isaacs, 2 Q. B. 555 (1892).

79. Philadelphia, etc., R. Co. v. Northam, 2 Ben. 1. See Burrill v. Crossman, 16 C. C. A. 381, 69 Fed. 747.

80. Gage v. Morse, 12 Allen, 410. See case of Van Etten v. Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630, note. Held, that in the absence of a stipulation in a bill of lading for the payment of demurrage by the consignee, in case of detention of the vessel by the consignor for loading for an unreasonable length of time, damages in the nature of demurrage may be recovered from the latter. If the bill of lading provides for payment of demurrage, consignee is not liable therefor. Where he is the owner of the cargo and the vessel is through his fault detained an unreasonable length of time at the port of discharge, he is liable for damages *in the nature of demurrage.* See Dayton v. Parke, 142 N. Y. 391, 37 N. E. 642.

agents negligently deliver them to an improper person.[81] And even where loss or damage from neglect of an agent is excepted, it would be construed as contemplating only the hazards of transportation, and not negligence in delivering the goods to a person without authority to receive them.[82]

§ 1740. If a particular vessel be named in the bill of lading by the carrier, it must be assumed that the owner of the goods designated her as the proper one to take the goods, having regard to the voyage and time of sailing, and the carrier cannot send by another vessel without assuming the whole risk of loss or damage to the goods while on such vessel.[83]

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81. The Santee, 7 Blatchf. 186; Osterhoudt v. Southern Pacific Co., 47 App. Div. 146, 62 N. Y. Supp. 134. In New York held, that provision in a bill of lading limiting liability of carrier for injury to goods inures to the benefit of the second carrier to whom goods are delivered. White v. Weir, 33 App. Div. 145, 53 N. Y. Supp. 465. A limitation contained in a bill of lading to the effect that the carrier shall not be liable for any loss sustained "unless written claim for the loss or damage shall be made to the person or party sought to be made liable, within thirty days, and the action in which said claim shall be sought to be enforced, shall be brought within three months after the said loss or damage occurs," is a reasonable one, and a delay of nearly three years in bringing suit for such a loss is fatal to the plaintiff's right of recovery therein. North British & Mercantile Ins. Co. v. Central Vermont R. Co., 9 App. Div. 4, 40 N. Y. Supp. 1113. And if the bill of lading contains the clause, "With privilege of stopping over at Greensburg and Rushville, Indiana," the consignee thereof may maintain an action against the carrier for failure to stop at such points. See Tebbs v. Railroad Co., 20 Ind. App. 192, 50 N. E. 486. Evidence of the custom and usage of trade is admissible for the purpose of showing the particular sense in which certain words used are intended, but such evidence cannot control or vary the positive stipulations in a bill of lading. See Louisville & Cin. Packet Co. v. Rogers, 20 Ind. App. 594, 49 N. E. 970. And accordingly it has been held that a stipulation in a bill of lading that the carrier shall not be responsible for loss or damage to property unless notice of such loss or damage is given to the delivering carrier within thirty hours after delivery, is not unreasonable as regards packages which may have been entirely lost and as to damaged packages, but its reasonableness will depend upon whether sufficient time was given to discover the damage and report the loss. See St. Louis & San Francisco R. Co. v. Hurst, 67 Ark. 407, 55 S. W. 215. See Chemical Co. v. Lackawanna Line, 70 Mo. App. 274.

82. Goddard v. Mallory, 52 Barb. 87. Clause in bill of lading, to the effect that shipper must give written notice of any claim for damages, held to be reasonable. See Wood v. Railway Co., 118 N. C. 1056, 24 S. E. 704; Leonard v. Chicago & Alton Ry. Co., 54 Mo. App. 293; Brauer v. Campania, etc., Co., 14 C. C. A. 88, 66 Fed. 776; Otis Mfg. Co. v. Ellems, 2 C. C. A. 85, 50 Fed. 934.

83. Guillaume v. Hamburgh, etc., Packet Co., 42 N. Y. 212; Robertson v. National Steamship Co., 139 N. Y. 416, 34 N. E. 1053; Louisville & Cin. Packet

Where a place of landing the goods is named in the bill of lading, they must be there landed if it can be done with safety.[84]

§ 1740a. Carrier cannot exclude liability for negligence.— The carrier is bound by the terms of the bill of lading when he accepts it from the shipper, although he may be ignorant of its contents;[85] and though it may contain an exemption from loss by fire, the exemption will not exclude liability for loss occasioned by the carrier's own negligence;[86] as, for instance, a railroad company carrying goods under such a bill of lading will be bound for loss by fire occasioned by sparks from the locomotive, the goods not being protected by proper apparatus;[87] the terms of the contract as evidenced by the bill of lading cannot be varied by parol evidence.[88]

By issuing a bill of lading of goods as deliverable to order, the carrier becomes bound not to deliver them without the production of such order; and laches of the holder in not presenting the order, however it may warrant the carrier in divesting itself of the

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Co. v. Rogers, 20 Ind. App. 594, 49 N. E. 970; Wiggins Ferry Co. v. Chicago & Alton R. Co., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430; The Protection, 42 C. C. A. 489, 102 Fed. 516.

84. Shaw v. Gardner, 12 Gray, 488; Margetson v. Glynn, 1 Q. B. 337 (1892).

85. Germania Fire Ins. Co. v. Memphis, etc., R. Co., 72 N. Y. 90; Belger v. Dinsmore, 51 N. Y. 166; Jennings v. Grand Trunk Ry. Co., 127 N. Y. 438, 28 N. E. 394.

86. Germania Fire Ins. Co. v. Memphis, etc., R. Co., 72 N. Y. 90; Lamb v. Camden, etc., Co., 46 N. Y. 271; Mynard v. Syracuse, etc., R. Co., 71 N. Y. 180; Wells v. Steam Nav. Co., 8 N. Y. 375; Lockwood v. Railroad Co., 17 Wall. 357; Hill & Man. Co. v. Providence, etc., Steamship Co., 113 Mass. 495; Rathbone v. N. Y. C. & H. R. R. Co., 140 N. Y. 48, 35 N. E. 418; Hornthal v. Steamboat Co., 107 N. C. 77, 11 S. E. 1049; Schaller v. Chicago & Northwestern R. Co., 97 Wis. 32, 71 N. W. 1042. Held, that the proof of the fact that goods were lost by fire, constituted, *prima facie*, a complete defense to an action to recover therefor, and casts upon the plaintiff the burden of showing that the negligence of the carrier contributed to the loss. Stanard Milling Co. v. White Line, etc., Co., 122 Mo. 258, 26 S. W. 704. But the rule in Missouri is different beyond connecting lines. State Nat. Bank v. Chicago, etc., Ry. Co., 72 Mo. App. 82.

87. Steinweg v. Erie R. Co., 43 N. Y. 123.

88. *Ante*, § 1729; Cincinnati, etc., R. Co. v. Pontius, 19 Ohio St. 221; Germania Fire Ins. Co. v. Memphis, etc., R. Co., 72 N. Y. 90; Long v. New York Central R. Co., 50 N. Y. 76. See *ante*, § 1729*a*; Van Etten v. Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630, note.

special risks assumed as carrier, forms no warrant for a delivery of the goods to a person having no authority to receive them.[89]

It has been considered competent for carriers, by specific regulation brought distinctly to the notice of consignors to agree upon the valuation of property shipped, with a rate of freight based thereon, and a limit of liability to such agreed value, but such limitation would not be permitted to overrule a statutory enactment as to the carrier's liability, or to exempt the carrier from responsibility.[90]

§ 1741. **When losses by the perils of the sea are excepted** in the bill of lading, it is incumbent on the carrier to show that any loss which has occurred was occasioned by such peril;[91] but when the peril is shown to have existed, the carrier is *prima facie* relieved from liability, and its negligence, if averred, must be proved.[92] So, where loss from "rust, leakage, or shrinkage" is excepted in the bill, the shipper must prove negligence in order to charge the carrier with such loss.[93] And, indeed, wherever negligence enters into the cause of the loss, the carrier is liable, although it pro-

89. The Thames, 7 Blatchf. 226. And when a bill of lading has been issued by an agent of a railroad company, who had authority to receive goods for shipment over its own and connecting lines, and where such agent had issued a bill of lading to the consignor and the draft has been drawn on the consignee with the bill of lading attached, the railroad company is estopped from denying the truth of the recitals therein. See St. Louis & Santa Fe R. Co. v. Adams, 4 Kan. App. 306, 45 Pac. 920. See Schwarzchild v. Savannah, etc., Ry. Co., 76 Mo. App. 623.

90. Railroad Co. v. Fraloff, 100 U. S. 24; Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. Rep. 151; Graves v. Lake Shore, etc., R. Co., 137 Mass. 33, 50 Am. Rep. 282; Magnin v. Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608; Richmond & D. R. Co. v. Payne, 86 Va. 481, 10 S. E. 749; Douglas Co. v. Minnesota T. Co., 62 Minn. 288, 64 N. W. 899.

91. Hooper v. Rathbone, Taney, 519; The Juniata Paton, 1 Biss. 279. See Doherr v. The Etona, 18 C. C. A. 380, 71 Fed. 895. Compare Kennedy v. Bibber, 2 C. C. A. 50, 50 Fed. 841; Steinwender v. The Aspasia, 26 C. C. A. 372, 80 Fed. 1003; The Phœnicia, 40 C. C. A. 221, 99 Fed. 1005.

92. Transportation Co. v. Downer, 11 Wall. 129; The Juniata Paton, 1 Biss. 15; Calderon v. Atlas Steamship Co., 170 U. S. 281, 18 S. Ct. 588; Chicago, etc., R. Co. v. Sloan, 169 U. S. 133, 18 S. Ct. 289.

93. The Invincible, 1 Low. 225; Nelson v. Nordlinger, 14 C. C. A. 412, 67 Fed. 356. See Botsford v. Insurance Co., 8 C. C. A. 67, 59 Fed. 161; The Peoria, etc., R. Co. v. United States Rolling Stock Co., 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348; The Henry B. Hyde, 32 C. C. A. 534, 90 Fed. 114. See Braker v. The Gloaming, 46 Fed. 671.

ceeded from an excepted source.[94] When the bill of lading contains a clause exempting the carrier from liability for loss "by theft on land or afloat," it is not intended to apply to a theft by the purser of the ship put in charge of the articles.[95]

§ 1742. As to the condition of the goods.— A recital in a bill of lading, that a cask was received "in good order and well conditioned," extends only to the apparent external condition of the cask, excluding any implication as to its intrinsic soundness and sufficiency.[96] And the recital "received in good order and condition" is merely presumptive evidence that the goods were free from internal injuries.[97] The words "shipped in apparent good order" do not change the legal effect of the bill, and it is only *prima facie* evidence that they were in good order; the admission

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94. Gill v. General Iron Screw Collier Co., L. R., 1 C. P. 600; The David and Caroline, 5 Blatchf. 266; Merchants, etc., Co. v. Cornforth, 3 Colo. 280. But receipt given by an express company as common carriers for a package received by it for transportation limiting liability of company to $50, "at which the article forwarded is hereby valued unless otherwise herein expressed," constitutes a valid contract between shipper and carrier, and $50 is the legal limit of carrier's liability in the absence of a declaration of value higher than that sum in the receipt. Ballou v. Earle, 17 R. I. 441, 22 Atl. 1113, 33 Am. St. Rep. 881; Maxwell & Putnam v. Southern Pacific R. Co., 48 La. Ann. 385, 19 So. 287. Compare Stanard Milling Co. v. White Line, etc., Co., 122 Mo. 258, 26 S. W. 704. See Hance v. Wabash Western Ry. Co., 56 Mo. App. 476; Hill v. Missouri Pacific Ry. Co., 46 Mo. App. 517; Bennitt v. Missouri Pac. R. Co., 46 Mo. App. 656; Leonard v. Chicago & Alton Ry. Co., 54 Mo. App. 293; Paddock v. Missouri Pacific Ry. Co., 60 Mo. App. 328; Vaughn v. Wabash R. Co., 62 Mo. App. 461; Wilson v. Missouri Pacific Ry. Co., 66 Mo. App. 388; Minter v. Chicago, etc., Ry. Co., 82 Mo. App. 130; Klass Commission Co. v. Wabash R. Co., 80 Mo. App. 164; American Central Ins. Co. v. Chicago & Alton Ry. Co., 74 Mo. App. 89; Vaughn v. Wabash Ry. Co., 78 Mo. App. 639. See Michalitschke Bros. v. Wells, Fargo & Co., 118 Cal. 683, 50 Pac. 847; Pierce v. Southern Pacific Ry. Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302; Nordlinger v. Nelson, 46 Fed. 859; American Sugar Refining Co. v. The Euripides, 18 C. C. A. 226, 71 Fed. 728; Bixby v. Deemar, 4 C. C. A. 559, 54 Fed. 718; Wabash Ry. Co. v. Brown, 152 Ill. 484, 39 N. E. 273. See Barker v. The Swallow, 44 Fed. 771; Thin v. Richards & Co., 2 Q. B. 141 (1894). Westport Coal Co. v. McPhail, 2 Q. B. 130, *contra*.

95. Spinetti v. Atlas Steamship Co., 14 Hun, 100, 80 N. Y. 71.

96. The Olbers, 3 Bened. 148.

97. Richards v. Doe, 100 Mass. 524. See also Hastings v. Pepper, 11 Pick. 43; Nelson v. Woodruff, 1 Black, 160, and *ante*, § 1729; Carter v. The Mascotte, 2 C. C. A. 399, 51 Fed. 605; Argo Steamship Co. v. Seago, 42 C. C. A. 128, 101 Fed. 999.

being limited to the apparent condition, a latent defect may be shown by the carrier.[98]

Where the master of the vessel uses all proper diligence, the charterers cannot recover damages for delay caused by forcible detention by the Government.[99]

§ **1742a. Burden of proof as to damage.**— When goods are damaged while in the possession of the carrier, the injury is presumed *prima facie* to have been occasioned by the carrier's default and hence the burden is upon him to prove that it arose from a cause, for which he was not responsible. If it appear that the damage was caused by the dangers of navigation or some other cause within the existence of the bill of lading, the burden is then upon the shipper to show that the damage might have been avoided by the exercise of reasonable care and skill. Where a cargo was damaged by the spring of a leak in the center-board trunk of the vessel it was held that under the implied conditions of seaworthiness, the burden was on the vessel to see that at the commencement of the voyage the center-board trunk was in such good condition as to withstand the stress to which, on such a voyage, it might reasonably have been subjected, but the burden may be satisfied or shifted by general evidence of seaworthiness.[1]

SECTION IV.

TRANSFER OF BILLS OF LADING.

§ **1743. As to who may transfer the bill of lading.**— Strictly speaking, no person but the consignee, when the bill of lading is made out in his name, can pass legal title to the goods, by indorsement of the bill, its *prima facie* effect being to vest ownership in him.[2] But if the consignor be the owner, and the shipment be on his own account and risk, although he may not pass the title by virtue of a mere indorsement of the bill of lading, unless he be consignee also, or it be deliverable to his order, yet by an assign-

98. The Oriflamme, 1 Sawy. 176.

99. The Onrust, 1 Bened. 431.

1. The Warren Adams, 20 C. C. A. 486, 74 Fed. 413. See also *ante*, § 729, and notes.

2. The Sally Magee, 3 Wall. 457; Slater v. Church, 11 App. Div. 307, 42 N. Y. Supp. 389; Louisville & Nashville R. Co. v. Allgood, 113 Ala. 163, 20 So. 986. See Horner v. Missouri Pacific Ry. Co., 70 Mo. App. 285; Neill v. Produce Co., 41 W. Va. 37, 23 S. E. 702.

ment, either on the bill of lading or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except a purchaser for a valuable consideration, by an indorsement of the bill of lading itself. Such an assignment not only passes the legal title as against his agents and factors, but also against his creditors, in favor of the assignee.[3] It is necessary that the bill of lading be delivered, in order to pass the goods, and an indorsement without delivery will not suffice.[4] But putting it in the post-office, addressed to the indorsee or to another for him, would be a valid delivery.[5] When the indorsement of a bill of lading is proved, it will be presumed to have been indorsed for value until the contrary is shown.[6]

§ **1744. Indorsement in blank.**—A bill of lading indorsed in blank was supposed at one time to be distinguishable from one indorsed to a particular person;[7] but it has long since been conceded and established that no such distinction can be supported, and an indorsement in blank filled up to a particular person is as effectual as if originally so written.[8]

§ **1745. Conditional and restrictive indorsements.**— A bill of lading may be indorsed with conditions or restrictions to the same effect as the like indorsement of a bill of exchange or promissory note. Thus, if the goods are to be delivered, provided A. B. pay a certain draft, all subsequent indorsees take subject to that condition, and have no title until it is complied with.[9] And the indorsement of a bill of lading "without recourse" was recently held to be valid; and the shipowners having delivered the goods in pursuance of it, were not permitted to sue for the original consideration.[10]

§ **1745a. Distinction between transfer of property symbolized by bill of lading and transfer of carrier's contract.**— It must be borne in mind that the bill of lading is both the symbol of the property

3. Conrad v. Atlantic Ins. Co., 1 Pet. 445.

4. Allen v. Williams, 12 Pick. 297; Southern Ry. Co. v. Kinchen & Co., 103 Ga. 186, 29 S. E. 816. Compare Ætna Nat. Bank v. Water Power Co., 58 Mo. App. 532.

5. Buffington v. Curtis, 15 Mass. 528.

6. Dracachi v. Anglo-Egyptian Navigation Co., L. R., 3 C. P. 190.

7. Snee v. Prescott, 1 Atk. 245.

8. Lickbarrow v. Mason, 2 T. R. 63.

9. Barrow v. Coles, 3 Campb. 92; Walley v. Montgomery, 3 East, 585.

10. Lewis v. M'Kee, L. R., 2 Exch. 37.

which is delivered to the carrier for transportation, and evidence of the carrier's contract to transport and deliver that property. As a symbol of property it may be transferred, but as a contract with the carrier it is a chose in action, and as such it is not at common law assignable. Upon a refusal of the carrier to deliver the goods, the transferee of the bill of lading might sue such carrier for the wrongful conversion of the goods, because the property in them passed by transfer of the bill of lading;[11] but he could not at common law maintain an action for a breach of the contract contained in the bill of lading, as, for instance, for not delivering them according to the contract, to which the transferee was not a party, for the reason that such contract was not transferable.[12] This has been changed in England by the statute of 18 & 19 Victoria. In some of the States of the United States the transferee of the bill of lading acquires all rights of his transferrer to the benefit of the contract; and generally the assignee of a *chose in action* may sue either in his own name or the name of his assignor.

§ **1746. When transfer confers greater rights than transferee possesses.**— Between the original vendor and vendee, the transmission or indorsement of the bill of lading is as ineffectual for all purposes as for the absolute transfer of the property, and only serves as evidence of their relations without itself affecting them. Its receipt by the consignee and vendee does not defeat the vendor's right of stoppage *in transitu*. And the only case in which the transfer of the bill of lading confers greater rights than could be conferred without such transfer, is as between the consignor and consignee on the one hand, and a transferee of the bill, as the representative of the goods, to a *bona fide* purchaser on the other.[13]

§ **1747. Changes of common law by statute.**— The common law respecting bills of lading has been very much changed by statute in England and in some of the United States; and other documentary evidences of title are placed in some cases on the same footing. But it would be trespassing too much upon the necessary

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11. Haille v. Smith, 1 Bos. & P. 564; Midland Nat. Bank v. Missouri, etc., R. Co., 62 Mo. App. 531.

12. Howard v. Shepherd, 19 L. J. C. P. 248; Thompson v. Downing, 14 L. J. Exch. 320; Sanders v. Vanzeller, 12 L. J. Exch. 497; Leggett on Bills of Lading, 341, 342; Cent. L. J., Jan. 13, 1882, vol. XIV, No. 2, p. 24.

13. Rowland v. Bigelow, 12 Pick. 307; Gurney v. Behrend, 3 El. & Bl. 622.

and legitimate topics of this volume to discuss the modifications of statute law, and the nature of other instruments assimilated in a greater or less degree to those strictly negotiable.[14]

§ 1747a. Effect of statute making bill of lading negotiable.— In the United States Supreme Court it was recently held that although a statute makes bills of lading negotiable by indorsement and delivery, it does not follow that all the consequences incident to the indorsement of bills and notes ensue or are intended to ensue from such negotiation; and that the rule that a *bona fide* purchaser of a lost or stolen bill or note is not bound to look beyond the instrument has no application to the case of a lost or stolen bill of lading. And that the purchaser of a bill of lading, who has reason to believe that his vendor was not the owner thereof, or that it was held to secure an outstanding draft, is not a *bona fide* purchaser, nor entitled to hold the merchandise covered by the bill against the true owner.[15]

§ 1748. Difference between consignee and vendee.— By the common law, a factor or consignee stood in a different situation from a vendee with respect to his power to pass the property therein by an indorsement of the bill of lading; for the reason that, though he might bind his principal by a sale thereof, he could not do so by a pledge, that not being within the usual scope of his authority.[16] And even when the indorsement was by the vendor himself, the transfer operated only as a conveyance of the property in the goods, but not as an assignment of the contract, so that the indorsee could not sue upon the bill of lading,[17] except in admiralty, where different rules obtained.[18] But now the effect of the Factors Act

14. See Cartwright v. Wilmerding, 24 N. Y. 521; *post*, § 1750*a*.

15. Shaw v. Railroad Co., 101 U. S. (11 Otto) 557. In Maryland, bills of lading are negotiable by statute in the same sense as bills of exchange. Tiedeman v. Knox, 53 Md. 612. See the following cases, which relate to statutes making bills of lading negotiable. Price v. Wisconsin County, 43 Wis. 267; Hale v. Milwaukee County, 29 Wis. 482; Greenbaum v. Megibben, 10 Bush, 419; Erie Dispatch Co. v. St. Louis County, 6 Mo. App. 172; Merchants' Bank v. Union R. Co., 69 N. Y. 373; *post*, § 1750*a*; Raleigh & Gaston v. Lowe, 101 Ga. 320, 28 S. E. 867.

16. Newson v. Thornton, 6 East, 17; Martin v. Coles, 1 Maule & S. 140; Burton v. Curyea, 40 Ill. 320. *Contra*, Marine Bank v. Wright, 48 N. Y. 1.

17. Thompson v. Downing, 14 M. & W. 403; Sanders v. Vanzeller, 4 Q. B. 297; Smith's Merc. Law, 380.

18. The Rebecca, 5 Rob. Adm. 102; 1 Parsons on Shipping, 193.

in England is to give validity to pledges by agents, as well as to sales;[19] and whether the consignor be vendor, or merely consigning the goods for sale, his right of stoppage will be defeated by the assignment of the bill of lading, even to a person not a vendee, but from whom money has been borrowed on the faith of it. And by the Bills of Lading Act, all rights of action and liabilities upon the bill of lading are to vest in and bind the consignee or indorsee, to whom the property in the goods shall pass.[20]

§ 1749. **As to the bona fide transferee.**— The transfer of the bill of lading, in order to affect the vendor's right of stoppage *in transitu,* must be, both by the common law and the statute law of England, to a *bona fide* third person. But it is not requisite to *bona fides* that such person should be without notice that the goods have not been paid for, because a man may be perfectly honest in purchasing goods which he knows have not been paid for, but without notice of such facts as render the bill of lading not fairly and honestly assignable.[21] If, however, the transferee of the bill of lading knew at the time of transfer that the consignee of the goods was insolvent, or in any way assisted to defraud the consignor, he can stand in no better situation than the consignee, and the consignor retains the right of stoppage *in transitu* against him.[22]

§ 1750. **Title to bill of lading not like title to bill of exchange.**— The bill of lading not being negotiable, the mere honest possession of such an instrument, indorsed in blank, or in which the goods are made deliverable to bearer, although acquired for a valuable consideration, is not such a title to the goods as the like possession of a bill of exchange or negotiable note would be to the money promised to be paid by the acceptor or maker. The indorsement of a bill of lading can, therefore, give no better right to the goods than the indorser himself had (unless by statutory enactment), for the bill of lading is unlike commercial paper in this: that the

19. Benjamin on Sales, 607, 608, 657; 1 Smith's Lead. Cas. 885.

20. Benjamin on Sales, 658; Ouachita Nat. Bank v. Weiss & Co., 49 La. Ann. 573, 21 So. 857.

21. Cuming v. Brown, 9 East, 506. See Dymock v. Missouri, etc., Ry. Co., 54 Mo. App. 400.

22. Vertue v. Jewell, 2 T. R. 681. See Cahn v. Pocketts, etc., Co., 1 Q. B. 643 (1899).

consignee cannot acquire a better title to the property symbolically delivered than his assignor had at the time of assignment.[23]

§ **1750a. Bill of lading lost, stolen, or fraudulently obtained.**— It follows from what has been stated, that if the owner should lose or have stolen from him a bill of lading indorsed in blank, the finder or the thief could confer no title upon an innocent third person.[24] But the title of *bona fide* third parties will prevail against the vendor who has actually transferred the bill of lading to the vendee, although he may have been induced by the vendee's fraud to do so, because a transfer obtained by fraud is not void, but voidable only.[25] If the goods do not actually belong to the shipper, his obtaining and transferring a bill of lading for them will not vest title in the transferee.[26]

§ **1751.** The indorsee of a bill of lading may libel the vessel in which the goods are shipped, for failure to deliver them, though he may be but an agent or trustee for another — as, for instance, the casheir of a bank.[27] And the consignee of the goods to whom the bill has been indorsed, may not only libel the carrier vessel for its default, but also a vessel by whose tortious collision with the carrier vessel the goods have been lost.[28]

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23. Emery v. Irving Nat. Bank, 25 Ohio St. 255. See Voss v. Robertson, 46 Ala. 483; Haas v. Kansas City, etc., R. Co., 81 Ga. 795; Dean v. Driggs, 137 N. Y. 274, 33 N. E. 326, 33 Am. St. Rep. 721; Louisville & Nashville R. Co. v. Barkhouse, 100 Ala. 543, 13 So. 534; Fast v. Canton, etc., R. Co., 77 Miss. 498, 27 So. 525; Landa v. Latten Bros., 19 Tex. Civ. App. 246, 46 S. W. 48; Cavallaro v. Texas & Pacific Ry. Co., 110 Cal. 348, 42 Pac. 918.

24. Gurney v. Behrend, 2 El. & Bl. 622, 23 L. J. Q. B. 265; Brower v. Peabody, 13 N. Y. 126; Dows v. Perrin, 16 N. Y. 333; Dows v. Greene, 24 N. Y. 644; Barnard v. Campbell, 55 N. Y. 462; Benjamin on Sales, 658; 1 Smith's Lead. Cas. 900; *ante*, § 1747*a*; Shaw v. Railroad Co., 101 U. S. (11 Otto) 557; Raleigh & Gaston v. Lowe, 101 Ga. 320, 28 S. E. 867.

25. Pease v. Gloahec, L. R., 1 Privy C. App. 219; Benjamin on Sales, 658. In Dows v. Greene, 24 N. Y. 644, Smith, J., said: "A contract of sale infected by fraud, is valid as against the party committing the fraud, and is valid to pass and to protect a transfer of the property when there is an absolute delivery as against the vendor till it is rescinded. As against him and in his favor it is a voidable contract, voidable at his election; as against all other persons it is a valid contract until rescinded. Now, I conceive that the same rule applies to this bill of lading as would apply to a sale and delivery of personal property." Compare Dows v. Perrin, 16 N. Y. 325, and Cartwright v. Wilderming, 24 N. Y. 521; Jasper Tr. Co. v. Railroad Co., 99 Ala. 416, 14 So. 546.

26. Moore v. Robinson, 62 Ala. 537.

27. The Thames, 14 Wall. 98.

28. The Vaughan, 14 Wall. 258.

CHAPTER LV.

GUARANTIES, AND THE LAW OF GUARANTY AS APPLICABLE TO NEGOTIABLE INSTRUMENTS.

SECTION I.

DEFINITION, NATURE, AND CONSTRUCTION OF GUARANTIES.

§ **1752.** A guaranty is defined to be a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is, in the first instance, liable to such payment or performance.[1] The word "guaranty" signifies the same as "warranty," and both words are derived from the French verb *garantir,* to undertake, and were formerly used as synonymous terms.[2]

§ **1753. Difference between guaranty and ordinary suretyship.**—Guaranty is a peculiar kind of suretyship, as is also an indorsement; but guaranty differs from indorsement, and it differs also from the ordinary contract of a surety. The distinction between a guarantor and an ordinary surety is not easily defined, and the terms have been frequently used as convertible. A surety is generally a comaker of the note, while the guarantor never is a maker; and the leading difference between the two is, that the surety's promise is to meet an obligation which becomes his own immediately on the principal's failure to meet it, while the guarantor's promise is always to pay the debt of another.[3] A surety is liable as much as his principal is liable, and absolutely liable as soon as default is made, without any demand upon the principal whatever, or any notice of his default. He may be damaged by reason of no demand being made or notice given, and he may be sued as a promisor.[4]

1. Fell on Guaranty, 1; Story on Notes, § 457; Smith's Merc. Law, chapter XI, section I; Davis Sewing Machine Co. v. Gibbons, 4 Kan. App. 237, 45 Pac. 946.

2. Burrill's Law Dict.

3. 2 Parsons on Notes and Bills, 118.

4. Perry v. Barret, 18 Mo. 140. Hence it has been held that in case of the death of the principal no demand upon his legal representatives for payment is necessary in order to hold the sureties. Willis v. Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842.

The guarantor's liability is less stringent, and unless demand is made within a reasonable time, and notice given in case of default, he is discharged to the extent that he may be damaged by delay. Thus, if the debtor has, in the meantime, become insolvent, so that he could not have recourse upon him, he could not be held.[5] Thus, we see the surety's liability is primary and direct, like that of the principal. The guarantor's is secondary and collateral. And, in general, the guarantor contracts to pay, if, by the exercise of due diligence, the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment at once, if the principal debtor makes default.[6] As has been well said, the surety "is an insurer of the debt; the guarantor is the insurer of the solvency of the debtor."[7] Nor does his guaranty inure to the benefit of an indorser signing before him, and with whom he is not in privity.[8]

The contract of the indorser of a note and that of the guarantor upon a note, are so distinct and different that one Statute of Limitations may be applied to the note and another to the guaranty.[9]

§ 1754. Difference between guaranty and indorsement.— The liability of a guarantor also differs materially from, and is more onerous than, that of an indorser. The indorser contracts to be liable only upon condition of due presentment of the bill or note on the exact day of maturity, and due notice to him of its dishonor. And he is absolutely discharged by failure in either particular, although he may suffer no actual damage whatever. The guarantor's contract is more rigid, and he is bound to pay the amount upon a presentment made, and notice given to him of dishonor, within a reasonable time. And in the event of a failure to make presentment and give notice within such reasonable time,

5. Ibid. In Bishop v. Eaton, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437, it is held that "A surety upon a promissory note, who relies upon the guaranty of a third person for reimbursement, is not required, after payment of the note, to attempt to collect the money from the maker, and it is no defense in an action on the guaranty that he did not promptly notify the guarantor of the default of the maker, at least in the absence of evidence that the guarantor was injured by the delay."

6. Piedmont Guano Co. v. Morris, 86 Va. 944, 11 S. E. 883.

7. Krampt's Exrx. v. Hatx's Exrs., 52 Pa. St. 525; Reigart v. White, 52 Pa. St. 438; Arents v. Commonwealth, 18 Gratt. 770; Getty v. Schantz, 101 Wis. 229, 77 N. W. 191.

8. Phillips v. Plato, 42 Hun, 189.

9. Carpenter v. Thompson, 66 Conn. 457, 34 Atl. 105.

he is not absolutely discharged from all liability, but only to the extent that he may have sustained loss or injury by the delay.[10] The same person may be guarantor, and also indorser of a note; and in such case, while failure to give him due notice of demand and nonpayment will discharge him as indorser, he will still be bound as guarantor.[11]

§ 1755. As to construction of guaranties.— For the interpretation of guaranties, the cases lay down very opposite rules. Some of them incline to construe the guaranty most strongly against the guarantor, on the ground that the words of an instrument are to be taken most strongly against the party using them.[12] Others construe it strictly, because it is (generally) an engagement to answer for the debt of another.[13] Certainly, where there are ambiguous phrases used, they are to be taken most strongly against the guarantor, upon the general principle which throws the burden of ambiguity upon the party creating it.[14] But no special rules, different from those which apply to other contracts, govern it, and it ought to receive a fair and liberal interpretation according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification or liberal construction beyond the fair import of its terms. On the other hand, as guaranties are contracts of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold

10. Arents v. Commonwealth, 18 Gratt. 770; Story on Notes, § 460; Castle v. Rickley, 44 Ohio St. 490; Burrow v. Zapp, 69 Tex. 476. In New York held, that the holder of a note was not obliged to exhaust collaterals securing same before proceeding against the guarantors, nor were they (the guarantors) entitled to be credited with the value of such collaterals, but that when guarantors have paid they are subrogated to the rights and securities of the holder. See Deering & Co. v. Russell, 5 N. Dak. 319, 65 N. W. 691; Smith v. Ojerholm, 18 Tex. Civ. App. 111, 44 S. W. 41, citing text approvingly.

11. Deck v. Works, 57 How. Pr. 292. In Georgia held, that a person who merely writes his name on the back of a promissory note to guarantee its payment, but whose indorsement is neither essential to, nor proper in, the due transmission of title, is a surety only and is not entitled to notice as an indorser. See Sibley v. American Exch. Nat. Bank, 97 Ga. 126, 25 S. E. 470.

12. Mason v. Pritchard, 12 East, 227; Mayer v. Isaac, 6 M. & W. 610; Drummond v. Prestman, 12 Wheat. 518.

13. Whitney v. Groot, 24 Wend. 82; Bigelow v. Benton, 14 Barb. 128; Evans v. Whyle, 5 Bing. 485, 15 Eng. C. L. 514; Nicholson v. Paget, 1 C. & M. 48.

14. Hargreave v. Smee, 6 Bing. 244, 19 Eng. C. L. 69.

the party bound to the full extent of what appears to be his engagement. Letters of guaranty are commercial instruments, generally drawn up by merchants, sometimes inartificial and often loose in their structure and form. They should not, therefore, be construed with nice and technical care; but according to the facts and circumstances accompanying the transaction, holding in view as the main object to ascertain and effectuate the intentions of the parties.[15]

§ **1756.** If the guaranty propose a credit, that particular credit must be granted, or the guarantor will not be bound.[16] An authority to draw bills at ninety days from time to time means at ninety days' sight, and does not authorize a drawing at ninety days from date.[17] But in Massachusetts it has been held that one who is authorized to draw drafts on another "at ten or twelve days" with nothing to indicate whether ten or twelve days after date or after sight is meant, may exercise his own discretion, and consult his own convenience in that particular.[18] Where, by letter of credit addressed to the plaintiffs, Q. opened an account with them in favor of R. & Co., for a certain amount to be used by sixty days' sight drafts, "for advances to be made on consignments of merchandise" to Q.'s address, and afterward the plaintiffs by letter informed R. & Co. that Q. had opened a credit with the plaintiffs in favor of R. & Co. for that amount to be used by their drafts at sixty days' sight; and the letter confirmed the credit, and promised that R. & Co.'s drafts should be protested, it was held that only sixty-day drafts, drawn "against shipments of consignments to the address of Q.," fell within the letter.[19]

§ **1757. Liability of party who writes his name on back of note before that of payee.**— Great diversity of opinion has arisen as to the liability of one who writes his name on the back of a note which is payable to a particular payee before such payee's name. If such an indorsement be made at a period subsequent to the

15. Douglas v. Reynolds, 7 Pet. 122; Lee v. Dock, 10 Pet. 493; Lawrence v. McCalmont, 2 How. 449; Bell v. Bruen, 1 How. 187; Mauran v. Bullus, 16 Pet. 528; Moore v. Holt, 10 Gratt. 294; Smith v. Dann, 6 Hill, 543; Mussey v. Rayner, 22 Pick. 228.

16. Walrath v. Thompson, 6 Hill, 540; Foerderer v. Moors, 33 C. C. A. 641, 91 Fed. 476.

17. Ulster County Bank v. McFarlan, 3 Den. 553.

18. Barney v. Newcomb, 9 Cush. 47.

19. Gelpcke v. Quentrell, 66 Barb. 617.

original transaction, the indorser is not an original promisor, but a guarantor.[20] It will be presumed, however, that such indorsement was made at the time the note was executed;[21] and, as will be seen in the first volume of this work, the decisions of the courts are very diverse and conflicting as to the liability of the party making it — some regarding him as a comaker, others as a surety, others as an indorser, and others still as a guarantor.[22]

Our view is this: When the note is not negotiable, such a party is to be deemed a guarantor. He cannot be an indorser, for the simple reason that there is no such thing as indorsement, in its commercial sense, of nonnegotiable paper. And if he intended to be a surety, it is reasonable to presume that he would have signed conjointly with the maker, or, by the word "surety" attached to his signature, indicated an intention to assume that character. He can, therefore, only be a guarantor.

When the note is negotiable, the very opposite presumption arises. It is intended to pass current from hand to hand, and it is but natural to presume that one who assures a negotiable instrument intends to assure it to all who may become its holders, unless the contrary design appears; and that assuming the responsibility, he is also entitled to the privileges of an indorser. It is true that there is no transfer accompanying such indorsement, either in point of fact or colorably, as in the ordinary case of an accommodation indorsement, and in the title as against the maker, such indorsement forms no link. But the indorser in such a case seems to us to stand in the position of a drawer whose bill is payable to the order of the payee, and which has been accepted by the maker. His indorsing in that peculiar style would indicate that it was done for accommodation of the maker, and we cannot see that this analogy between his position and that of an accommodation drawer fails in any particular.[23]

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20. Benthall v. Judkins, 13 Metc. (Mass.) 265; Union Bank v. Willis, 8 Metc. (Mass.) 504; Irish v. Cutter, 31 Me. 536; Howard v. Jones, 13 Mo. App. 596; Castle v. Rickley, 44 Ohio St. 490; Etz v. Place, 81 Hun, 203, 30 N. Y. Supp. 765; Burnham v. Gosnell, 47 Mo. App. 637.

21. Benthall v. Judkins, 13 Metc. (Mass.) 265; Lowell v. Gage, 38 Me. 35; Camden v. M'Koy, 3 Scam. 437. Evidence is admissible to show when the signature was made. Draper v. Snow, 20 N. Y. 331. See vol. I, § 728.

22. See vol. I, § 707 *et seq.;* New York Security & Trust Co. v. Storm, 81 Hun, 33, 30 N. Y. Supp. 605. In Tennessee, regarded as comaker. See Logan v. Ogden, 101 Tenn. 392, 47 S. W. 489.

23. See vol. I, §§ 707, 714.

§ 1758. Right of guarantor who pays note.—The guarantor of a note, who pays it upon his guaranty of payment by the payee, who is also indorser, is entitled to it for his own use when he pays it to the holder; and in so doing he becomes vested with the same rights which the payee had against the maker, and no more. If the consideration as between the maker and payee has failed, he cannot recover of the maker, as he does not step in the shoes of the *bona fide* holder, to whom he paid it.[24]

A guaranty of a note made after its execution upon a new and sufficient consideration is valid, although the note is payable to the maker's order and not indorsed by him, it having been in that condition at the time the guaranty was made.[25]

SECTION II.

THE CONSIDERATION OF GUARANTIES AND THE OPERATION OF THE STATUTE OF FRAUDS.

§ 1759. (I) As to the consideration of guaranties.—It is necessary to the validity of a guaranty that it should be upon a valuable consideration. There are three classes of cases which should be discriminated: (1) *When the guaranty is contemporaneous with the principal contract.* In such a case it is not necessary that it should be a separate and distinct consideration from that upon which the bill or note was executed. It may be for the accommodation of the drawer, maker, or other party to add strength to the paper and induce the guarantee to take it, and then the value received from him embraces the guarantor as well as the principal. The credit is not given solely to either, but to both; and when the guaranty is made prior to delivery, it will be presumed to be upon consideration of the credit, and will be valid.[26]

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24. Putnam v. Tash, 12 Gray, 121; *post*, § 1789.

25. Jones v. Thayer, 12 Gray, 443; Carpenter v. Thompson, 66 Conn. 457, 34 Atl. 105.

26. Parkhurst v. Vail, 73 Ill. 323; Draper v. Snow, 20 N. Y. 331; Manrow v. Durham, 3 Hill, 584; Leggett v. Raymond, 6 Hill, 639; Bickford v. Gibbs, 8 Cush. 184; Hopkins v. Richardson, 9 Gratt. 494; Snively v. Johnson, 1 Watts & S. 309; Colburn v. Averill, 30 Me. 310; Gillighan v. Boardman, 29 Me. 79; Campbell v. Knapp, 15 Pa. St. 27; Cahill Iron Works v. Pemberton, 48 App. Div. 468, 62 N. Y. Supp. 944. But somewhat in conflict with the principle announced in the text, it has been held in Kentucky that the guarantor of a note, even where the guarantee was contemporaneous with the execution of the principal contract, may rely for defense upon want of consideration

§ 1760. (2) When the guaranty is made after the contract is completed, and is not for the benefit of the guarantor.—In such case, the original consideration being exhausted, there must be some new and sufficient consideration to support it, otherwise it will be void.[27] And when it is shown that the guaranty was made after the completion of the note or other contract, there is no presumption of consideration, but the contrary; and the plaintiff must prove a new and express consideration in order to enforce it.[28] There may, however, be circumstances which show that, although the guaranty was not made until after delivery of the instrument, it was designed and understood originally that it should be made, or have the effect as if made beforehand, and that it entered into the inducement to the promisee to take it; and under such circumstances it will relate back to the time when it was intended to operate, and be valid accordingly.[29] But unless this be the case, the consideration must appear, where it is necessary that it be set forth, in order to satisfy the Statute of Frauds.[30]

§ 1761. (3) When the guaranty is made after the contract is completed, and is for the benefit of the guarantor.— Thus, where a party holds a bill or note, and upon a transfer in some transaction of his own guarantees it to his transferee — in such case, the consideration moves directly to him for his own benefit; it is really his own debt that he promises to pay in a particular way, and not the debt of another.[31] And the clause of the statute respecting

for the note unless he has received consideration therefor from the creditor. See Wood Mowing & Reaping Machine Co. v. Land, 98 Ky. 516, 32 S. W. 607; Winans v. Gibbs & Starrett Mfg. Co., 48 Kan. 777, 30 Pac. 163, citing text. See Bageley v. Cohen, 121 Cal. 604, 53 Pac. 1117; Dillman v. Nadelhoffer, 160 Ill. 121, 43 N. E. 378.

27. Howe v. Merrill, 5 Cush. 80; Tenney v. Prince, 4 Pick. 385. See also and compare Williams v. Williams, 67 Mo. 667; Green v. Shepherd, 5 Allen, 570. But as to innocent holder, see Ewing v. Clarke, 8 Mo. App. 570; Howard v. Jones, 13 Mo. App. 596; Baker v. Wahrmund, 5 Tex. Civ. App. 268, 23 S. W. 1023; Messenger v. Vaughan, 45 Mo. App. 15; Lowenstein v. Sorge, 75 Mo. App. 281; Bank of Commerce of West Superior v. Ross, 91 Wis. 320, 64 N. W. 993.

28. Tenney v. Prince, 4 Pick. 385; Klein v. Currier, 14 Ill. 237; Parkhurst v. Vail, 73 Ill. 323; Johnston v. McDonald 41 S. C. 81, 19 S. E. 65. See Adams v. Huggins, 78 Mo. App. 219.

29. Hawkes v. Phillips, 7 Gray, 284; Moies v. Bird, 11 Mass. 436; Adams v. Huggins, 73 Mo. App. 140; Pauly v. Murray, 110 Cal. 13, 42 Pac. 313.

30. Edwards on Bills, 223.

31. Osborne v. Lawson, 26 Mo. App. 554. See Leonhardt v. Citizens' Bank, 56 Nebr. 38, 76 N. W. 452.

a promise or engagement to pay the debt of another has no application to it.[32]

§ 1762. (II) As to the operation of the Statute of Frauds.— In the 29th year of Charles II. (1667), there was enacted "The Statute of Frauds," as it is called, a provision of which was that "noe action shall be brought whereby to charge the defendant upon any speciall promise to answere for the debt, default, or miscarriages of another person, unlesse the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Many questions have arisen upon the construction of this statute, both in England and in the United States, in every one of which it has been copied, either precisely or in a somewhat modified form, and some of them it is necessary to consider in connection with guaranties. (1) When is a guaranty such a promise to answer for the debt of another as to come within the meaning of the statute? (2) How must it be expressed, when it comes within the statute, in order to conform to it?

§ 1763. Firstly: When a guaranty is a promise to answer for the debt of another.— When a third person gets credit or forbearance, upon the guaranty of another, even when it is contemporaneous, the latter's promise is clearly "a promise to answer for" his debt, and it must comply with the statute in order to be valid. But there are cases in which a guaranty is really to answer for one's own debt, though having the appearance of a promise to answer for another's, and in such cases it is not within the statute.[33] Thus, where the defendant transferred the note of a third person, payable to him or bearer, to the plaintiff in exchange for his own note, which plaintiff held, and at the same time indorsed a guaranty on the back of it, without expressing a consideration, it was held that, "although in form a promise to answer for the debt or default of another, in substance it was an engagement to pay the guarantor's own debt in a particular way," and that "it would be good without any writing."[34] So where a third person's note was transferred with mere verbal guaranty that it "was good

32. See *post*, § 1763.

33. Throop on Verbal Agreements, 640, § 650; Jones v. Bacon, 72 Hun, 506, 25 N. Y. Supp. 212.

34. Brown v. Curtis, 2 N. Y. 225.

and collectible," in part payment of a horse, it was held valid, because in reality a promise to pay the amount, unless the third person paid it for him.[35] This doctrine is uniformly adopted in the United States, where the guaranty is upon a pre-existing consideration, as well as where it is for a debt contracted, goods sold, or obligations exchanged, at the time the guaranty is made.[36] Where one who sells a note guarantees its payment, the guaranty is an original undertaking, and need not be written.[37]

§ 1764. Secondly: As to the terms of the guaranty.— It has been held uniformly in England, that when the guaranty is to answer the debt of another the consideration must be expressed, as well as the promise, to satisfy the word "agreement" in the statute, and that parol evidence is inadmissible to suppy it.[38] This view rested upon the ground that the word "agreement" was used in the sense of a mutual contract, and that it was necessary for the consideration, without which there is no contract, to appear upon the face of the writing, in order to the existence of a written agreement. In the United States a number of cases have adopted this reasoning;[39] but the word "agreement" signifies, in its ordinary acceptation, the thing agreed upon, and it would seem that if the thing agreed upon was in writing the statute would be complied with. It is true that the formal compact is technically an agreement; but the word would seem to have been used in its popular and ordinary sense, rather than as a technicality, being intended to apply to all manner of contracts among the people; and the

35. Cardell v. McNiel, 21 N. Y. 336 (1860). See also Fowler v. Clearwater, 35 Barb. 143 (1861); Dauber v. Blackney, 38 Barb. 432 (1862); Milks v. Rich, 80 N. Y. 269 (1880). See *ante*, § 739*a*.

36. Beaty v. Grim, 18 Ind. 131 (1862); Malone v. Keener, 44 Pa. St. 107 (1862); Dyer v. Gilson, 16 Wis. 557 (1863); Huntington v. Wellington, 12 Mich. 10 (1863); Thurston v. Island, 6 R. I. 103 (1859); Hopkins v. Richardson, 9 Gratt. 485 (1852); Hall v. Rodgers, 7 Humphr. 536 (1874); Rowland v. Rorke, 4 Jones (N. C.) 337 (1857); Johnson v. Gilbert, 4 Hill, 178; Meech v. Smith, 7 Wend. 315; Sheldon v. Butler, 24 Minn. 513.

37. Meech v. Smith, 7 Wend. 315; Hunt v. Adams, 5 Mass. 358.

38. Wain v. Walters, 5 East, 19; Saunders v. Wakefield, 4 B. & Ald. 595; Jenkins v. Reynolds, 3 Brod. & B. 14; Morley v. Boothby, 3 Bing. 107; Newbury v. Armstrong, 6 Bing. 201; Alnutt v. Ashenden, 5 M. & G. 392.

39. Henderson v. Johnson, 6 Ga. 390; Elliott v. Giese, 7 Harr. & J. 457; Rigby v. Norwood, 34 Ala. 129; Simons v. Steele, 36 N. H. 73; Sears v. Brink, 3 Johns. 210; Leonard v. Vredenburgh, 8 Johns. 29; Nichols v. Allen, 23 Minn. 543; Ordeman v. Lawson, 49 Md. 135; Parry v. Spikes, 49 Wis. 385; Cahill Iron Works v. Pemberton, 48 App. Div. 468, 62 N. Y. Supp. 944.

opinion predominates in this country that if the promise is written it is sufficient.[40]

§ 1765. When name in blank is sufficient writing to satisfy Statute of Frauds.— In those States where the consideration is not required to be expressed, the name of the party in blank is often regarded as a sufficient writing to satisfy the statute, the signature applying to the contract already written, or to the words above the signature, which are afterward written by implied authority, as, for instance, where one not the payee of a note indorses it when it is made.[41] This is, we think, the correct view; but there is also another ground on which such party may be held, that is, that such party is an indorser, and that the statute has no application to those cases which come peculiarly within the rules of the law merchant.[42]

Where the statute only requires the "promise" to be in writing, it is not necessary for the consideration to appear.[43]

§ 1766. When consideration must appear it need not be set out at length.— Where it is held that the consideration must appear in the guaranty of another's debt, it is nevertheless not necessary that it be set out at length; but sufficient, if it appear by reasonable intendment. Thus, "I hereby guarantee the present account of Miss H. M., due to B. & Co., of £112 4 4, and what she may contract from this date to 30th of September next," was held sufficient indication of the consideration; which was for a future as well as past credit, and it was not necessary that the consideration and promise should be coextensive.[44] So, "in consideration of your being in advance to Messrs. Lees & Sons, in the sum of £10,000, for the purchase of cotton, I do hereby give you my guaranty for that amount in their behalf."[45] So, "You will

40. Packard v. Richardson, 17 Mass. 122, Parker, C. J.; Smith v. Ide, 3 Vt. 390; Gillighan v. Boardman, 29 Me. 79; Sage v. Wilcox, 6 Conn. 81; Reed v. Evans, 17 Ohio, 128; Buckley v. Beardslee, 2 South. 570; Ashford v. Robinson, 8 Ired. 114; Wren v. Pearce, 4 Smedes & M. 91; Little v. Nabb, 10 Mo. 3.

41. Perkins v. Catlin, 11 Conn. 213; Nelson v. Dubois, 13 Johns. 175; Moies v. Bird, 11 Mass. 436; Sloan v. Gibbes, 56 S. C. 480, 35 S. E. 408, 76 Am. St. Rep. 559, citing text; Pauly v. Murray, 110 Cal. 13, 42 Pac. 313.

42. See chapter XIX, § 567, and notes, vol. I; Throop on Verbal Agreements, 159, §§ 85, 86; text approved in Taylor v. French, 2 Lea, 260.

43. Colgin v. Henley 6 Leigh, 85; Taylor v. Ross, 3 Yerg. 330; Pearce v. Wren, 4 Smedes & M. 91; Violett v. Patten, 5 Cranch, 142; Edwards on Bills, 240, 241.

44. Russell v. Moseley, 3 Brod. & B. 211.

45. Haigh v. Brooks, 10 Ad. & El. 309.

please be so good as to withdraw the promissory note, and I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making, on the whole, £45." [46] So it was held, that the consideration, which was a forbearance to sue, was sufficiently manifest where the plaintiff, having pressed W. for payment of a debt, the defendant, W.'s attorney, sent to plaintiff a bill accepted by W. at two months, inclosed in a letter, wherein defendant said: "W. being again disappointed in receiving remittances, and you expressed yourself inconvenienced for money, I inclose you his acceptance at two months," and the plaintiff refusing the bill, unless defendant put his name to it, the latter wrote on the back of the letter: "I will see the bill paid for W." [47]

§ **1767. New York decisions.**— In New York, it was formerly held, that if the original contract and the guaranty were contemporaneous, and the guaranty, therefore, an essential inducement to the credit given, it would not be necessary to show any other consideration than that moving between the parties to the original contract; and that whether the guaranty were on the same or a separate paper, it need not disclose a distinct consideration.[48] Subsequently the Statute of Frauds was so amended in that State as to require the consideration to be expressed in writing, and since then a stricter interpretation has obtained. Thus, where a party wrote under a promissory note simultaneously with its execution, and the consideration was granted upon the credit of his name, "I hereby guarantee the payment of the above note," the guaranty was held void because no consideration was expressed.[49] But where the consideration is required to be expressed, it need not be defined; and, therefore, the words "value received" are deemed a sufficient expression of it.[50] If a guaranty be under seal, the consideration is conclusively imported.[51]

46. Shortrede v. Cheek, 1 Ad. & El. 57.

47. Emmatt v. Kearns, 5 Bing. N. C. 559.

48. Leonard v. Vredenburgh, 8 Johns. 29; Barley v. Freeman, 11 Johns. 221; Nelson v. Dubois, 13 Johns. 175, approved in D'Wolf v. Rabaud, 1 Pet. 476; Eppert v. Hall, 133 Ind. 417, 31 N. E. 74, 32 N. E. 713.

49. Brewster v. Silence, 11 Barb. 144, 8 N. Y. 207. See also Glen Cove Mut. Ins. Co. v. Harrold, 20 Barb. 298; Draper v. Snow, 20 N. Y. 331.

50. Brewster v. Silence, 11 Barb. 144; Douglass v. Howland, 24 Wend. 35; Watson v. McLaren, 26 Wend. 425; Day v. Elmore, 4 Wis. 190.

51. Bank of Tennessee v. Barksdale, 5 Sneed, 73; Crocker v. Gilbert, 9 Cush. 131.

§ **1767a.** The United States Supreme Court considers that where a guaranty is written upon a promissory note after it has been delivered and taken effect as a contract, it requires a distinct consideration to support it; and that where the statute of a State requires the consideration to be expressed in writing, such guaranty is void, where it does not express any consideration. The Statute of Frauds as applied to commercial instruments is a rule of decision of the United States courts.[52]

SECTION III.

FORMS AND VARIETIES OF GUARANTIES.— ABSOLUTE AND CONDITIONAL GUARANTIES.

§ **1768. Forms of guaranties.**— The guaranty of a bill or note need not be in any particular form, and it is governed usually by the same rules which apply to other guaranties.

A guaranty is generally in writing, but when it is to answer for the debt of another, it *must* be written. But there may be valid verbal guaranties. When written, it may be: (1) By a separate instrument; or (2) by writing on the instrument guaranteed; and it may be (3) sealed or unsealed

When it is written on the instrument guaranteed, its very presence is identification of the contract referred to; but when on a separate paper, it must describe with sufficient accuracy the bill or note or other contract it refers to.

§ **1768a. As to the varieties of guaranties.**— A guaranty may be (1) general or special; (2) absolute or conditional; (3) limited or unlimited; and (4) temporary or continuing. A general guaranty is a guaranty to whomsoever may accept the proffer made. A special guaranty is a guaranty to a particular person.

§ **1769. In the second place, as to absolute and conditional guaranties.**— If A. guarantees, expressly or by implication, to pay the note of B. to C., provided B. does not pay it, he becomes absolutely liable for its payment immediately upon B.'s default, and is, therefore, deemed an absolute guarantor of the due payment of the note by B. to C.[53] But if A. guarantees the collectibility or

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52. Moses v. Lawrence County Bank, 149 U. S. 298, 13 Sup. Ct. Rep. 900.

53. Dickerson v. Dickerson, 39 Ill. 575; Allen v. Rightmere, 20 Johns. 365; Arents v. Commonwealth, 18 Gratt. 770; Cowles v. Peck, 55 Conn. 251; Loomis Inst. v. Hurd, 57 Conn. 435; City Sav. Bank v. Hopson, 53 Conn. 453;

goodness of B.'s note to C., he does not absolutely guarantee its payment, but only that he will pay it in the event that C. shall test the collectibility or goodness of the note by regular prosecution of suit against B., and shall be unable, by due and reasonable diligence, to enforce its payment. And accordingly he is only deemed a conditional guarantor of payment.[54]

And he is always deemed a conditional guarantor of payment when there is some extraneous event, beyond the mere default of the principal, upon which the guaranty becomes binding.[55]

The words, "I guarantee the collection of the within note,"[56] and "I promise that this note is good and collectible after due course of law,"[57] and "I warrant this note good,"[58] are phrases of similar import, binding the guarantor only upon condition that the guarantee acts with due diligence in prosecuting the collection

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Osborne v. Lawson, 26 Mo. App. 555; Huff v. Slife, 25 Nebr. 448; Bloom v. Warder, 13 Nebr. 476; Beardsley v. Hawes *et al.*, 71 Conn. 39, 40 Atl. 1043; Roberts, Throp & Co. v. Laughlin, 4 N. Dak. 167, 59 N. W. 967; Beardsley v. Hawes *et al.*, 71 Conn. 39, 40 Atl. 1043. And it has likewise been held that one who was not a party to a note signed a guaranty written on the back of the note "I guarantee payment, demand, and notice of protest waived," that the guaranty was absolute and the guarantor could not plead want of notice and demand and lack of diligence on the part of the payee in collecting from the payor as a defense. Hoyt v. Quint, 105 Iowa, 443, 75 N. W. 342; Friend v. Smith Gin Co., 59 Ark. 86, 26 S. W. 374; Flentham v. Steward, 45 Nebr. 640, 63 N. W. 924; Holm v. Jamieson, 173 Ill. 295, 50 N. E. 702.

54. 2 Am. Lead. Cas. 129, 133; Cowles v. Peck, 55 Conn. 251; Lemmon v. Strong, 55 Conn. 443; Allen v. Rundle, 50 Conn. 9; Forbes v. Rowe, 48 Conn. 413; Summers v. Barrett, 65 Iowa, 292. And the guarantor of a draft has been held not to be legal if the drawee originally refuses to accept it, and is not liable therein. Merchants' Nat. Bank v. Citizens' State Bank, 93 Iowa, 650, 61 N. W. 1065, 57 Am. St. Rep. 284.

55. Dickerson v. Derrickson, 39 Ill. 575. The guaranty was: "I do hereby agree, in case G. K. does not pay R. P. D. $325 in three months from date, to guarantee to said D. the payment of said sum of money." Walker, C. J., said: "In this case the parties have only clothed in language what the law implies in all mere absolute guaranties. The contract of an absolute guarantor is, that if the principal fails to pay, the guarantor will. If it were not so, it would not be a guaranty, but an independent undertaking."

56. Loveland v. Shepherd, 2 Hill, 139. See Central Investment Co. v. Miles, 56 Nebr. 272, 76 N. W. 566; Holmes v. Jamieson, 173 Ill. 295, 50 N. E. 702, *contra*.

57. Moakley v. Riggs, 19 Johns. 69.

58. Curtis v. Smallman, 14 Wend. 231; Cumpston v. McNair, 1 Wend. 457; Cowles v. Peck, 55 Conn. 251; Burton v. Dewey, 4 Kan. App. 589, 46 Pac. 325; State Bank v. Burton-Gardner Co., 14 Utah, 420, 48 Pac. 402.

of the note. Where the language of the guaranty was, "I hereby guarantee the payment of the within note '*without protest*,'" it was held to create a mere technical guaranty whereby the guarantor was not deprived of his right to require the guarantee to exhaust all remedies against prior indorsers, should any of them remain liable by reason of waiver of protest, or otherwise.[59]

§ **1769a. What is due diligence in such cases,** depends largely upon the statutes of the States, which are variant, and upon the practice which has grown up in the courts; and is rather a question of local jurisprudence than one of general commercial law. We do not deem it, therefore, appropriate to pursue the topic through its multiform ramifications. It may be generally stated, however, that "diligent and honest prosecution of a suit against the principal to judgment with a return of *nulla bona*, has always been regarded as one of the extreme tests of due diligence." [60]

But if the principal were insolvent, suit would be vain, and need not be brought.[61] And so, if he remove from the State where the contract was made.[62] But if the principal resided in a foreign State when the contract was made, the guarantee would then be required to proceed against him before pursuing the guarantor.[63]

SECTION IV.

LIMITED AND UNLIMITED, AND TEMPORARY AND CONTINUING GUARANTIES.

§ **1770.** A guaranty may be limited or unlimited in respect to the amount guaranteed. It may be limited to a single transaction.

59. Zahm v. First Nat. Bank, 103 Pa. St. 579; Hartman v. Same, 103 Pa. St. 581; Getty v. Schantz, 40 C. C. A. 560, 100 Fed. 577, citing text. Compare Pierce v. Merrill, 128 Cal. 464, 61 Pac. 64. An indorsement on a promissory note by the payee as follows: "For value received, I hereby sell and assign the within note to W., and guarantee the payment and collection of the same, and agree to pay all attorneys' fees, and do hereby waive presentment for payment, protest and notice of protest, and nonpayment of the same," constitutes a direct and absolute undertaking to pay the note, upon which undertaking, the indorser is liable at the suit of the assignee. See Metzger v. Hubbard, 153 Ind. 189, 54 N. E. 761. See Leonhardt v. Citizens' Bank, 56 Nebr. 38, 76 N. W. 452; Dillman v. Nadelhoffer, 160 Ill. 121, 43 N. E. 378.

60. Camden v. Doremus, 3 How. 515; Jones v. Ashford, 79 N. C. 176.

61. Camden v. Doremus, 3 How. 515; M'Doal v. Yeomans, 8 Watts, 361; Sanford v. Allen, 1 Cush. 473; Flentham v. Steward, 45 Nebr. 640.

62. Cooke v. Nathan, 16 Barb. 342; White v. Case, 13 Wend. 543.

63. Burt v. Horner, 5 Barb. 501.

It may be limited within a certain period of time. And it may be a continuing or standing guaranty, applying to successive transactions, without limit as to time.[64] Where A. & B. addressed a letter of credit to C., saying, "If D. wishes to take goods of you on credit, we are willing to lend our names as security for any amount he may wish," it was held unlimited as to the amount, but not continuing beyond the first parcel of goods delivered to D., there being no words to show that successive transactions were contemplated.[65] So, where the agreement was to be answerable "for the payment of £50 for T. L., in case T. L. does not pay for the gin he received from you," it was held limited to the single purchase of £50 worth of gin.[66] So, where it ran: "I hereby guarantee Mr. J. J.'s account with you for wine and spirits to the amount of £200;" [67] and where it guaranteed A. "to the extent of sixty pounds, at quarterly account, bill two months, for goods to be purchased for him of B." [68] Where the wife of C., a retail trader, owning property in her own right, gave the plaintiff, with whom C. dealt, the following guaranty: "In consideration of you having, at my request, agreed to supply and furnish goods to C., I do hereby guarantee to you the sum of £500. This guaranty to continue in force for the period of six years, and no longer," it was held that the guaranty did not cover sums due for goods supplied before its date, but was limited to goods sold after its date, to the value of £500.[69]

§ **1770a.** "Guaranties," as is well said in Rhode Island, by Matterson, J., "have been divided into two classes;[70] one where the consideration is entire, that is, where it passes whole at one time, and the other where it passes at different times and is, therefore, separable or divisible. The former are not revocable by the guarantor and are not terminated by his death and notice of that

64. Gay v. Ward, 67 Conn. 147, 34 Atl. 1025.

65. Rogers v. Warner, 8 Johns. 92. To the same general effect is the case of Barnett v. Wing, 62 Hun, 125, 16 N. Y. Supp. 567; Brittain Dry Goods Co. v. Yearout, 59 Kan. 684, 54 Pac. 1062.

66. Nicholson v. Paget, 1 Cromp. & M. 48. But *quære*, Mayer v. Isaac, 6 M. & W. 605.

67. Alnutt v. Ashenden, 5 M. & G. 392.

68. Melville v. Hayden, 3 B. & Ald. 593.

69. Morrell v. Cowan, 7 Ch. Div. 151; Frost v. Weatherbee, 23 S. C. 354.

70. National Eagle Bank v. Hunt, 16 R. I. 148, 13 Atl. 115.

fact.[71] The latter, on the contrary, may be revoked as to subsequent transactions by the guarantor upon notice to that effect, and are determined by his death and notice of that event." [72]

§ **1771.** Where the letter of credit ran, "The object of the present letter is to request you, if convenient, to furnish them (S. & H. H.) with any sum they may want, as far as fifty thousand dollars, say fifty thousand dollars," it was held to be limited to a single advance of $50,000, and that when the sum was once advanced, the guaranty was exhausted.

"The language of a letter," said Story, J., "should be very strong that would justify the court in holding the guaranty to be a continuing guaranty, which is to cover advances from time to time to the stipulated amount, *toties quoties,* until the guarantor shall give notice to the contrary. I see nothing in this letter to justify such a conclusion; and in every doubtful case, I think that the presumption ought to be against it." [73]

Where the guaranty was as security "to the amount of £10,000 on certain acceptances, or any other account thereafter to subsist between A. & B.," it was held to cover all transactions up to the amount of £10,000, but none beyond.[74]

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71. Green v. Young, 8 Me. 14, 22 Am. Dec. 218; Moore v. Wallace, 18 Ala. 458; Royal Ins. Co. v. Davis, 40 Iowa, 469; Lloyd v. Harper, 16 Ch. Div. 290; Rapp v. Phœnix Ins. Co., 113 Ill. 390, 55 Am. Rep. 427.

72. Offerd v. Davies, 12 C. B. (N. S.) 748; Jordan v. Dobbins, 122 Mass. 168, 23 Am. Rep. 305; Coulpart v. Clemenston, 5 Q. B. Div. 42; Rapp v. Phœnix Ins. Co., 113 Ill. 390; Menard v. Scudder, 7 La. Ann. 385.

73. Cremer v. Higginson, 1 Mason, 323. See Drovers' Nat. Bank v. Albany County Bank, 44 Fed. 183.

74. Sansome v. Bell, 2 Campb. 39. In Ranger v. Sargent, 36 Tex. 26, it appeared that R. & Co. were sued on a draft drawn September 3, 1866, on the faith of a letter of credit as follows: "The bearer, W. H. R., is authorized to draw on us for six hundred dollars specie. Houston, August 31, 1866. R. & Co." They pleaded that, since the giving of the letter of credit, they had paid to W. H. R., and to his order, more than the sum specified in the letter of credit, whereby the authority conferred by said letter had been exhausted; and that the plaintiff, by the exercise of ordinary diligence, could have ascertained these facts. Held to be a good defense. That though the instrument sued on was a general letter of credit, in that it was directed to no particular person, and limited to no time or place, yet it was special in that it was limited in amount, and a party making advances on it was bound to make inquiry whether it had been paid, or the authority to draw exhausted; and held further, that when the defendants delivered the letter of credit, it became the absolute property of the holder, and they lost all control over it.

§ **1772. Expressions of continuing credit; English decisions.**— In the foregoing cases, it will be observed that there were no such expressions of continuing credit, as "from time to time," or "at any time," or for "any debt," etc.,— and where such expressions are used, they are regarded as extending the guaranty to several and successive transactions. Thus a guaranty of "any debt A. B. may contract in his business, as jeweler, not exceeding one hundred pounds, after this date," [75] or to A. "for any goods he hath, or may supply my brother W. P. with to the amount £100," [76] has been held to be limited only in respect to the amount guaranteed at any one time, and to apply to any sum or goods not over £100, which might be advanced from time to time. Lord Ellenborough said, in the first of the cases just cited: "The guaranty is not confined to one instance, but applies to debts successively renewed. If a party means to be surety only for a single dealing, he should take care to say so. By such an instrument as this, a continuing suretyship is created to the special amount." [77] The like decision was rendered upon a guaranty of "any bills you may draw on him on account, etc., to the amount of £200." [78] So where it was "to the extent of £300, for any tallow or soap supplied by B. to F." [79]

§ **1773. Decisions in the United States.**— In the United States the like course of adjudication has been followed. Where the guaranty ran, "I will be responsible for what stock McK. has had, or may want hereafter, to the amount of five hundred dollars," it was held to embrace successive advances of $500 each.[80] And in a leading case before the United States Supreme Court, where the letter of credit recited that the bearer "might require your aid from time to time" and promised "to be responsible at any time for a sum not exceeding eight thousand dollars," the expressions, "from time to time," and "at any time," were thought decisive of its being a continuing guaranty of several and successive advances of $8,000.[81]

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75. Merle v. Wells, 2 Campb. 413.

76. Mason v. Pritchard, 2 Campb. 436.

77. Merle v. Wells, 2 Campb. 413; Fifth Nat. Bank v. Woolsey, 31 App. Div. 61, 52 N. Y. Supp. 827. See Fisher v. National Bank, 12 C. C. A. 409, 64 Fed. 706.

78. Mayer v. Isaac, 6 M. & W. 605.

79. Barton v. Bennett, 3 Campb. 220.

80. Gates v. McKee, 13 N. Y. 237.

81. Douglass v. Reynolds, 7 Pet. 113. See 2 Am. Lead. Cas. 38 *et seq.* In

SECTION V.

THE NEGOTIABILITY OF GUARANTIES.

§ **1774. In the first place: As to the negotiability of guaranties not written upon negotiable instruments.**— It seems to be settled, by weight of authority, that when the guaranty is written upon a separate paper, unless it were addressed in such a manner as to denote that it was intended to guarantee the bill or note to every holder, it would not be negotiable; and that if addressed to a particular person only, it would be a mere personal contract limited to that person.[82] And when no person's name is mentioned in such a guaranty, it will be regarded as limited to the first person who takes the note, and relies on the guaranty.[83]

§ **1774a. Equitable interest in guaranty is assignable.**— But in either case — and in any case of the guaranty of a bill or note — the party to whom the guaranty is originally made, may, in equity, assign his right to the holder at the same time that he transfers the bill or note, and thereby invest him with the equitable, although not the legal, title thereto.[84]

§ **1775.** In New York the doctrine was urged by Senator Verplanck, in a dissenting opinion of great learning and ability, that although the guaranty of a negotiable instrument be upon a separate paper, and be not expressed in negotiable words, it ought to be held negotiable in the same manner and to the same extent in favor of each successive holder.[85] And while the weight of authority is to the contrary it is difficult, and in our judgment impossible, to answer satisfactorily the cogent reasoning upon which this view is based.

Tidioute Sav. Bank v. Libbey, 101 Wis. 193, 77 N. W. 182, certain persons in an instrument in writing guaranteed to W. T. R. & Co., "the payment of any and all indebtedness now due or hereafter to become due to him, growing out of, or occasioned by, any act of F. & L. Co." Held to be a general continuing guaranty. Leonhardt v. Citizens' Bank, 56 Nebr. 38, 76 N. W. 452.

82. McLaren v. Watson's Exrs., 19 Wend. 559, 26 Wend. 425; Story on Notes, § 484; 2 Am. Lead. Cas. 314, 2 Rob. Pr. (new ed.) 298, 299; Voltz v. National Bank, 158 Ill. 532, 42 N. E. 69, citing text.

83. Story on Notes, § 484.

84. Arents v. Commonwealth, 18 Gratt. 770; Story on Bills, § 457.

85. McLaren v. Watson's Exrs., 26 Wend. 431 *et seq.;* Everson v. Gere, 47 N. Y. S. C. 250; Vermont Township Bank v. St. Johnsbury R. Co., 40 Fed. 423.

§ 1776. In the second place: As to guaranties written upon the paper contemporaneous with its execution; not generally deemed negotiable.— When the guaranty is made at the time the paper is executed and delivered, there are numerous authorities which hold that where it is not expressed in negotiable words, the mere fact that it is written upon a negotiable instrument does not impart to it any negotiability, and no action can be maintained upon it by any subsequent holder thereof. It was so held in Massachusetts where, underneath the signature of the payee of a note indorsed by him, the defendant wrote: "I guarantee the payment of semi-annual interest on this note as well as the principal." [86] So in Michigan where the defendant McCauley, contemporaneously with the execution of the note, made by Sayer payable to Soule, wrote on the back: "For value received, I hereby guarantee the payment of the within note," and Soule, the payee, indorsed it to the plaintiff, it was held he could not recover, the guaranty not being negotiable.[87] But in such cases it will be presumed, unless the contrary appears, that the guarantor of a note for accommodation contracted with the party who sues upon it, and it will not be necessary for him to prove affirmatively that he was the first holder for value.[88]

§ 1777. Cases maintaining the negotiability of the guaranty of a negotiable instrument made at its inception.— But, on the other hand, there are cases which maintain that, although the guaranty on the paper, written at the time of delivery, specifies no person to whom the guarantor undertakes to be liable, and has no negotiable words, it runs with the instrument to which it refers, partakes of its quality of negotiability, and any person having the legal interest in the instrument takes in like manner the guaranty as an incident, and may sue thereon.[89] And it has been said, in such a case, "this view is consistent with the nature of the transaction, the evident intention of the parties, and the objects and

86. True v. Fuller, 21 Pick. 140 (1838); Louisville Trust Co. v. Louisville, etc., R. Co., 22 C. C. A. 378, 75 Fed. 433, citing text.

87. Tinker v. McCauley, 3 Mich. 188 (1854), overruling Higgins v. Watson, 1 Mich. 420. See also Small v. Sloan, 1 Bosw. 353 (1857).

88. Northumberland County Bank v. Eger, 58 Pa. St. 97.

89. Phelps v. Church, 65 Mich. 232; Russell v. Klink, 53 Mich. 151; Green v. Burrows, 47 Mich. 70. See Cooper v. Dedrick, 22 Barb. 516, for law of New York; Louisville Trust Co. v. Louisville, etc., R. Co., 22 C. C. A. 378, 75 Fed. 433, citing text; Crissey v. Interstate Loan & Tr. Co., 59 Kan. 561, 53 Pac. 867.

uses of commercial paper." [90] This seems to us the better doctrine. By writing the guaranty on the paper, the guarantor evidences his intention to guarantee the contract of the maker. That contract, being negotiable, is made with any and every person who may be the holder, and the guarantor is thus brought in privity with any and every person who becomes the holder.[91] The foregoing views of the text were recently approved in Indiana, in the case of a note where above the name of the payee and indorser there were written the words, "We jointly or severally, for value received, hereby guarantee the prompt payment of the within note," signed by two persons, and suit was brought by the indorsee of the payee against the guarantors.[92]

§ 1778. Views of Story and Parsons considered.— Judge Story says that "with a view to the convenience and security of merchants, as well as the free circulation and credit of negotiable paper, it would seem that such a guaranty upon the face of a bill of exchange, not limited to any particular person, but purporting to be general, without naming any person whatsoever, or purporting to be a guaranty to the payee or his order, or to the bearer, ought to be held, upon the very intention of the parties, to be a complete guaranty to every successive person who shall become the holder of the bill." [93]

On the contrary, Professor Parsons says: "Our view of this question is this: The negotiability of paper payable to order is established by a very peculiar exception to the general law of contracts; and this exception rests upon a usage so ancient and universal as to show a distinct and urgent need of it. But the

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90. Webster v. Cobb, 17 Ill. 466 (1856), Skinner, J. See Arents v. Commonwealth, 18 Gratt. 770.

91. In McLaren v. Watson's Exrs., 26 Wend. 430 (1841), Walworth, Chancellor, said: "A guaranty indorsed upon a negotiable note, whereby the guarantor agrees with the holder of the note that he will be answerable that the note shall be paid to him or to his order, or the bearer thereof, when it becomes due, is probably negotiable by the transfer of the note upon which it is written; for it is in fact a special indorsement of the note, or more properly a negotiable note in itself. But to make a guaranty negotiable as a part of the note to which it relates, it must be on the note itself, or at least it must be annexed to it, in the nature of *un allonge*, or eking out of the paper upon which the note is written." Com. Bank v. Cheshire Provident Inst., 59 Kan. 361, 53 Pac. 131, 66 Am. St. Rep. 368, citing text.

92. Cole v. Merchants' Bank, S. C. of Ind., Am. Law Reg., Nov., 1878, p. 703.

93. Story on Bills, § 458.

negotiability of a guaranty has no such usage in its favor, and is not, therefore, within the exception. Moreover, we do not think it likely to be brought within this usage, or on other grounds established by adjudication, because all exceptions are to be limited by the necessity for them; and we see no necessity for any such rule, inasmuch as all the good which could be gained from making guaranties negotiable may be derived, and is now in part derived, from the practice and the law of indorsement." [94] But we cannot concur with this eminent jurist as to the inutility of a negotiable guaranty. There is no form of indorsement by which the liability of a guarantor can be engrafted upon, and made negotiable with, a negotiable instrument. An indorser in the ordinary form is absolutely discharged by want of exact demand and notice. A guarantor is only entitled to reasonable notice, and is only discharged to the extent that he would otherwise be injured. If the indorser waives demand and notice, he is entitled to no demand or notice whatever, and thus he makes the indorsement more onerous than that of guaranty. A negotiable guaranty is an engagement intermediate between that of an indorsement in the ordinary form, and one waiving demand and notice; and when a party intends to enter into such an engagement, there is certainly nothing in the policy of the modern law which should prevent it.

§ **1779.** In some cases it has been held that a guaranty of payment, indorsed on the back of a negotiable note at the time it was made, rendered the guarantor liable to the payee and to every subsequent *bona fide* holder, as a joint and several maker of the note.[95] But this doctrine, as has been said, "originated in, and has always been confined to, New York." [96] And there it no longer obtains.[97]

§ **1780. Absolute negotiable promise on the back of a note.**— In the foregoing cases, the words only imported a secondary obligation; and when they are absolute in their terms, an absolute effect

94. 2 Parsons on Notes and Bills, 133, 134.

95. Hough v. Gray, 19 Wend. 202; Ketchum v. Gray 24 Wend. 456; Luqueer v. Prosser, 1 Hill, 256, 4 Hill, 420.

96. Tucker v. McCauley, 3 Mich. 194, Douglass, J.; Carpenter v. Thompson, 66 Conn. 457, 34 Atl. 105.

97. Brown v. Curtis, 2 N. Y. 225; Durham v. Manrow, 2 N. Y. 533; Brewster v. Silence, 14 Barb. 144; Draper v. Snow, 20 N. Y. 331; Glen Cove Mut. Ins. Co. v. Harrold, 20 Barb. 298.

will be given them. For a party signing on the back of a note may make an absolute negotiable promise to pay it, as well as on its face. Where C. and D. indorsed on the back of a note from A. to B. at the time it was made: "For value received, we jointly and severally undertake to pay the money within mentioned, to the said B." (the payee), they were held as original promisors.[98] So an indorsement, with the words "holders on the within," makes the indorser an original promisor.[99] So do the words indorsed: "I will see the within paid."[1] And where the note was written: "We, A. as principal, and B. as surety, promise, etc.," was signed by A. and indorsed by B., the latter was held as joint maker.[2]

§ 1781. In the third place: As to guaranty written on the paper by the transferrer at the time of the transfer; view that it is negotiable.— In such cases the better opinion, as it seems to us, is that the transferrer combines the liability of indorser and guarantor. He transfers the instrument, and indorses it, by which he becomes liable as indorser by due demand and notice, and he superadds a guaranty which renders him liable without demand or notice upon default of the principal. In Vermont, it appeared that the payee of a negotiable note transferred it for value, and wrote on the back over his signature, "I guarantee the payment of the within note." The plaintiff, a remote transferee, sued; and it was held that he could recover, on the ground that the indorsement of the payee transferred the legal title in the note to every subsequent holder, notwithstanding the person to whom the note was first transferred was not named in the indorsement, and it was not made in terms payable to order or bearer. Further, that such indorsement rendered the payee liable as an indorser to any holder; also as guarantor without proof of demand and notice, and that the guaranty passed to every holder.[3]

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98. White v. Howland, 9 Mass. 314.

99. Brett v. Marston, 45 Me. 401.

1. Amsbaugh v. Gearhart, 11 Pa. St. 482.

2. Palmer v. Grant, 4 Conn. 389.

3. Partridge v. Davis, 20 Vt. 500 (1848). See also Heaton v. Hulbert, 3 Scam. 489. In Robinson v. Lain, 31 Iowa, 9, Day, C. J., said: "We confess ourselves unable to give effect to the contract of guaranty of payment and waiver of demand and notice if the payees intend to return the title. The writing simply constitutes an indorsement with an enlarged liability." In Heard v. Dubuque County Bank, 8 Nebr. 16, the payee wrote on the back,

§ 1782. Contrary view that a guaranty upon the transfer of negotiable paper is not a negotiation within the law merchant.— But other authorities hold that a guaranty written on a note by the transferrer, naming no one as promisee, could only be operative in favor of the party who first took the instrument on the faith of it.[4] In the United States Supreme Court it has been held that a guaranty is not a negotiation of the bill or note as understood by the law merchant.[5] In Massachusetts, the payee of a note wrote on the back over his signature, "I hereby guarantee the within note." Suit was brought by a subsequent holder. The court held[6] that this was not such an indorsement as authorizes such holder to sue, and, referring to a previous case,[7] said: "It is

"For value received, I hereby guarantee payment of the within note, and waive presentation, protest, and notice." Held to be an indorsement with the enlarged liability of guaranty. See Deck v. Works, 57 How. Pr. 292; State Nat. Bank v. Haylen, 14 Nebr. 480; Kellogg v. Douglas County Bank, 58 Kan. 43, 48 Pac. 587, citing text. See Pollard v. Huff, 44 Nebr. 892, 63 N. W. 58; Maddox v. Duncan, 143 Mo. 613, 45 S. W. 688, 65 Am. St. Rep. 678, note.

4. Nevins v. Bank of Lansingburgh, 10 Mich. 547; Omaha Nat. Bank v. Walker, 5 Fed. 399.

5. Trust Co. v. National Bank, 101 U. S. (11 Otto) 70. In this case the note was payable to the Cook County National Bank, and over the signature of the president of the bank, there was written on the back the following: "For value received, we hereby guarantee the payment of the within note at maturity, or at any time thereafter, with interest at ten per cent. per annum until paid, and agree to pay all costs or expenses paid or incurred in collecting the same." Strong, J., said: "In no commercial sense is this an indorsement, and probably it was not intended as such. * * * That a guaranty is not a negotiation of the bill or note as understood by the law merchant is certain. Snevily v. Ekel, 1 Watts & S. 203; Lamourieux v. Hewitt, 5 Wend. 307; Miller v. Gaston, 2 Hill, 188. * * * The contract cannot be converted into an indorsement or assignment. And if it could be treated as an assignment of the note, it would not cut off the defenses of the maker." Omaha Nat. Bank v. Walker, 2 McCrary, 565.

6. Belcher v. Smith, 7 Cush. 482 (1851); Taylor v. Binney, 7 Mass. 481 (1811), is to same effect. But Upham v. Prince, 12 Mass. 14, seems to uphold the doctrine of the text.

7. In Tuttle v. Bartholomew, 12 Metc. (Mass.) 454 (1847), Dewey, J., said: "A different view of this question seems to have been taken in the case of Blakely v. Grant, 6 Mass. 386, which was an action upon a bill of exchange. This case was decided a year previous to that of Tyler v. Binney, but does not appear to have been referred to in the argument or decision of the latter case. In the case of Blakely v. Grant, it was held that a signature of the payee to the following words, 'should the within exchange not be accepted and paid agreeably to its contents, I hereby engage to pay the holder, in

true there was the further objection in that case, that the guaranty was signed not only by the payee of the note, but also by another person. But irrespective of that, the court were of opinion that the plaintiff could not enforce the payment of the note by a suit in his own name as indorsee."

The view has been taken in some cases that a guaranty by the transferee operates as a strict guaranty as between transferrer and transferee, and does not pass to subsequent holders; but that as to them it operates as an assignment of the note, so far as to enable them to sue other parties than the guarantor.[8]

§ **1783.** In Massachusetts, where the payee of a note transferred it with the words, "I guarantee the payment of this note within six months," the court said: "The defendant's engagement amounts to a promise that the note should at all events be paid within six months. Now, this promise may not be assignable in law; and yet the note itself may be assignable by the party to whom it was so transferred, so that, upon nonpayment of it by the promisor, the holder would have a right of action against Prince as indorser." [9]

§ **1784. Where the holder transfers the note and guarantees the collection,** the doctrine has been held that the intention is manifested to make simply a special contract, and not to become liable as an indorser. Thus, where a note payable to S. B. or bearer was transferred to L. with the words, "I warrant the collection of the within note, for value received," over his signature, and it passed into the hands of a subsequent holder from the transferee, it was held that he could not maintain suit against the transferrer as an indorser.[10] But it is at least clear that the transferrer of a

addition to the principal, twenty per cent. damages,' might operate as a transfer of the bill of exchange, and that the indorsement was good, though no person was named as indorsee; and that a *bona fide* holder might insert above such stipulation a direction to pay the contents to his order."

8. Myrick v. Hasey, 27 Me. 12. See Upham v. Prince, 12 Mass. 14.

9. Upham v. Prince, 12 Mass. 15 (1815).

10. In Lamourieux v. Hewitt, 5 Wend. 308, Savage, C. J., said: "I am of opinion that an action cannot be maintained on the guaranty in the name of the present plaintiff. The defendant was liable upon his guaranty, not as an indorser of negotiable paper, but as the party to a special contract, which might have been written on a separate piece of paper as well as on the back of the note. The contract was made with Tuttle, and any action upon it must be in the name of Tuttle. Promissory notes are negotiable only by virtue of the statute, but this negotiable quality is not extended to any other instrument relating to the note." Vanderveer v. Wright, 6 Barb. 547.

note payable to bearer, who acquires it under a guaranty from the holder, would get title as against the maker, and could maintain action against him.[11] Where the payees of a note wrote on the back of it, "We guarantee the payment of the within note at maturity," it was held that they became jointly and severally liable without demand or notice, and that it was their duty to seek the holder and pay him.[12]

SECTION VI.

REQUISITES TO THE ESTABLISHMENT AND PRESERVATION OF GUARANTOR'S LIABILITY.

§ **1785. As to notice of acceptance of guaranty.**— When the guaranty is made through personal treaty between the guarantor and guarantee, and whenever the fact that the guarantee has accepted the proffer of the guarantor is equally in the knowledge of both parties, no notice that he accepts the guaranty need be given by the guarantee, for the simple reason that it is already known to the guarantor.[13] This rule applies where there is a guaranty of a specific existing demand, such as a bill or note;[14] but when a proposition for a guaranty is made, it must, like any other proposition for a contract, be accepted before it is binding; and the guarantee must notify his assent in some form, for both minds must concur in order to constitute a contract.[15] And when the guaranty is of a general character, addressed at large to any person, without limit as to amount of time, it is regarded rather as a proposition than as a contract, and notice of its acceptance should be given by the party acting upon it.[16]

§ **1785a. Views of United States Supreme Court.**— A series of decisions by the United States Supreme Court has established

11. Johnson v. Mitchell, 50 Tex. 212. See *ante*, §§ 663, 696.

12. Gage v. Mechanics' Nat. Bank, 79 Ill. 62.

13. Lent v. Padelford, 10 Mass. 230; Wildes v. Savage, 1 Story, 22; Walker v. Forbes, 25 Ala. 139; Davis v. Wells, 104 Mass. 159; McGhee v. National Bank, 93 Ala. 192, 9 So. 734.

14. Montgomery v. Kellogg, 43 Miss. 486; Thrasher v. Ely, 2 Smedes & M. 147; Wilcox v. Draper, 12 Nebr. 138; Klostermann v. Olcott, 25 Nebr. 382; Marx & Bliem v. Luling Co-operative Assn., 17 Tex. Civ. App. 408, 43 S. W. 596.

15. Jackson v. Yendes, 7 Blackf. 526; Shewell v. Knox, 1 Dev. 404, 2 Am. Lead. Cas. 104, 2 Rob. Pr. (new ed.) 292.

16. Mussey v. Rayner, 22 Pick. 229; Montgomery v. Kellogg, 43 Miss. 486.

the further doctrine that when a letter of credit is addressed to a particular person, or is placed in the hands of the debtor, expressly or impliedly addressed to all the world, and such letter contemplates future and prospective guaranties, notice of its acceptance is necessary, because without it he could neither know to whom he was liable nor to what amount. And it is necessary, in order that he may be put on his guard against losses, and avail himself of the appropriate means of protection.[17] In a recent case before that court the question was elaborately considered, and it was held that the rule requiring notice of the acceptance of a guaranty, and of an intention to act under it in those cases where in legal effect the instrument is only an offer or proposal, acceptance of which by the guarantee is necessary to that mutual assent without which there can be no contract; and that no such notice is necessary where the guarantors contract unconditionally to guarantee overdrafts to a certain extent.[18]

§ 1785b. Decisions of State courts.— The State tribunals have generally adopted the same doctrine,[19] and it may be regarded as the prevailing view of the law, although it has been sharply criticised,[20] and it has been declared that it has no foundation in English jurisprudence.[21] Knowledge derived from circum-

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17. Adams v. Jones, 12 Pet. 207; Douglass v. Reynolds, 7 Pet. 113; Edmundson v. Drake, 5 Pet. 624; Lee v. Dick, 10 Pet. 482; Russell v. Clarke, 7 Cranch, 69; Wildes v. Savage, 1 Story C. C. 22; Louisville Mfg. Co. v. Welch, 10 How. 461; Doud v. National Bank, 4 C. C. A. 607, 54 Fed. 846.

18. Davis v. Wells, Fargo & Co., Morrison's Transcript, vol. 111, No. 1, p. 130, affirming 2 Utah, 411; Wise v. Miller, 45 Ohio St. 388.

19. Bradley v. Carey, 8 Me. 234; Tuckerman v. French, 7 Me. 115; Norton v. Eastman, 4 Me. 521; Craft v. Isham, 13 Conn. 28; Rapelye v. Bailey, 3 Conn. 438; Babcock v. Bryant, 12 Pick. 133; Mussey v. Rayner, 12 Pick. 223; Kay v. Allen, 9 Barr, 320; Lawson v. Townes, 2 Ala. 373; Walker v. Forbes, 25 Ala. 139; Taylor v. Wetmore, 10 Ohio, 490 (overruled by Powers v. Bumcranz, 12 Ohio St. 284). See Wells v. Davis, 2 Utah, 44, and *ante*, § 1785*a*; Montgomery v. Kellogg, 43 Miss. 486; Oaks v. Miller, 13 Vt. 106; Lowry v. Adams, 22 Vt. 166 (overruling Train v. Jones, 11 Vt. 44); Kincheloe v. Holmes, 7 B. Mon. 5; Lowe v. Beckwith, 14 B. Mon. 184; Rankin v. Childs, 9 Mo. 674; Hill v. Calvin, 4 How. (Miss.) 231; Central Sav. Bank v. Shine, 48 Mo. 461.

20. 2 Am. Lead. Cas. 77, 99.

21. Douglas v. Howland, 24 Wend. 50. See also Smith v. Dann, 6 Hill, 543; Caton v. Shaw, 2 H. & Gill, 13; Powers v. Bumcranz, 12 Ohio St. 284 (overruling Taylor v. Wetmore, 10 Ohio, 490); Wilcox v. Draper, Nebr. S. C., Nov., 1881, Alb. L. J., March 18, 1882, p. 209.

stances will be equivalent to notice, unless injury has been caused by want of earlier information,[22] and notice may be inferred from circumstances;[23] and when the guaranty has been accepted, it is not necessary to give notice of each particular advance made in accordance with it.[24]

§ 1786. Demand upon principal and notice of default to guarantor. — When the guaranty depends upon the happening of a contingent event, it is necessary when the event has occurred that notice should be given to the guarantor within a reasonable time in order to enable him to secure himself against loss.[25] But when the guaranty is an absolute engagement to pay in the event that the principal does not pay, the authorities differ as to the necessity of demand or notice at any time in order to preserve the liability of the guarantor. By one class of authorities it is contended that where one transfers a promissory note and guarantees its payment, proof of demand and notice of nonpayment is unnecessary; that the guarantor is the debtor of the holder, and it is his duty to seek the creditor and pay the debt the very day it is due; and that his undertaking is absolute to pay the note when due if the maker does not then pay it. And that proceedings against the maker and notice to the guarantor are only necessary when there is a guaranty of collection which is a conditional agreement to pay if the money cannot be collected from the maker.[26]

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22. Norton v. Eastman, 4 Me. 521.

23. Oaks v. Weller, 13 Vt. 106; Lowry v. Adams, 22 Vt. 160.

24. Douglass v. Reynolds, 7 Pet. 126; Lowe v. Beckwith, 14 B. Mon. 184.

25. Dickerson v. Derrickson, 39 Ill. 577; Clay v. Edgerton, 19 Ohio St. 553; Montgomery v. Kellogg, 43 Miss. 486; Hughes v. Heyman, 4 App. D. C. 444.

26. Allen v. Rightmere, 20 Johns. 366; Brown v. Curtiss, 2 N. Y. 228; Heaton v. Hulbert, 3 Scam. 490; Wright v. Dyer, 48 Mo. 526; Voltz v. Harris, 40 Ill. 159; Roberts v. Hawkins, 70 Mich. 566; Hungerford v. O'Brien, 37 Minn. 306. In Clay v. Edgerton, 19 Ohio St. 553, the holder transferred the paper, indorsing thereon the words, "I guarantee the payment of the within note to C. Edgerton or order." Brinckerhoff, C. J., said: "In the second place, it is argued by counsel for plaintiffs in error that the petition is insufficient, because it contains no allegations of demand by Edgerton upon Hoot, the maker of the note, for payment thereof, and notice to Clay of nonpayment. On this point much confusion has doubtless arisen from a failure to discriminate between a guaranty which depends on some contingency or condition, and one which is in its terms absolute and unconditional. Where a guaranty is dependent on some condition or contingency expressed in, or fairly implied from, the terms of the contract of guaranty, a compliance with those terms on the part of the guarantee is necessary, and must be alleged and proved in

§ 1787. Cases maintaining necessity of demand, and notice of default in reasonable time to bind guarantor.— By another class of cases it is maintained that as the nonpayment of the debt must come peculiarly within the knowledge of the guarantee, the guarantor is entitled to require demand upon the maker within a reasonable time, and notice of nonpayment within a reasonable time after default.[27] This seems to us the correct doctrine; and the

order to a recovery upon it. But where the guaranty of payment is absolute and unconditional, we are of opinion that it is not necessary, in order to make out a *prima facie* case for recovery, to aver or prove either demand or notice. This, we think, is fairly inferable from what is said by this court in Bashford v. Shaw, 4 Ohio St. 266. And this view of the question is directly ruled in Allen v. Rightmere, 20 Johns. 365; Brown v. Curtiss, 2 N. Y. 225; Breed v. Hillhouse, 7 Conn. 523; Read v. Cutts, 7 Greenl. 186, and Heaton v. Hulbert, 3 Scam. 489. We are aware that cases may be found in which the point has been ruled otherwise; but it seems to us that the reasoning of Bronson, J., in Brown v. Curtiss, *supra*, is unanswerable and irresistible. And there is nothing either in Bashford v. Shaw, *supra*, or in Forest v. Stewart, 14 Ohio St. 246, adverse to this conclusion, and what is said by the court in Greene v. Dodge & Cogswell, 2 Ohio, 431, related to a case in which the court construed the contract of guaranty sued on to be a conditional one. Now, the contract of guaranty in the case before us is absolute and unconditional. Its language is: 'I guarantee the payment of the within note to C. Edgerton or order,' and we are of opinion that no averment of demand or notice in the petition was necessary; and if any loss had resulted to the guarantor by reason of any laches on the part of the guarantee, such laches, if it could be made available at all, would be matter of defense to be set up by the guarantor." Holmes v. Preston *et al.*, 71 Miss. 541, 14 So. 455.

27. In Douglas v. Reynolds, 7 Pet. 126, 12 Pet. 523, Story, J., said: "The fourth instruction insists that a demand of payment should have been made of Haring, and in case of nonpayment by him, that notice of such demand and nonpayment should have been given in a reasonable time to the defendant, otherwise the defendants would be discharged from their guaranty. We are of opinion that this instruction ought to have been given. By the very terms of this guaranty, as well as by the general principles of law, the guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt. A demand upon him, and a failure on his part to perform his engagements, are indispensable to constitute a *casus fœderis*. The creditors are not, indeed, bound to institute any legal proceedings against the debtor, but they are required to use reasonable diligence to make demand, and to give notice of the nonpayment. The guarantors are not to be held to any length of indulgence of credit which the creditors may choose; but have a right to insist that the risk of their responsibility shall be fixed and terminated within a reasonable time after the debt has become due. The case of Allen v. Rightmere, 20 Johns. 265, is distinguishable. There the note was payable to the defendant himself, or order, at a future day, and he indorsed it with a special guaranty of its due payment; and the court held this en-

great body of the cases which maintain the contrary view seem to have grown out of the idea which has obtained in New York, that the guaranty of a note is an absolute, and not a collateral and conditional, engagement. In an Iowa case, where the defendant was sued as guarantor of a note upon which was written, "For value received, I hereby guarantee the payment of the within," it was said by Day, J.: "If the principal fails to pay when he should, the guarantor must be informed in a reasonable time, soon enough to give him such opportunities as he ought to have to save him from loss. If the notice be delayed a very short time, but by reason of the delay the guarantor loses the opportunity of obtaining indemnity, and is irreparably damaged, he would be discharged from his obligation. But, if the delay were for a long period, and it was, nevertheless, clear that the guarantor would have derived no benefit from an earlier notice, the delay would not impair his obligation." [28]

§ 1788. Nature of the demand and notice of default necessary to hold guarantor liable.— But the authorities which regard demand upon the principal, and notice of default, as necessary to render the guarantor's liability absolute, do not contemplate that punctual demand and immediate notice which are necessary to charge an indorser. Nor do they consider that either the demand or notice at any time are absolute conditions precedent. The guarantor is only entitled in any event to exact demand and notice of default within a reasonable time — such time depending upon all the circumstances of the case; and although they be neglected alto-

gagement absolute, and not conditional." Oxford Bank v. Haynes, 8 Pick. 423; Talbot v. Gay, 18 Pick. 535; Cannon v. Gibbs, 9 Serg. & R. 202; Newton Wagon Co. v. Diers, 10 Nebr. 285; Beardsley v. Hawes *et al.*, 71 Conn. 39, 40 Atl. 1043. In the last case, held: "A written promise to pay interest semi-annually in advance, contained in a negotiable note payable on demand, makes it clear that the parties to the note understood and intended that it should run for some time, and for at least six months. Accordingly, the payee of such a note is under no obligation to demand payment four months from its date, and thereafter use due diligence to collect of the maker, in order to hold the guarantor of the note liable thereon. (The reference to four months is under section 1859, which provides that negotiable promissory notes payable on demand, remaining unpaid four months from their date, shall be considered overdue.)

28. Second Nat. Bank v. Gaylord, 34 Iowa, 248; Rodabaugh v. Pitkin, 46 Iowa, 545. He must show that he has been injured by the delay. Sabin v. Harris, 12 Iowa, 90; Martyn v. Lamar, 75 Iowa, 236; Hughes v. Heyman, 4 App. D. C. 444.

gether, the guarantor will only be discharged provided he has suffered loss, and then only to the extent of such loss. For if he could not have profited by demand, or by notice of default, and has lost nothing for want of them, there is no reason why he should complain.[29]

When the principal is insolvent at maturity of the debt, and so continues, there is a presumption that the guarantor has sustained no injury by delay as to demand and notice;[30] and, on the other hand, injury will be sufficiently proved when it appears that the guarantor was solvent at maturity, and became insolvent before demand was made or notice given.[31]

The guarantor may expressly waive notice of acceptance of the guaranty, and also demand and notice of default, in writing, on the face of the guaranty;[32] or he may waive it by a promise to pay after maturity, in like manner as an indorser.[33]

§ **1789. As to what will discharge guarantor.**— The guarantor is discharged by a release of his principal as effectually as he would be by payment.[34] And even if the guarantee be "until paid."[35] He is also discharged by any extension of time allowed the principal by the guarantee upon a consideration; by any renewal which suspends the original debt; and by a surrender of any secu-

29. Dickerson v. Derrickson, 39 Ill. 577; Voltz v. Harris, 40 Ill. 155; Farmers, etc., Bank v. Kercheval, 2 Mich. 504; Rhett v. Poe, 2 How. (S. C.) 457; Fuller v. Scott, 8 Kan. 33; Burrow v. Zapp, 69 Tex. 476, citing the text; Hughes v. Heyman, 4 App. D. C. 444; Nance v. Winship Machine Co., 94 Ga. 649, 21 S. E. 901; Davey Bros. v. Waughtal, 99 Iowa, 654, 68 N. W. 904; McAllister v. Pitts, 58 Nebr. 424, 78 N. W. 711.

30. Reynolds v. Douglas, 12 Pet. 523; Wildes v. Savage, 1 Story, 22; Rhett v. Poe, 2 How. 457; Bashford v. Shaw, 4 Ohio St. 263; Hance v. Miller, 21 Ill. 636; Van Wart v. Woolley, 3 B. & C. 439.

31. Oxford Bank v. Haynes, 8 Pick. 423; Talbot v. Gay, 18 Pick. 534; Woodson v. Moody, 4 Humphr. 303; Beeker v. Saunders, 6 Ired. 380; Mayberry v. Boynton, 2 Harr. 24.

32. Bickford v. Gibbs, 8 Cush. 154; Worcester County Inst., etc. v. Davis, 13 Gray, 531; Wadsworth v. Allen, 8 Gratt. 174; Osborne v. Lawson, 26 Mo. App. 549; Star Wagon Co. v. Swezy, 63 Iowa, 520; Baskin v. Crews, 66 Mo. App. 22.

33. Reynolds v. Douglas, 12 Pet. 523; Louisville Mfg. Co. v. Welsh, 10 How. 476; Sigourney v. Wetherell, 6 Metc. (Mass.) 563. See *ante*, §§ 1059 to 1168; Harvey v. First Nat. Bank, 56 Nebr. 320, 76 N. W. 870.

34. Cowper v. Smith, 4 M. & W. 519; Savings Bank v. Strother, 28 S. C. 504.

35. Bernd v. Lynes, 71 Conn. 733, 43 Atl. 189.

rity held by the creditor.[36] Otherwise the guarantor might be seriously damaged by the act of the guarantee. But taking security from the principal would not discharge him, unless there were some agreement to give him time, because that would strengthen, rather than weaken, his debt.[37] In short, a guarantor is a species of surety, and will be discharged by any act of the creditor that would discharge a surety.[38] A guaranty of the payment by another of goods to be sold not founded on any present consideration to the guarantor, and providing that it shall continue until written notice shall be given of its termination, is revoked by the death of the guarantor.[39] It has also been held that the guarantor may avail himself of any offset or counterclaim growing out of the contract, performance of which is guaranteed, to which the original promisor is entitled.[40] While in general the surety is not released by the passivity or delay of the creditor in suing the principal, a delay of five years in bringing an action against the maker has been held to discharge the guarantor of a note.[41]

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36. Sigourney v. Wetherell, 6 Metc. (Mass.) 553; Shook v. Shute, 9 Port. 113; Crosby v. Wyatt, 10 N. H. 318; Mayhew v. Crickett, 2 Swanst. 185; Hart v. Hudson, 6 Duer, 294; Howell v. Jones, 1 Cromp., M. & R. 97; Dixon v. Spencer, 59 Md. 247. An extension of time allowed the principal will not discharge the guarantor, if the guarantee provide for renewals. Koenig v. Bramlett, 20 Mo. App. 637; Del., L. & W. R. Co. v. Burkhard, 43 N. Y. S. C. 59; Manning, Cushing & Co. v. Alger, 85 Iowa, 617, 52 N. W. 542; First Nat. Bank v. Bradley, 61 Kan. 615. But not when he assents to the renewal and helps to bring it about. Harvey v. First Nat. Bank, 56 Nebr. 320, 76 N. W. 870; Foerderer v. Moors, 33 C. C. A. 641, 91 Fed. 476; Holmes v. Williams, 177 Ill. 386, 53 N. E. 93.

37. Sigourney v. Wetherell, 6 Metc. (Mass.) 553; Norton v. Eastman, 4 Greenl. 521.

38. See *ante*, §§ 1308 *et seq.*, 1326 *et seq.*; Conger v. Babbett, 67 Iowa, 14.

39. Jordan v. Dobbins, 122 Mass. 168. It is considered by some authorities that unless the terms of the guaranty forbid, the law writes in the contract of continuing guaranty, the power to revoke the guaranty upon notice. Coulpart v. Clemenston, L. R., 5 Q. B. Div. 42; Jordan v. Dobbins, 122 Mass. 168, 23 Am. Rep. 305; Bank v. Strever, 18 N. Y. 502; Gay v. Ward, 67 Conn. 147, 34 Atl. 1025; Hyland v. Habich, 150 Mass. 112, 22 N. E. 765, 15 Am. St. Rep. 174. While death may not *ipso facto* terminate continuing guaranty, notice to or knowledge thereof by the party guaranteed is a revocation and precludes fresh advances on faith of the guaranty. Gay v. Ward, 67 Conn. 147, 34 Atl. 1025.

40. Aultman Co. v. Heffner, 67 Tex. 62.

41. Tiffany v. Willis, 37 N. Y. S. C. 266; Blanding v. Wilsey, 107 Iowa, 46, 77 N. W. 508; Getty v. Schantz, 40 C. C. A. 560, 100 Fed. 577.

§ **1789a. Effect of payment by guarantor.**— The guarantor may agree with the payee of a note that his payment thereof shall not operate an extinction of the debt, but that the note or bill shall be kept alive for his benefit, so that his right of action against any prior party will be upon the instrument itself, and not for money paid for the use and benefit of such party.[42]

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42. Granite Nat. Bank v. Fitch, 145 Mass. 567; *ante*, § 1758. In absence of agreement, guarantor's action is not on note, but to recover money paid out for the use and benefit of defendant. See Austin v. Hamilton, 7 Wash. 382, 34 Pac. 1097.

CHAPTER LVI.

LETTERS OF CREDIT AND CIRCULAR NOTES.

SECTION I.

DEFINITION AND NATURE OF LETTERS OF CREDIT.

§ **1790.** Letters of credit are instruments of frequent use in commerce, and while not possessing all the characteristics of negotiability which pertain to bills and notes, partake of them to such an extent as to be necessarily classed as negotiable instruments. A letter of credit may be defined to be a letter of request, whereby one person requests some other person to advance money or give credit to a third person, and promises that he will repay or guarantee the same to the person making the advancement, or accept bills drawn upon himself, for the like amount. It is called a general letter of credit when it is addressed to all persons in general requesting such advance to a third, and a special letter of credit when addressed to a particular person by name.[1]

Sometimes the letter of credit is in the form of an authority to the correspondent to draw bills on the letter writer; and there are cases, as we shall see, in which it amounts to an actual acceptance by the letter writer of the bills when drawn.

In the chapter on Guaranties,[2] letters of credit have been incidentally treated where they partook of the nature of guaranties. But they are frequently direct and independent promises, and deserve more particular notice.

§ **1791.** Mr. Bell, the learned commentator on the Laws of Scotland, whose language has been approvingly quoted by Judge Story

1. See Union Bank v. Coster, 3 N. Y. 214; Johannessen v. Munroe, 9 App. Div. 409, 41 N. Y. Supp. 586, quoting with approval the text; Krakauer v. Chapman, 16 App. Div. 115, 46 N. Y. Supp. 127, citing text; London, etc., Bank v. Parrot, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64.

2. See *ante*, chapter LV. In Scribner v. Rutherford, 65 Iowa, 551, a letter of credit is said to be, in effect, an absolute undertaking to pay the money advanced upon the faith of the instrument.

in his treatise on Bills,[3] says: "Letters of credit, strictly speaking, are mandates, giving authority to the person addressed to pay money, or furnish goods, on the credit of the writer. They are generally made use of for facilitating the supply of money or goods required by one going to a distance or abroad, and avoiding the risk and trouble of carrying specie, or buying bills to a greater amount than may be required. The debt, which arises on such a letter in its simplest form, when complied with, is between the mandatory and mandant; though it may be so conceived as to raise a debt also against the person who is supplied by the mandatory: 1. Where the letter is purchased with money by the person wishing for the foreign credit; or, is granted in consequence of a check on his cash account; or, procured on the credit of securities lodged with the person who grants it; or, in payment of money due by him to the payee, the letter is, in its effects, similar to a bill of exchange drawn on the foreign merchant. The payment of the money by the person on whom the letter is granted raises a debt or goes into account between him and the writer of the letter, but raises no debt to the person who pays on the letter against him to whom the money is paid. 2. Where not so purchased, but truly an accommodation, and meant to raise a debt against the person accommodated, the engagement generally is to see paid any advances made to him, or to guarantee any draft accepted, or bill discounted; and the compliance with the mandate in such case raises a debt both against the writer of the letter and against the person accredited."

§ **1792.** Letters of credit have long been in use amongst merchants. Hallam, in his work on the Middle Ages, has observed that: "There were three species of paper credit in the dealings of merchants: 1. General letters of credit, not directed to any one, which are not uncommon in the Levant. 2. Orders to pay money to a particular person. 3. Bills of exchange regularly negotiable. Instances of the first are mentioned by Macpherson about 1200. The second species was introduced by the Jews about 1183."

§ **1793.** Marius[4] gives a very full description of letters of credit. "Now," he says, "letters of credit, for the furnishing of moneys by exchange, are of two sorts, the one general, the other special.

3. Story on Bills, § 463.

4. Marius on Bills, 36, 37; Story on Bills, § 460.

The general letter of credit is, when I write my open letter, directed to all merchants, and others, that shall furnish moneys unto such and such persons, upon this my letter of credit, wherein and whereby I do bind myself, that what moneys shall be by them delivered unto the party or parties therein mentioned, within such a time, at such and such rates (or, in general terms, at the price current), I do thereby bind myself for to be accountable and answerable for the same to be repaid according to the bill or bills of exchange, which, upon receipt of the money so furnished, shall be given or delivered for the same. And if any money be furnished upon such my general letter of credit, and bills of exchange therefor given, and charged, drawn, or directed to me, although, when the bills come to hand, and are presented to me, I should refuse to accept thereof, yet (according to the custom of merchants) I am bound and liable to the payment of those bills of exchange, by virtue and force of such my general letter of credit, because he or they which do furnish the money have not so much (if any) respect unto the sufficiency or ability of the party which doth take up the money as unto me, who have given my letter of credit for the same, and upon whose credit, merely, those moneys may be properly said to have been delivered. The special letter of credit is, when a merchant, at the request of any other man, doth write his open letter of credit, directed to his factor, agent, or correspondent, giving him order to furnish such or such a man, by name, with such or such a sum of money, at one or more times, and charge it to the account of the merchant that gives the letter of credit, and takes bills of exchange, or receipts for the same." And again: "Now, in the general letter of credit, he that writes it doth make use of his credit for his own account and concernments in his way of trade; and, therefore, there needs no more than his letter of credit to make him liable to repay what shall be so furnished. But in the particular letter of credit, he that writes the letter doth it not to make use of the moneys himself, or to be employed for his own use, but for the use and accommodation of some other man, at whose request he is willing and doth write his letter of credit; and, therefore, it is very expedient and ordinary for him at whose entreaty the letter is written at the writing and upon receipt thereof, to give security by bond, or otherwise, unto the merchant that gives the letter of credit, for repayment unto him, his executors, or assigns, of all such moneys as shall be received by virtue of the said letters of credit; for the

merchant, by his letter, stands sufficiently bound to his correspondent; and, therefore, it is no more but reason that he for whom the letter is granted should give (as it were) his counter-bond for repayment. The bills of exchange, which are to be made for moneys taken up by letters of credit, do run in the ordinary form of bills of exchange."

§ 1794. Resemblance of letters of credit to bills of exchange.— Letters of credit very much resemble bills of exchange in some particulars, but they are not bills; on the contrary, they possess striking differences, although used frequently to avail the same general purposes. A person in New York having need of a certain amount in London, may purchase a bill on a London banker for that amount; and thus readily transfer his funds from the one place to the other. But he may not know to what extent he will need funds in London, and not desire to make an absolute transfer of all that he may possibly need to that point, nor to reduce what securities he may hold, into money. And then his convenience may be better suited by taking with him, or sending to London, a letter of credit to a house there, in which the letter drawer, who is duly authorized to do so, requests it to furnish the letter holder, or order, or bearer, whatever of money, or other thing, he may need to a certain amount. The letter drawer may be only the agent of the letter drawee; or he may be a correspondent, or other person well known to it. He receives the consideration either in a deposit of funds, or securities from the letter bearer; and becomes the debtor of the letter drawee, who makes advancements upon faith of the letter, to their full extent.

Thus it becomes a constructive transfer of funds, without any actual transfer, like a bill of exchange. But it differs from a bill in several particulars: (1) It is not payable absolutely, but only in the event that the letter bearer may use it; which is optional with him. (2) It is not necessarily for a certain amount. (3) It is not necessary that it be addressed to a particular person. (4) The letter writer in many cases becomes the principal and only debtor for the advances, and is not in such cases at all like the drawer of a bill. And (5) he is never, like the drawer of a bill, entitled to immediate notice, if the letter is not complied with.

§ 1795. The liability of the letter drawer is not definite like that of the drawer of a bill; but each particular letter of credit

is to be construed according to the particular language of the mandate. (1) Sometimes it is a direct order to advance money to a certain amount to the letter bearer, and an absolute undertaking to repay it. (2) Sometimes it promises to honor bills, drawn for any amount which may be advanced to the letter bearer. (3) And sometimes it undertakes that the letter drawer will become surety of the letter bearer to the extent of the amount advanced, or credit given him.

§ **1796. Circular notes.**— There is a peculiar kind of letter of credit, called a circular note, which has recently come in vogue, and is thus described: "Circular notes, as they are called, are a still more recent invention, and are now used extensively both in this country and in Europe, but by travelers almost exclusively. They are generally, but not always, for specific sums, and are in fact letters of credit, which a banking-house gives to a traveler, and which are made available, on presentation to any of the agents or correspondents of the house, in a long list of places, the names, both of the places and of the agents in them, being usually stated in the instrument itself. A principal object of this is to enable a traveler to supply himself with funds frequently and at various points, and thus to prevent the necessity of carrying with him large sums of money, or depositing them at the principal centers of business along his route. They are usually transferable by indorsement, and are perhaps more like bills of exchange than ordinary letters of credit, but are not the same, nor would they be in all respects governed by the law of negotiable paper." [5]

SECTION II.

TO WHOM A LETTER OF CREDIT IS AVAILABLE, AND HOW FAR IT IS NEGOTIABLE.

§ **1797.** There is no doubt that a special letter of credit is an available promise in favor of the person to whom it is specially addressed, whenever he makes the advance, or grants the credit which it requests.[6] Nor is there any doubt that if any one else attempts to accept and act upon the proposition contained in the letter, he comes in as a mere volunteer; and he cannot, by thus thrusting himself forward, create any legal obligation on the part

5. 2 Parsons on Notes and Bills, 109.

6. Story on Bills, § 462.

of the writer.[7] And, as we have already seen, it is equally well settled that if it contains a promise to honor bills, it is enforceable in the hands of any person taking them upon the faith of it, either as an actual acceptance, or as a promise to accept, as the case may be.[8]

§ 1797a. To whom writer of general letter of credit is liable.— It was at one time questioned whether a general letter of credit addressed to any person or persons, without any special designation, was available in the hands of any person making the advance, or granting the credit against the party signing it; or whether the remedy lay exclusively between the letter writer, and the letter bearer to whom it was given. But this, too, is now settled, and there is no doubt that as soon as any person accepts the proposition tendered at large, and on his so doing, a contract is at once completed between himself and the letter writer, and it is the same in effect as if it had been specially addressed to him, for there springs up at once a direct privity between him and the letter writer.[9] And this applies not only to cases where the letter purports on its face to be addressed generally to any person or persons whatsoever, who should make the advance, but also in cases where the letter of credit is addressed solely to the person to whom the advance is to be made, and merely states that the person signing the same will become his surety for a certain amount, without naming any person to whom he will become security, if

7. Robins v. Bingham, 4 Johns. 476; Walsh v. Bailie, 10 Johns. 180; Taylor v. Wilmore, 10 Ohio, 490; 2 Rob. Pr. (new ed.) 284.

8. See vol. I, §§ 550 to 570. In Marchington v. Vernon, Guildhall, Trin., 27 Geo. III. B. R. (quoted in Story on Bills, § 462, note 1), which was assumpsit by the holder of a bill against the assignee of the drawee, who had given a promise to the drawer to honor the bill, Buller, J., said: "Independent of the rules which prevail in mercantile transactions, if one person makes a promise to another for the benefit of a third, that third person may maintain an action upon it."

9. Lawrason v. Mason, 3 Cranch, 492 (1806); Watson's Exrs. v. McLaren, 19 Wend. 565, 26 Wend. 425; Birckhead v. Brown, 5 Hill, 642; Northumberland Bank v. Eyer, 58 Pa. St. 102, 103; Union Bank v. Coster, 3 N. Y. 214, 2 Den. 375; Pollock v. Helm, 54 Miss. 1, 28 Am. Rep. 342, 347, and notes. In 2 Ames on Bills and Notes, 783, it is said: "One who issues a letter of credit makes a distinct contract with each holder who takes the bill on the faith of the letter, *i. e.*, with each holder who accepts the offer contained in the letter, and these distinct contracts are no more negotiable than any other chose in action." Edwards on Bills, 239; Cheever v. Schall, 87 Hun, 32, 33 N. Y. Supp. 751.

it is obviously to be used to procure credit from some third person, and the advance is made by such person upon the faith of it.[10]

In a case before the United States Supreme Court, the letter was as follows: "Alexandria, 28th November, 1800. Mr. James M'Pherson, Dear Sir: We will become your security for one hundred and thirty barrels of corn, payable in twelve months. (Signed) Lawrason & Smoot." [11] It was held that the plaintiff, who had advanced the corn on the faith of the letter, could recover of the writers. Marshall, C. J., said: "There is an actual assumpsit to all the world, and any person who trusts, in consequence of that promise, has a right of action."

§ **1798. Negotiability of letter of credit when it relates to bills of exchange.**—The doctrine now established goes further than this, and asserts not only the inviolability of the promise contained in the letter of credit by one acting on the faith of it, but real negotiability when it relates to bills of exchange. In an English case, it appeared that the A. & M. Bank gave to Dickson, Tatham & Co., a letter of credit, addressed to them, authorizing them to draw bills upon the bank to a certain amount, and that D., T. & Co.

10. Lawrason v. Mason, 3 Cranch, 492 (1806); Boyce v. Edwards, 4 Pet. 121; Adams v. Jones, 12 Pet. 207.

11. Lawrason v. Mason, 3 Cranch, 492 (1806); Pollock v. Helm, 54 Miss. 1. In Russell v. Wiggin, 2 Story, 213, Messrs. Wiggin, of London, authorized parties in Boston, by a letter of credit, to draw bills on them in London for a certain amount, and promised to accept them. The payees, who had taken the bills in India on faith of the letters, sued the Messrs. Wiggin. Story, J., said: "I have understood, and always supposed, that in the commercial world letters of credit of this character were treated as in the nature of negotiable instruments; and that the party giving such a letter, held himself out to all persons who should advance money on bills drawn under the same, and upon the faith thereof, as contracting with them an obligation to accept and pay the bills. And I confess myself totally unable to comprehend how, upon any other understanding, these instruments could ever possess any general circulation and credit in the commercial world. No man ever is supposed to advance money upon such a letter of credit, upon the mere credit of the party to whom the letter is given; and I venture to affirm that no man ever took bills on the faith of such a letter without a distinct belief that the drawee was bound to him to accept the bills, when drawn, without any reference to any change of circumstances which might occur in the intermediate time between the giving of the letter of credit and the drawing of the bills under the same, of which the holder, advancing the money, had no notice. Any other supposition would make the letter of credit no security at all, or, at best, a mere contingent security; and the money would, in effect, be advanced mainly upon the credit of the drawer of the bills, which appears to me to be at war with the whole object for which letters of credit are given."

drew accordingly, and sold the bills to the Asiatic Banking Corporation. The A. & M. Bank having failed, the Asiatic Banking Corporation carried in a claim for the amount of them, under the winding up of the A. & M. Bank. The claim was resisted on the ground that D., T. & Co. were indebted to the A. & M. Bank in an amount exceeding the amount of the bills; and that the Asiatic Banking Corporation was only the equitable assignee of D., T. & Co., and were subject to any claim arising from the state of accounts between the bank and their assignors. But the lords justices, before whom the case was heard, held that persons taking the bills on the faith of the letter of credit were entitled to the absolute benefit of its terms, and were not subject to any collateral or cross-claims.[12]

§ 1799. When letter of credit amounts to acceptance.— Sometimes the letter of credit is in the form of an authority to a party or parties therein named to draw a bill of exchange on the letter writer; and its effect is frequently such as to amount to an actual acceptance of the bill drawn, according to its tenor, and to transmute the letter writer's liability from a mere promise contained in the letter to that of an actual party to the bill. In order for it to have this effect, it is necessary, (1) that the letter be written a reasonable time before the bill is drawn;[13] (2) that the contents of the letter should be communicated to the party who takes the bill, and that he should take the bill on the faith of the letter.[14] For this purpose a telegram is equivalent to a letter.[15]

When the letter designates a specific bill, which is drawn and taken in pursuance of its terms, the party taking it has his election to treat it either as an actual acceptance, or as a promise to accept, and accordingly to sue the letter writer as acceptor of the bill, or for breach of promise to accept.[16]

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12. *In re* Agra & Masterman's Bank, L. R., 2 Ch. App. 391 (1867), approved *In re* Blakely Co., L. R., 3 Ch. App. 154, and in Arents v. Commonwealth, 18 Gratt. 769 (1868).

13. See chapter XIX, § 560 *et seq.*, vol. I; Lefargue v. Harrison, 70 Cal. 380, approving the text.

14. Ibid. And accordingly it has been held that where one witnesses a false attestation of signature to a letter of credit, and on the faith of such forgery one sells and delivers stock of goods to the person named in the letter of credit, recovery may actually be had against the subscribing witness for the price of the goods so sold. See Mendenhall v. Stewart, 18 Ind. App. 262, 47 N. E. 943.

15. Bank of Montreal v. Thomas, 16 Ont. 503; Garretson v. North Atchison Bank, 39 Fed. 166.

16. Russell v. Wiggin, 2 Story C. C. 213.

According to some authorities, the letter writer cannot be sued as acceptor (but only for breach of promise to accept), unless the letter designates the specific bill — puts its finger on the particular bill, so to speak;[17] but the better opinion, as it seems to us, is adopted by others, that whenever the bill corresponds with the authority under which it is drawn sufficiently to be identified, the letter writer may be sued as acceptor.[18]

§ **1800. Conclusion.**— And here we conclude these Commentaries on the Law of Negotiable Instruments. Nice and refined in many of the distinctions necessary to be noticed, and strictly technical in many of its ramifications, the subject is, nevertheless,

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17. Boyce v. Edwards, 4 Pet. 11; Coolidge v. Payson, 2 Wheat. 66; Schimmelpennick v. Bayard, 1 Pet. 264; State Ins. Bank v. Young, 14 Fed. 890.

18. See chapter XIX, §§ 560, 561 *et seq.*, vol. I; Bissell v. Lewis, 4 Mich. 450; Nelson v. First Nat. Bank, 48 Ill. 39; Ulster County Bank v. McFarland, 5 Hill, 434, 3 Den. 553. In Scribner v. Rutherford, 65 Iowa, 553, it was held that the letter must indicate in what way the writer proposes to be bound; whether as surety, acceptor, indorser, or guarantor. There the language was: "K. wants a little money. If you want any one on the note, I will fix it when I come in." And in Wilson v. Beardsley, 20 Nebr. 449, where a party having written authority to draw for $75, raised the amount to $175 by adding the figure 1, it was held that a person indorsing such party's draft on the giver of credit for the raised amount could recover to the extent of $75, the credit actually given. Atlanta Nat. Bank v. N. W. Fertilizing Co. (Ga.), 9 S. E. 671. Where the character of the letter of credit amounts to an acceptance, the letter writer is estopped from setting up a defense based upon the alleged invalidity of the letter of credit for any cause. McCann v. City of Albany, 158 N. Y. 634, 53 N. E. 673; Benecke v. Haebler, 38 App. Div. 344, 58 N. Y. Supp. 16. In this case, vendees of certain goods sent to firm of bankers letter: "Please issue letter of credit for account of ourselves, in favor of Anton Strauss of Budapesth (the vendor), for any sums not exceeding about 825 pounds Stlg. Drafts to be drawn at three months' date from date of bill of lading against shipment by the steamer or steamers to New York, direct or otherwise, for invoice cost of 1,000 bags beans. Bills to be accompanied by full set, in due course, of blank indorsed bills of lading to order and original invoice certified by the U. S. Consulate." The letter of credit was issued and vendor availed himself of it by drawing with blank indorsed bill of lading and certified invoice attached, which draft was accepted by the bankers. Bank informed vendees by letter, of the transaction and transmitted to them invoice and bill of lading for the merchandise. Vendees acknowledged same by letter "as per their letter of credit for 825 pounds." Held, that the letter last referred to constituted an approval by the vendees of the bankers' acceptance of the draft drawn by the vendor and a plain admission that both draft and acceptance were regular and in accordance with letter of request; further held that the bankers were not merely guarantors of bills drawn by the vendor on the vendees. The principle stated in the text is equally applicable to ordinary bills of exchange. Seaboard Nat. Bank v. Burleigh, 74 Hun, 400, 26 N. Y. Supp. 587.

pervaded by a broad, and liberal, and catholic spirit, as engaging to the mind of the philosophical student of jurisprudence, as it is instructive and needful to the active practitioner of the profession. Fortunes, vaster in amount than the dowries of monarchs, are daily committed, in our commercial cities, to the keeping of those frail but precious fabrics known as negotiable papers. With good faith crowned as their patron goddess, and fortune as their ward, they attract to their consideration and protection, not only the hunters of wealth, but as well the good who cherish sentiments of integrity, and the learned and great who expound the principles by which it shall be jealously guarded and maintained.

Ever expanding to embrace new species of instruments within its scope of operation; ever increasing in consequence as commerce explores new fields of adventure, industry unlocks new mines of wealth, and capital seeks new subjects of investment, the law of negotiability is destined to rise into an importance of which its early history gave little promise, and which its present development falls far short of realizing.

In no other branch of jurisprudence have the laws of different nations and different States so closely assimilated to each other. It is the pioneer in producing a homogeneous code, which shall prevail throughout the realm of commerce, without regard to the limits of country, race, or language. It is continuously struggling to eradicate local partialities, and prejudices, and temporary expediencies, and to attain that which shall remain stable, because founded on principles of universal justice. It was in maintaining the validity, and enforcing the obligation of a negotiable instrument that the United States Supreme Court said: "We will never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice." [19] And for the facilitation of trade, and the fair understanding of mercantile negotiations among all mercantile men, it is to be hoped that the day is not far distant, when it may be truly said (in the language of Cicero, approvingly quoted by Mansfield and Story), respecting the law of our subject, wherever industry turns a wheel or commerce sets a sail: "*Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.*"

19. *Ante*, vol. I, § 10, note cititng Swift v. Tyson, 16 Pet. 1.

END OF VOLUME SECOND.

APPENDIX.

THE NEGOTIABLE INSTRUMENTS LAW.

"The following is a copy of the Negotiable Instruments Law as enacted by the State of New York. The following states have also enacted the same law, to wit:

Massachusetts, Connecticut, Rhode Island, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, Tennessee, Florida, Ohio, Wisconsin, Iowa, Colorado, North Dakota, Utah, Oregon, Washington, and Arizona, and also the District of Columbia.

THE NEGOTIABLE INSTRUMENTS LAW.

Article I. General provisions. (§§ 1-7.)
II. Form and interpretation of negotiable instruments. (§§ 20-42.)
III. Consideration. (§§ 50-55.)
IV. Negotiation. (§§ 60-80.)
V. Rights of holder. (§§ 90-98.)
VI. Liabilities of parties. (§§ 110-119.)
VII. Presentment for payment. (§§ 130-148.)
VIII. Notice of dishonor. (§§160-189.)
IX. Discharge of negotiable instruments. (§§ 200-206.)
X. Bills of exchange; form and interpretation. (§§ 210-215.)
XI. Acceptance. (§§ 220-230.)
XII. Presentment for acceptance. (§§ 240-248.)
XIII. Protest. (§§ 260-268.)
XIV. Acceptance for honor. (§§ 280-290.)
XV. Payment for honor. (§§ 300-306.)
XVI. Bills in a set. (§§ 310-315.)
XVII. Promissory notes and checks. (§§ 320-325.)
XVIII. Notes given for a patent rights and for a speculative consideration. (§§ 330-332.)
XIX. Laws repealed, when to take effect. (§§ 340-341.)

ARTICLE 1.*

General Provisions.

Section 1. Short title.
2. Definitions and meaning of terms.
3. Person primarily liable on instrument.
4. Reasonable time, what constitutes.
5. Time how computed; when last day falls on holiday.
6. Application of chapter.
7. Rule of law merchant; when governs.

§ 1. **Short title.**— This act shall be known as the negotiable instruments law.

§ 2. **Definitions and meaning of terms.**— In this act unless the context otherwise requires:

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counter-claim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

§ 3. **Person primarily liable on instrument.**— The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.

§ 4. **Reasonable time, what constitutes.**— In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

* The numbers of the sections of this article in other States than New York are as follows: Colorado, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Pennsylvania, Utah, Virginia, and Washington, 190–196; Maryland, 13–19; Ohio, 3178–3178*e*; Oregon, 190–192; Rhode Island, 1–7; Wisconsin, 1675. In Arizona, Connecticut, District of Columbia, Florida, and Tennessee, these sections are not numbered.

§ 5. Time, how computed; when last day falls on holiday.— Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

§ 6. Application of chapter.— The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

§ 7. Law merchant; when governs.— In any case not provided for in this act the rules of the law merchant shall govern.

ARTICLE II.*

Form and Interpretation.

Section 20. Form of negotiable instrument.
21. Certainty as to sum; what constitutes.
22. When promise is unconditional.
23. Determinable future time; what constitutes.
24. Additional provisions not affecting negotiability.
25. Omissions; seal; particular money.
26. When payable on demand.
27. When payable to order.
28. When payable to bearer
29. Terms when sufficient.
30. Date, presumption as to.
31. Ante-dated and post-dated.
32. When date may be inserted.
33. Blanks, when may be filled.
34. Incomplete instrument not delivered.
35. Delivery; when effectual; when presumed.
36. Construction where instrument is ambiguous.
37. Liability of person signing in trade or assumed name.
38. Signature by agent; authority; how shown.
39. Liability of person signing as agent, et cetera.
40. Signature by procuration; effect of.
41. Effect of indorsement by infant or corporation.
42. Forged signature; effect of.

§ 20. Form of negotiable instrument.— An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer.

2. Must contain an unconditional promise or order to pay a sum certain in money.

3. Must be payable on demand or at a fixed or determinable future time.

* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3304–3326; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 1–23; Maryland, 20–42; Ohio, 3171–3171*v*; Rhode Island, 9–31; Wisconsin, 1675–1 to 1675–23.

4. Must be payable to order or to bearer; and

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

§ 21. **Certainty as to sum; what constitutes.**— The sum payable is a sum certain within the meaning of this act, although it is to be paid:

1. With interest; or

2. By stated instalments; or

3. By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or

4. With exchange, whether at a fixed rate or at the current rate; or

5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

§ 22. **When promise is unconditional.**— An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or

2. A statement of the transaction which gives rise to the instrument.

But an order or promises* to pay out of a particular fund is not unconditional.

§ 23. **Determinable future time; what constitutes.**— An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; or

2. On or before a fixed or determinable future time specified therein; or

3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

§ 24. **Additional provisions not affecting negotiability.**— An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

2. Authorizes a confession of judgment if the instrument be not paid at maturity; or

3. Waives the benefit of any law intended for the advantage or protection of the obligor; or

4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

§ 25. **Omissions; seal; particular money.**— The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or

* Error in engrossing.

2. Does not specify the value given, or that any value has been given therefor; or

3. Does not specify the place where it is drawn or the place where it is payable; or

4. Bears a seal; or

5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

§ 26. When payable on demand.— An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or

2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

§ 27. When payable to order.— The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or

2. The drawer or maker; or

3. The drawee; or

4. Two or more payees jointly; or

5. One or some of several payees; or

6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

§ 28. When payable to bearer.— The instrument is payable to bearer:

1. When it is expressed to be so payable; or

2. When it is payable to a person named therein or bearer; or

3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or

4. When the name of the payee does not purport to be the name of any person; or

5. When the only or last indorsement is an indorsement in blank.

§ 29. Terms when sufficient.— The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

§ 30. Date, presumption as to.— Where the instrument or an acceptance of any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement, as the case may be.

§ 31. Ante-dated and post-dated.— The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this

is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

§ 32. When date may be inserted.— Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

§ 33. Blanks; when may be filled.— Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated* to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

§ 34. Incomplete instrument not delivered.— Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

§ 35. Delivery; when effectual; when presumed.— Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

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* The word "negotiated" substituted for "negotiable" by Laws N. Y. 1898, c. 336.

§ 36. Construction where instrument is ambiguous.— Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount;

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

§ 37. Liability of person signing in trade or assumed name.— No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

§ 38. Signature by agent; authority; how shown.— The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

§ 39. Liability of person signing as agent, etc.— Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

§ 40. Signature by procuration; effect of.— A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

§ 41. Effect of indorsement by infant or corporation.— The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

§ 42. **Forged signature; effect of.**— Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

ARTICLE III.*

Consideration of Negotiable Instruments.

Section 50. Presumption of consideration.
51. What constitutes consideration.
52. What constitutes holder for value.
53. When lien on instrument constitutes holder for value.
54. Effect of want of consideration.
55. Liability of accommodation party.

§ 50. **Presumption of consideration.**— Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

§ 51. **Consideration, what constitutes.**— Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

§ 52. **What constitutes holder for value.**— Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

§ 53. **When lien on instrument constitutes holder for value.**— Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

§ 54. **Effect of want of consideration.**— Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.

§ 55. **Liability of accommodation party.**— An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

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* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3327–3332; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 24–29; Maryland, 43–48; Ohio, 3171*w*–3172*a*; Rhode Island, 32–37; Wisconsin, 1675-50–1675-55.

ARTICLE IV.*

Negotiation.

Section 60. What constitutes negotiation.
61. Indorsement; how made.
62. Indorsement must be of entire instrument.
63. Kinds of indorsement.
64. Special indorsement; indorsement in blank.
65. Blank indorsement; how changed to special indorsement.
66. When indorsement restrictive.
67. Effect of restrictive indorsement; rights of indorsee.
68. Qualified indorsement.
69. Conditional indorsement.
70. Indorsement of instrument payable to bearer.
71. Indorsement where payable to two or more persons.
72. Effect of instrument drawn or indorsed to a person as cashier.
73. Indorsement where name is misspelled, et cetera.
74. Indorsement in representative capacity.
75. Time of indorsement; presumption.
76. Place of indorsement; presumption.
77. Continuation of negotiable character.
78. Striking out indorsement.
79. Transfer without indorsement; effect of.
80. When prior party may negotiate instrument.

§ 60. What constitutes negotiation.— An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

§ 61. Indorsement; how made.— The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

§ 62. Indorsement must be of entire instrument.— The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

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* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3333–3353; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 30–50; Maryland, 49–69; Ohio, 3172*b*–3172*v*; Rhode Island, 38–58; Wisconsin, 1676–1676-20.

§ 63. **Kinds of indorsement.**— An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

§ 64. **Special indorsement; indorsement in blank.**— A special indorsement specifies the person to whom, or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

§ 65. **Blank indorsement; how changed to special indorsement.**— The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

§ 66. **When indorsement restrictive.**— An indorsement is restrictive, which either

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

§ 67. **Effect of restrictive indorsement; rights of indorsee.**— A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

§ 68. **Qualified indorsement.***—A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

§ 69. **Conditional indorsement.**—Where an indorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

§ 70. **Indorsement of instrument payable to bearer.**— Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially

* The dash and the words "a qualified indorsement" omitted in the original act through error were added by Laws N. Y. 1898, c. 336.

is liable as indorser to only such holders as make title through his indorsement.

§ 71. **Indorsement where payable to two or more persons.**— Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

§ 72. **Effect of instrument drawn or indorsed to a person as cashier.**— Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

§ 73. **Indorsement where name is misspelled, et cetera.**— Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

§ 74. **Indorsement in representative capacity.**— Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

§ 75. **Time of indorsement; presumption.**— Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

§ 76. **Place of indorsement; presumption.**— Except where the contrary appears every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.

§ 77. **Continuation of negotiable character.**— An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

§ 78. **Striking out indorsement.**— The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

§ 79. **Transfer without indorsement; effect of.**— Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

§ 80. **When prior party may negotiate instrument.**— Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

ARTICLE V.*

Rights of Holder.

Section 90. Right of holder to sue; payment.
91. What constitutes a holder in due course.
92. When person not deemed holder in due course.
93. Notice before full amount paid.
94. When title defective.
95. What constitutes notice of defect.
96. Rights of holder in due course.
97. When subject to original defenses.
98. Who deemed holder in due course.

§ 90. Right of holder to sue; payment.— The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

§ 91. What constitutes a holder in due course.— A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such were the fact;
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

§ 92. When person not deemed holder in due course.— Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

§ 93. Notice before full amount paid.— Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

§ 94. When title defective.— The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

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* The numbers of the sections of this article in other States than New York are as follows: Arizona 3354–3362; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 51–59; Maryland, 70–78; Ohio, 3172*w*–3173*d*; Rhode Island, 59–67; Wisconsin, 1676-21–1676-29.

§ 95. What constitutes notice of defect.— To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

§ 96. Rights of holder in due course.— A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

§ 97. When subject to original defenses.— In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

§ 98. Who deemed holder in due course.— Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

ARTICLE VI.*

Liabilities of Parties.

Section 110. Liability of maker.
111. Liability of drawer.
112. Liability of acceptor.
113. When person deemed indorser.
114. Liability of irregular indorser.
115. Warranty; where negotiation by delivery, et cetera.
116. Liability of general indorsers.
117. Liability of indorser where paper negotiable by delivery.
118. Order in which indorsers are liable.
119. Liability of agent or broker.

§ 110. Liability of maker.— The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse.

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* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3363–3372; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 60–69; Maryland, 79–88; Ohio, 3173*e*–3173*n*; Rhode Island, 68–77; Wisconsin, 1677–1677-9.

§ 111. Liability of drawer.— The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted and* paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

§ 112. Liability of acceptor.— The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
2. The existence of the payee and his then capacity to indorse.

§ 113. When person deemed indorser.— A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

§ 114. Liability of irregular indorser.— Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.
3. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

§ 115. Warranty where negotiation by delivery, et cetera.— Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.

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* Error in engrossing. The word in the Commissioners' draft is "or." The mistake was not corrected by Laws N. Y. 1898, c. 336. It occurs only in the New York statute.

§ 116. Liability of general indorser.— Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matter and things mentioned in subdivisions one, two and three of the next preceding section; and

2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

§ 117. Liability of indorser where paper negotiable by delivery.— Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

§ 118. Order in which indorsers are liable.—As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

§ 119. Liability of agent or broker.— Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section one hundred and fifteen* of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

ARTICLE VII.†

Presentment for Payment.

Section 130. Effect of want of demand on principal debtor.
131. Presentment where instrument is not payable on demand.
132. What constitutes a sufficient presentment.
133. Place of presentment.
134. Instrument must be exhibited.
135. Presentment where instrument payable at bank.
136. Presentment where principal debtor is dead.
137. Presentment to persons liable as partners.
138. Presentment to joint debtors.
139. When presentment not required to charge the drawer.
140. When presentment not required to charge the indorser.
141. When delay in making presentment is excused.
142. When presentment may be dispensed with.
143. When instrument dishonored by non-payment.

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* Amended by Laws of N. Y. 1898, c. 336, so as to give correct number.

† The numbers of the sections of this article in other States than New York are as follows: Arizona, 3373–3391; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 70–88; Maryland, 89–107; Ohio, 3173*o*–3174*f*; Rhode Island, 78–96; Wisconsin, 1678–1678-18.

Section 144. Liability of persons secondarily liable, when instrument dishonored.
145. Time of maturity.
146. Time; how computed.
147. Rule where instrument payable at bank.
148. What constitutes payment in due course.

§ 130. Effect of want of demand on principal debtor.— Presentment for payment is not necessary in order to charge the person primarily liable* on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity and has funds there available for that purpose, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

§ 131. Presentment where instrument is not payable on demand.— Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

§ 132. What constitutes a sufficient presentment.— Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf;
2. At a reasonable hour on a business day;
3. At a proper place as herein defined;
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

§ 133. Place of presentment.— Presentment for payment is made at the proper place.

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.
4. In any other† case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

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* The word "liable" omitted in the New York Act of 1897 supplied by Act of 1898, c. 336. In the Wisconsin Act all of the first sentence after the words "primarily liable on the instrument" is omitted.

† The word "other" omitted from the New York statute of 1897 through mistake supplied by Act 1898, c. 336.

§ 134. Instrument must be exhibited.— The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

§ 135. Presentment where instrument payable at bank.— Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

§ 136. Presentment where principal debtor is dead.— Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence, he can be found.

§ 137. Presentment to persons liable as partners.— Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

§ 138. Presentment to joint debtors.— Where there are several persons not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

§ 139. When presentment not required to charge the drawer.— Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

§ 140. When presentment not required to charge the indorser.— Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

§ 141. When delay in making presentment is excused.— Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

§ 142. When presentment may be dispensed with.— Presentment for payment is dispensed with:

1. Where, after the exercise of reasonable diligence presentment as required by this act cannot be made;
2. Where the drawee is a fictitious person;
3. By waiver of presentment express or implied.

§ 143. When instrument dishonored by non-payment.— The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid.

§ 144. Liability of person secondarily liable, when instrument dishonored.— Subject to the provisions of this act, when the instrument

is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder.

§ 145. Time of maturity.—Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due or becoming payable* on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

§ 146. Time; how computed.— Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

§ 147. Rule where instrument payable at bank.— Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

§ 148. What constitutes payment in due course.— Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

ARTICLE VIII.†

Notice of Dishonor.

Section 160. To whom notice of dishonor must be given.
161. By whom given.
162. Notice given by agent.
163. Effect of notice given on behalf of holder.
164. Effect where notice is given by party entitled thereto.
165. When agent may give notice.
166. When notice sufficient.
167. Form of notice.
168. To whom notice may be given.
169. Notice where party is dead.
170. Notice to partners.
171. Notice to persons jointly liable.
172. Notice to bankrupt.
173. Time within which notice must be given.
174. Where parties reside in same place.
175. Where parties reside in different places.
176. When sender deemed to have given due notice.

* The words " or becoming payable " were added by Laws N. Y. 1898, c. 336. They are not in the statute in the other States.

† The numbers of the sections of this article in other States than New York are as follows: Arizona, 3392–3421; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 89–118; Maryland, 108–137; Ohio, 3174*g*–3175*i*; Rhode Island, 97–126; Wisconsin, 1678-19–1678-48.

Section 177. Deposit in post-office, what constitutes.
178. Notice to subsequent parties, time of.
179. Where notice must be sent.
180. Waiver of notice.
181. Whom affected by waiver.
182. Waiver of protest.
183. When notice dispensed with.
184. Delay in giving notice; how excused.
185. When notice need not be given to drawer.
186. When notice need not be given to indorser.
187. Notice of non-payment where acceptance refused.
188. Effect of omission to give notice of non-acceptance.
189. When protest need not be made; when must be made.

§ 160. **To whom notice of dishonor must be given.**— Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

§ 161. **By whom given.**— The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

§ 162. **Notice given by agent.**— Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

§ 163. **Effect of notice given on behalf of holder.**— Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

§ 164. **Effect where notice is given by party entitled thereto.**— Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

§ 165. **When agent may give notice.**— Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

§ 166. **When notice sufficient.**— A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

§ 167. Form of notice.— The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

§ 168. To whom notice may be given.— Notice of dishonor may be given either to the party himself or to his agent in that behalf.

§ 169. Notice where party is dead.— When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

§ 170. Notice to partners.— Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.

§ 171. Notice to persons jointly liable.— Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

§ 172. Notice to bankrupt.— Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

§ 173. Time within which notice must be given.— Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

§ 174. Where parties reside in same place.— Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following;
2. If given at his residence, it must be given before the usual hours of rest on the day following;
3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

§ 175. Where parties reside in different places.— Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.
2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

§ 176. When sender deemed to have given due notice.— Where notice of dishonor is duly addressed and deposited in the post-office, the

sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

§ 177. **Deposit in post-office; what constitutes.**—Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter-box under the control of the Post-Office Department.

§ 178. **Notice to subsequent party; time of.**— Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

§ 179. **Where notice must be sent.**—Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or
2. If he live in one place, and have his place of business in another, notice may be sent to either place; or
3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

§ 180. **Waiver of notice.**— Notice of dishonor may be waived, either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied.

§ 181. **Whom affected by waiver.**— Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

§ 182. **Waiver of protest.**— A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.

§ 183. **When notice is dispensed with.**— Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

§ 184. **Delay in giving notice; how excused.**— Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

§ 185. **When notice need not be given to drawer.**— Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;
2. Where the drawee is a fictitious person or a person not having capacity to contract;

3. Where the drawer is the person to whom the instrument is presented for payment;

4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;

5. Where the drawer has countermanded payment.

§ 186. When notice need not be given to indorser.— Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;

2. Where the indorser is the person to whom the instrument is presented for payment;

3. Where the instrument was made or accepted for his accommodation.

§ 187. Notice of non-payment where acceptance refused.— Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

§ 188. Effect of omission to give notice of non-acceptance.— An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

§ 189. When protest need not be made; when must be made.— Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange.

ARTICLE IX.*

Discharge of Negotiable Instruments.

Section 200. Instrument; how discharged.
201. When person secondarily liable on, discharged.
202. Right of party who discharges instrument.
203. Renunciation by holder.
204. Cancellation; unintentional; burden of proof.
205. Alteration of instrument; effect of.
206. What constitutes a material alteration.

§ 200. Instrument; how discharged.†— A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;

* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3422–3428; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 119–125; Maryland, 138–144: Ohio, 3175*j*–3175*p*; Rhode Island, 127–133; Wisconsin, 1679–1679-6.

† Through an error in engrossing the words in the headnote have been transposed. It was intended to read, "How instrument discharged." The error was not corrected by the Act of 1898.

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

3. By the intentional cancellation thereof by the holder;

4. By any other act which will discharge a simple contract for the payment of money;

5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

§ 201. When persons secondarily liable on, discharged.— A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;

2. By the intentional cancellation of his signature by the holder;

3. By the discharge of a prior party;

4. By a valid tender of payment made by a prior party;

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;

6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument.* unless the right of recourse against such party is expressly reserved.

§ 202. Right of party who discharges instrument.— Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

§ 203. Renunciation by holder.— The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

§ 204. Cancellation; unintentional; burden of proof.— A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

§ 205. Alteration of instrument; effect of.— Where a negotiable instrument is materially altered without the assent of all parties liable

* By an error in engrossing, the words "unless made with the assent of the party secondarily liable, or" after the word "instrument" are omitted in the New York Act. They were not supplied by Laws 1898, c. 336.

thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

§ 206. What constitutes a material alteration.— Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration..

ARTICLE X.*

Bills of Exchange; Form and Interpretation.

Section 210. Bill of exchange defined.
211. Bill not an assignment of funds in hands of drawee.
212. Bill addressed to more than one drawee.
213. Inland and foreign bills of exchange.
214. When bill may be treated as promissory note.
215. Referee in case of need.

§ 210. Bill of exchange defined.— A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or† determinable future time a sum certain in money to order or to bearer.

§ 211. Bill not an assignment of funds in hands of drawee.— A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

§ 212. Bill addressed to more than one drawee.— A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

§ 213. Inland and foreign bills of exchange.— An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within the State. Any other bill is a foreign bill. Unless the

* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3429–3434; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 126–131; Maryland, 145–150; Ohio, 3175*q*–3175*v*; Rhode Island, 134–139; Wisconsin, 1680–1680-*e*.

† The word "or" omitted in the original New York statute supplied by Laws N. Y. 1898, c. 336.

contrary appears on the face of the bill, the holder may treat it as an inland bill.

§ 214. When bill may be treated as promissory note.— Where in a bill the drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

§ 215. Referee in case of need.— The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.

ARTICLE XI.*

Acceptance of Bills of Exchange.

Section 220. Acceptance, how made, et cetera.
221. Holder entitled to acceptance on face of bill.
222. Acceptance by separate instrument.
223. Promise to accept; when equivalent to acceptance.
224. Time allowed drawee to accept.
225. Liability of drawee retaining or destroying bill.
226. Acceptance of incomplete bill.
227. Kinds of acceptances.
228. What constitutes a general acceptance.
229. Qualified acceptance.
230. Rights of parties as to qualified acceptance.

§ 220. Acceptance; how made, et cetera.— The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee.† It must not express that the drawee will perform his promise by any other means than the payment of money.

§ 221. Holder entitled to acceptance on face of bill.— The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored.

§ 222. Acceptance by separate instrument.— Where an acceptance is written on a paper other than the bill itself, it does not bind the

* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3435–3445; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 132–142; Maryland, 151–161; Ohio, 3175*w*–3176*f*; Rhode Island, 140–150; Wisconsin, 1680*f*–1680*p*.

† The word "drawee" substituted for "drawer" by Laws N. Y. 1898, c. 336.

acceptor, except in favor of a person to whom it was shown and who, on the faith thereof, receives the bill for value.

§ 223. **Promise to accept; when equivalent to acceptance.**— An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

§ 224. **Time allowed drawee to accept.**— The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance if given dates as of the day of presentation.

§ 225. **Liability of drawee retaining or destroying bill.**— Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

§ 226. **Acceptance of incomplete bill.**— A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

§ 227. **Kinds of acceptances.**— An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

§ 228. **What constitutes a general acceptancy.**— An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.

§ 229. **Qualified acceptance.**— An acceptance is qualified which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
3. Local, that is to say, an acceptance to pay only at a particular place;
4. Qualified as to time;
5. The acceptance of some one or more of the drawees, but not of all.

§ 230. **Rights of parties as to qualified acceptance.**— The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

ARTICLE XII.*

Presentment of Bills of Exchange for Acceptance.

Section 240. When presentment for acceptance must be made.
241. When failure to present releases drawer and indorser.
242. Presentment; how made.
243. On what days presentment may be made.
244. Presentment; where time is insufficient.
245. When presentment is excused.
246. When dishonored by non-acceptance.
247. Duty of holder where bill not accepted.
248. Rights of holder where bill not accepted.

§ 240. When presentment for acceptance must be made.— Presentment for acceptance must be made:

1. Where the bill is payable after sight or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

§ 241. When failure to present releases drawer and indorser.— Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged.

§ 242. Presentment; how made.— Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day, and before the bill is overdue, to the drawee† or some person authorized to accept or refuse acceptance on his behalf; and

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

2. Where the drawee is dead, presentment may be made to his personal representative;

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* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3446–3454; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 143–151; Maryland, 162–170; Ohio, 3176*g*–3176*o*; Rhode Island, 151–159; Wisconsin, 1681–1681-8.

† The word "drawee" substituted for "drawer" by Laws N. Y. 1898, c. 336.

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

§ 243. **On what days presentment may be made.**— A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections one hundred and thirty-two* and one hundred and forty-five† of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day.

§ 244. **Presentment when time is insufficient.**— Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

§ 245. **Where presentment is excused.**— Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases:

1. Where the drawee is dead or has absconded, or is a fictitious person or a person not having capacity to contract by bill;
2. Where after the exercise of reasonable diligence, presentment cannot be made;
3. Where, although presentment has been irregular, acceptance has been refused on some other ground.

§ 246. **When discharged by non-acceptance.**— A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or
2. When presentment for acceptance is excused and the bill is not accepted.

§ 247. **Duty of holder where bill not accepted.**— Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

§ 248. **Rights of holder where bill not accepted.**— When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary.

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* Number "one hundred and thirty-two" substituted for seventy-two by Laws 1898, c. 336.

† Number "one hundred and forty-five" substituted for eighty-five. (*Id.*)

ARTICLE XIII.*

Protest of Bills of Exchange.

Section 260. In what cases protest necessary.
261. Protest; how made.
262. Protest; by whom made.
263. Protest; when to be made.
264. Protest; where made.
265. Protest both for non-acceptance and non-payment.
266. Protest before maturity where acceptor insolvent.
267. When protest dispensed with.
268. Protest; where bill is lost, et cetera.

§ 260. In what cases protest necessary.— Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

§ 261. Protest; how made.— The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

§ 262. Protest; by whom made.— Protest may be made by:

1. A notary public; or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more creditable witnesses.

§ 263. Protest; when to be made.— When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

§ 264. Protest; where made.— A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment

* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3455–3463; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 152–160; Maryland, 171–179; Ohio, 3176*p*–3176*x*; Rhode Island, 160–168; Wisconsin, 1681-9–1681-17.

at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

§ 265. Protest both for non-acceptance and non-payment.— A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

§ 266. Protest before maturity where acceptor insolvent.— Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

§ 267. When protest dispensed with.— Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

§ 268. Protest where bill is lost, et cetera.— Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

ARTICLE XIV.*

Acceptance of Bills of Exchange for Honor.

Section 280. When bill may be accepted for honor.
281. Acceptance for honor; how made.
282. When deemed to be an acceptance for honor of the drawer.
283. Liability of acceptor for honor.
284. Agreement of acceptor for honor.
285. Maturity of bill payable after sight; accepted for honor.
286. Protest of bill accepted for honor, et cetera.
287. Presentment for payment to acceptor for honor; how made.
288. When delay in making presentment is excused.
289. Dishonor of bill by acceptor for honor.

§ 280. When bill may be accepted for honor.— Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon or for the honor of the person for† whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which

* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3464–3473: Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 161–170; Maryland, 180–189; Ohio, 3176*y*–3177*g*; Rhode Island, 169–178; Wisconsin, 1681-18–1681-27.

† The word "for" omitted in the original New York Act supplied by Laws 1898, c. 336.

the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

§ 281. Acceptance for honor; how made.— An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

§ 282. When deemed to be an acceptance for honor of the drawer.— Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

§ 283. Liability of acceptor for honor.— The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

§ 284. Agreement of acceptor for honor.— The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

§ 285. Maturity of bill payable after sight; accepted for honor.— Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

§ 286. Protest of bill accepted for honor, et cetera.— Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

§ 287. Presentment for payment to acceptor for honor; how made.— Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity;
2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and seventy-five.*

§ 288. When delay in making presentment is excused.— The provisions of section one hundred and forty-one† apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

§ 289. Dishonor of bill by acceptor for honor.— When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

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* Number one hundred and seventy-five substituted for one hundred and four by Laws N. Y. 1898, c. 336.

† Number one hundred and forty-one substituted for eighty-one by Laws N. Y. 1898, c. 336.

ARTICLE XV.*

Payment of Bills of Exchange for Honor.

Section 300. Who may make payment for honor.
301. Payment for honor; how made.
302. Declaration before payment for honor.
303. Preference of parties offering to pay for honor.
304. Effect on subsequent parties where bill is paid for honor.
305. Where holder refuses to receive payment supra protest.
306. Rights of payer for honor.

§ 300. Who may make payment for honor.— Where a bill has been protested for non-payment, any person may intervene and pay its supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

§ 301. Payment for honor; how made.— The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.

§ 302. Declaration before payment for honor.—The notarial act of honor must be founded on a declaration made by the payer for honor, or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

§ 303. Preference of parties offering to pay for honor.— Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

§ 304. Effect on subsequent parties where bill is paid for honor.— Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

§ 305. Where holder refuses to receive payment supra protest.— Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

§ 306. Rights of payer for honor.— The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

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* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3474–3480; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington. 171–177; Maryland, 190–196; Ohio, 3177*h*–3177*n*; Rhode Island, 179–185; Wisconsin, 1681-28–1681-34.

ARTICLE XVI.*

Bills in a Set.

Section 310. Bills in sets constitute one bill.
311. Rights of holders where different parts are negotiated.
312. Liability of holder who indorses two or more parts of a set to different persons.
313. Acceptance of bills drawn in sets.
314. Payment by acceptor of bills drawn in sets.
315. Effect of discharging one of a set.

§ 310. Bills in sets constitute one bill.— Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

§ 311. Rights of holders where different parts are negotiated.— Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

§ 312. Liability of holder who indorses two or more parts of a set to different persons.— Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

§ 313. Acceptance of bills drawn in sets.— The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

§ 314. Payment by acceptor of bills drawn in sets.— When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

§ 315. Effect of discharging one of a set.— Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

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* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3481–3486; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 178–183; Maryland, 197–202; Ohio, 3177*o*–3177*t*; Rhode Island, 186–191; Wisconsin, 1681-35–1681-40.

ARTICLE XVII.*

Promissory Notes and Checks.

Section 320. Promissory note defined.
321. Check defined.
322. Within what time a check must be presented.
323. Certification of check; effect of.
324. Effect where holder of check procures it to be certified.
325. When check operates as an assignment.

§ 320. **Promissory note defined.**— A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

§ 321. **Check defined.**— A check is a bill of exchange drawn on a bank, payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

§ 322. **Within what time a check must be presented.**— A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

§ 323. **Certification of check; effect of.**— Where a check is certified by the bank on which it is drawn the certification† is equivalent to an acceptance.

§ 324. **Effect where the holder of check procures it to be certified.**— Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

§ 325. **When check operates as an assignment.**— A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

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* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3487–3491; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 184–189; Maryland, 203–208; Ohio, 3177*u*–3177*z*; Rhode Island, 192–197; Wisconsin, 1684–1684-5.

† The word "certification" substituted for "certificate" by Laws N. Y. 1898, c. 336.

ARTICLE XVIII.*

Notes Given for a Patent Rights and for a Speculative Consideration.

Section 330. Negotiable instruments given for patent rights.
331. Negotiable instruments given for a speculative consideration.
332. How negotiable bonds are made non-negotiable.

§ 330. Negotiable instruments given for patent rights.— A promissory note or other negotiable instrument, the consideration of which consists wholly or partly of the right to make, use or sell any invention claimed or represented by the vendor at the time of sale to be patented, must contain the words "given for a patent right" prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder; but this section does not apply to a negotiable instrument given solely for the purchase price or the use of a patented article.

§ 331. Negotiable instruments for a speculative consideration.— If the consideration of a promissory note or other negotiable instrument consists in whole or in part of the purchase price of any farm product, at a price greater by at least four times than the fair market value of the same product at the time, in the locality, or of the membership and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at a price greater by four times than the market value of the same product at the time in the locality, the words, "given for a speculative consideration," or other words clearly showing the nature of the consideration, must be prominently and legibly written or printed on the face of such note or instrument above the signature thereof; and such note or instrument, in the hands of any purchaser or holder, is subject to the same defenses as in the hands of the original owner or holder.

§ 332. How negotiable bonds are made non-negotiable.— The owner or holder of any corporate or municipal bond or obligation (except such as are designated to circulate as money, payable to bearer), heretofore or hereafter issued in and payable in this State, but not registered in pursuance of any State law, may make such bond or obligation, or the interest coupon accompanying the same, non-negotiable, by subscribing his name to a statement indorsed thereon that such bond, obligation or coupon is his property; and thereon the principal sum therein mentioned is payable only to such owner or holder, or his legal representatives or

* This article appears only in the statute as enacted in New York and Ohio.

assigns, unless such bond, obligation or coupon be transferred by indorsement in blank, or payable to bearer, or to order, with the addition of the assignor's place of residence.

ARTICLE XIX.

Laws Repealed; When to Take Effect.

Section 340. Laws repealed.
341. When to take effect.

§ 340. Laws repealed.— The laws or parts thereof specified in the schedule hereto annexed are hereby repealed.

§ 341. When to take effect.— This chapter shall take effect on the first day of October, eighteen hundred and ninety-seven.

Schedule of Laws Repealed.*

Revised Statutes.	Sections.	Subject-matter.
R. S., pt. II, ch. 4, tit. II.....	All.....	Bills and notes.

Laws of —	Chap.	Sections.	Subject-matter.
1835.....	141.....	All.....	Notice of protest; how given.
1857.....	416.....	All.....	Commercial paper.
1865.....	309.....	All.....	Protest of foreign bills, etc.
1870.....	438.....	All.....	Negotiability of corporate bonds; how limited.
1871.....	84.....	All.....	Negotiable bonds; how made non-negotiable.
1873.....	595.....	All.....	Negotiable bonds, how made negotiable.
1877.....	65.....	1, 3.....	Negotiable instruments given for patent rights.
1887.....	461.....	All.....	Effect of holidays upon payment of commercial paper.
1888.....	229.....	All.....	One hundredth anniversary of the inauguration of George Washington.
1891.....	262.....	1.....	Negotiable instruments given for a speculative consideration.
1894.....	607.....	All.....	Days of grace abolished.

* This schedule comprises only the New York statutes.

LAWS OF NEW YORK, 1897, CHAP. 613.

AN ACT to amend the Penal Code, relative to violation of The Negotiable Instruments Law.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The penal code is hereby amended by inserting at the end of title twelve the following new sections:

§ 384m. Notes given for patent rights.—A person who takes, sells or transfers a promissory note or other negotiable instrument, knowing the consideration of such note or instrument to consist in whole or in part of the right to make, use or sell any patent invention or inventions, or any invention claimed or represented to be patented, without having the words "given for a patent right" written or printed legibly and prominently on the face of such note or instrument above the signature thereto, is guilty of a misdemeanor.

§ 384n. Notes given for a speculative consideration.—A person who takes, sells or transfers a promissory note or other negotiable instrument, knowing the consideration of such note or instrument to consist in whole or in part of the purchase price of any farm product at a price greater by four or more times than the fair market value of the same product at the time in the locality, or in which the consideration shall be in whole or in part membership of and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bonds to purchase or sell any farm product at such rate, without having the words "given for a speculative consideration," or other words clearly showing the nature of the consideration prominently and legibly written or printed on the face of such note or instrument above the signature thereof is guilty of a misdemeanor.

§ 2. Section two of chapter sixty-five of the laws of eighteen hundred and seventy-seven, and section two of chapter two hundred and sixty-two of the laws of eighteen hundred and ninety-one, are hereby repealed.

§ 3. This act shall take effect the first day of October, eighteen hundred and ninety-seven.

INDEX TO VOLUMES I AND II.

[The figures opposite to references refer to paragraphs marked §. The Roman numeral "II." is prefixed to references to second volume.]

ABSCONDING. *See* EXCUSES, and II., 1144.
of payor is excuse for want of presentment, II., 1144.
especially if he is insolvent, II., 1144.
of payor to another place in same State or country excuses want of presentment, II., 1144.
but if holder knows his whereabouts he should seek him, II., 1144.
of drawee, maker, or acceptor does not excuse want of notice to drawer or indorser, II., 1144.
when drawer or indorser absconds, notice should be left at last place of abode, II., 1144.
or with party representing his estate, II., 1144.

ABSENCE. *See* EXCUSES, and II., 1114.
as excuse for non-presentment and notice, II., 1114 to 1123.

ACCEPTANCE. *See* PRESENTMENT FOR; DRAWER AND DRAWEE; PROMISES TO ACCEPT; PARTNERS; CORPORATIONS; STATUTE OF FRAUDS.
1. *Nature of*, 360.
drawer undertakes that bill will be accepted, 479.
acceptor engages to pay holder, 479.
drawee who is not acceptor may discount bill, 479.
drawee without acceptance not party to bill, 480.
may be waived, or dispensed with, 481.
in such case, negotiability of bill not impaired, 481.
what bills do not require acceptance, 482.
bills payable on demand do not require, 482.
nor does bill drawn by party on himself, 482.
nor bill drawn by partner on his firm, 482.
nor by corporation on its officer, 482.
either of a set may be accepted and sued on, 483.
drawee should accept but one of a set, 483.
when acceptor bound on several bills of a set, 483.
2. *Who may accept*, 484, 485.
bill imports that drawee is competent to accept, 484.
bill drawn on incompetent parties, 484.
none but drawee can accept unless for honor, 485.
second acceptance is alteration, 485.
but party may guarantee bill, 485.
cannot be series of acceptors, 485.
may be by any name party adopts, 485.
ambiguous cases, 486.
if no drawee is named, acceptor acknowledges himself drawee, 486.
may be by agent, 487.
holder may exact proof of agent's authority, 487.
whether holder must take agent's acceptance, 487.
if agency clear, holder must take acceptance by agent, 487.
if holder takes acceptance from one falsely assuming agency, and does not notify antecedent parties, they may be discharged, 487.
if bill drawn on agent individually he must accept individually, 487.

ACCEPTANCE — *continued.*
various and conflicting cases, 487.
joint drawees should accept jointly, 488.
if either joint drawee refuse acceptance, bill must be protested, 488.
but party accepting bound, 488.
one partner may accept, 488.
whether partner's acceptance *in his own name* suffices, 362, 488, 489.
how partner should accept, 488.
3. *When made,* 490, 491.
may be before drawing, 490.
may be after discount, maturity, protest, or refusal to accept, 490, 491.
acceptances in blank, 142, 143, 143*a*, 490.
acceptor in blank liable for amount to *bona fide* holder, though authority be exceeded, 490.
dates from delivery, 490.
is revocable until delivery, 490.
usage of banks respecting dishonor for non-acceptance, 490.
may be after death of drawer, 491, 498*a*.
and after prior refusal to accept, 491.
presumption as to time of, 491.
drawee may deliberate twenty-four hours as to, 492.
if drawee refuse, in twenty-four hours bill must be protested, 492.
when accepted and issued, acceptance is irrevocable, 493.
may be dated, 494.
acceptance presumed to be after drawing, and before maturity, 494.
when drawee should certify the date, 494.
when amount should be expressed in, 494.
4. *Form and varieties of,* 496.
may be express, implied, verbal, written, by telegram, on the bill, on separate paper, before bill drawn or afterward, absolute, conditional, or qualified, 496.
usual form is by writing his name and the word "accepted" on the face of the bill, 497, 504.
signature of drawee alone suffices, 497, 504.
or the word "accepted," without signature, 497.
what words constitute acceptance, 497.
effect of words "I will *not* accept," written on bill, 502.
not necessary for signature to be *across* the bill, 498.
position of signature immaterial, 498.
part payment does not amount to acceptance, 497*a*.
statutory requirement of acceptance in writing on bill, 497*b*.
construction of statutory requirements that acceptance be written on bill and signed, 479*b*.
letter of drawee, though drawer dead, may be sufficient, 498.
effect of drawee's death, 498*a*.
drawer's death, after delivery of bill to payee, no revocation, 491, 498*a*.
what conduct implies, 499.
when keeping bill by drawee amounts to, 499*a*.
whether the destruction of bill by drawee amounts to, 500.
drawee procuring discount of bill for his own accommodation, and promising to pay it, constitutes himself acceptor, 501.
authority to draw amounts to, 501.
drawee promising and refusing to accept is bound for damages, 502.
if drawee has funds of drawer, slight circumstances will raise presumption of contract to accept, 502.
"I protest within," is refusal of, 502.
may be on separate paper, 503.
what promises amount to, 503.
equivocal language will not amount to, 503.

ACCEPTANCE — *continued.*
5. *Verbal and written acceptances,* 406.
semble, holder may require written, 504, 507*a*.
verbal is binding, 504.
writing "accepted" across face of bill without signature, 504.
English statutes, 497*b*, 504.
by what law verbal, controlled, 867.
what words constitute verbal, 504*a*, 505, 506.
promise to pay on subsequent day, 505.
words used must show clear intent to accept, 506.
must be addressed to drawer, holder, or agent, 507.
if to stranger, do not amount to, 507.
holder must assent to verbal, 507*a*.
6. *Absolute, conditional, and qualified,* 508.
holder may require absolute, 508.
at his risk take conditional or qualified, 508.
or may treat the bill as dishonored, 508.
plaintiff must show performance of condition, 508.
conditional should be so averred, 508.
what words amount to conditional, 509.
holder refusing conditional, should protest, 510.
holder accepting conditional, should notify parties, 510.
protest for non-acceptance precludes holder from availing himself of conditional, 510.
indorser discharged by conditional, unless he is notified of its terms and assents, 510, 511, 515.
whether or not drawer discharged by conditional, 511.
effect of neglect to notify, when conditions complied with, 511.
construction of conditional, 512.
to *pay "when in funds,"* meaning and effect of, 513.
"when in funds" means "when in cash," 513.
when funds not received in lifetime of acceptor, administrator receiving them is liable, 513.
various instances construed, 513.
holder must show acceptor received funds, 513, 514.
can not resort to drawer until acceptor receives funds and refuses to pay, 513.
acceptor not liable if funds intercepted, 513.
when evidence admissible to explain conditional, 514.
Qualified, 515.
qualifications as to sum, time, place, and mode of payment, 515.
drawer and indorser discharged unless they assent to, 515.
acceptance to pay at another town is qualified, and operates as alteration, 515. II., 1379, 1381.
but not if payable at particular place in same town, 515. II., 1380.
may contain condition for renewal, 516.
acceptance for part of amount is good *pro tanto,* 516.
acceptance for part discharges antecedent parties, unless assented to, 516.
conditions in, should be written, 517.
may be in contemporaneous writing, 517.
but in latter case would not affect holder without notice, 517.
conditions in the body of the instrument, 517.
written acceptance cannot be altered by parol evidence, 517.
verbal acceptance may be shown, 518.
conditional, cannot be made after absolute acceptance, 518.
conditions as to acceptance may be in body of the bill, 517.
such cases construed, 517.

ACCEPTANCE — *continued.*
7. *Acceptances payable at a particular place,* 519.
House of Lords decided such acceptances to be qualified, 519.
English statute on the subject, 519.
does not affect promissory notes, 519.
allegation of presentment not necessary against acceptor, 519.
unless date be payable at a particular place, 519.
the words, "*only, and not otherwise or elsewhere,*" 519.
presentment for, must be alleged against drawer or indorser, 519.
so if bill be *drawn* payable at particular place, 519.
rule as to, in the United States, 520.
in effect, agrees with the English statute, 520.
8. *Acceptance for honor, or supra protest,* 521.
happens when drawee refuses to accept, and stranger accepts for honor of a party, 521.
inures to benefit of parties subsequent to one for whose honor the acceptance is, 521.
is only allowable after protest, 522.
form and ceremony of, 523.
acceptor should notify party for whose honor he accepts, 523.
any third person, not a party, may accept for honor, 524.
and, it seems, so may the drawee, 524.
unless he were bound in good faith to accept, 524.
rights of acceptor *supra protest,* 524, 526.
when he may recover against indorser, 524.
may be several acceptors *supra protest* for honor of different parties, 525.
acceptor *supra protest* should state for whose honor he accepts, 525.
if he does not, it will be presumed to be for honor of the drawer, 525.
acceptor *supra protest* may sue party for whose honor he accepted, and others whom such party could sue, 526.
must prove presentment and notice when he sues drawer, 526.
acceptance for honor not absolute engagement, 527.
in order to be binding (1) bill must be presented to original drawee at maturity, 527.
(2) if second refusal by drawer, must be second protest, 527.
(3) and then bill must be presented to acceptor *supra protest,* 527.
if acceptor *supra protest* refuse payment, after these steps taken, there must be another formal protest, 527.
does not admit signature of indorser for whose honor it is made, 528.
to what extent admissions extend, 528.
holder not bound to take, 529.
who may be sued by holder taking, 529, 531.
cases of protest for better security, 530.
effect of acceptance for honor on accommodation parties, 531.
releases parties who become such for accommodation of the drawer, 531.
9. *Effect of acceptance; what it admits,* 532.
acceptance makes drawee principal debtor, 532.
but drawee can not charge drawer unless he pays the bill, 532.
makes acceptor liable like the maker of a note, 532.
according to all the terms of the bill, 532.
stipulations for payment of attorney's fees enter into, 62*a*, 532.
if for accommodation, acceptor can not, nevertheless, sue drawer on the bill, 532.
but may sue him for money paid at his request, 532.
acceptance admits everything essential to validity of the bill, 533.

ACCEPTANCE — *continued.*
that is to say — (1) signature of the drawer; (2) funds in the hands of the drawee; (3) capacity of the drawer; (4) capacity of the payee to indorse; (5) handwriting and authority of drawer's assumed agent, 533, 534, 535, 536, 537. II., 1363.
binds acceptor, though drawer's name be forged, 533.
as between drawer and acceptor, the latter may show he had no funds; but not as against *bona fide* holder, 534.
10. *What acceptance does not admit*, 538, 539, 540.
it does not admit genuineness of payee's or other indorser's signature, 538. II., 1225, 1364.
acceptor paying under forged indorsement may recover back amount, 538.
rule does not apply where drawer has issued bill bearing forged indorsement, 538.
reason of exception, 538.
does not admit indorser's signature, though bill be payable to drawer's order, 538. II., 1225, 1365.
rule in case of fictitious drawer, 538.
does not admit agency to indorse, 539. II., 1225.
does not admit genuineness *of terms* of the bill, 540.
11. *Extinguishment of acceptor's obligation*, 541.
acceptor's obligation may be extinguished, discharged, or waived by — (1) operation of law; (2) payment; (3) release; (4) express or implied waiver, 541, 542, 543, 544, 545.
bankruptcy or statute of limitations discharges, 541.
acceptance discharged by express renunciation, 542, 544.
different rule applicable to other executory contracts after breach, 542.
when acceptance is for accommodation, 543.
where acceptance is for value, 544.
circumstances must amount to express renunciation, 545.
delay to proceed against acceptor, or receiving interest from, or giving time to other party, does not discharge acceptor, 546.
effect of failure of consideration, 547.
extending time in acceptance, 547.
accepting after maturity, 547.
taking security from other party, 548.
co-extensive or collateral security taken from acceptor, 548.
when cancellation discharges acceptance, 549.
effect of cancellation, 549.
every holder may avail himself of written or verbal acceptance, 563.

ACCEPTANCE SUPRA PROTEST, OR FOR HONOR. *See* ACCEPTANCE, and 521 to 531.
if acceptor is responsible for issuing bill in such form as admits of easy alteration, he is bound, 540.

ACCEPTOR. *See* ACCEPTANCE; PROMISES TO ACCEPT; CORPORATION; AGENT; FORGERY; ALTERATION.
there can be but one acceptor of bill, 412, 485.
the acceptor must be drawee or acceptor for honor, 412, 485.
whether corporation or officer is acceptor in certain cases, 412, 413.
whether principal or agent is acceptor in certain cases, 414.
is principal party to bill, 532. II., 1236.
whether acceptor of bill indorsed in blank can pass good title before maturity, 781*b*.
if bill passed out of his hands after acceptance, its production is evidence of payment, II., 1227.
when he pays should take receipt, II., 1228.
is entitled to possession of bill, II., 1228.
whether liable for re-exchange, II., 1449, 1450.

ACCEPTOR — *continued.*
author's view that he is liable, II., 1450.
is discharged by alteration of bill, II., 1379.
insertion of place of payment is alteration, II., 1379.
but drawee in particular city may designate place of payment therein, 515. II., 1380.
is bound to holder who takes bill after acceptance, though drawer's name be forged, II., 1361.
whether he may recover from holder when bill is forged, who presented it for payment, II., 1361, 1362.
what acceptor admits. *See* ACCEPTANCE, and 533.
law of place of payment controls contract of, 896.
if place of payment not specified, it is presumably place of acceptance, 896, 918.
liability of for interest, re-exchange, and damages, 918. II., 1449, 1450.
when acceptor may recover amounts paid on forged and altered drafts. *See* FORGERY and ALTERATION, and II., 1359 to 1369.
recognized exceptions to rule generally stated that acceptor can not recover payments of forged drafts, II., 1367.
may recover (1) when payment is made to payee, II., 1367.
(2) where parties are mutually in fault, II., 1367.
(3) where party holding paper has not exercised customary precaution, II., 1367.
(4) where payment is made for honor of drawer, II., 1368.

ACCOMMODATION BILLS AND NOTES. *See* BONA FIDE HOLDER; CONSIDERATION; DIVERSION; PRINCIPAL AND SURETY.
are made on sufficient consideration, 790.
holder of bill or note made for accommodation need not show that he gave value, 165.
bills and notes for mutual accommodation valid, 187.
member of firm has no implied power to execute accommodation paper in firm's name, 365.
if instrument shows on face that partner signed firm's name for accommodation, holder must show assent of other members, 365.
word "surety" attached to firm's name conveys notice, 365.
when transaction shows on its face that party signed for accommodation, 365.
bona fide holder without notice may recover against firm whose name is used by member for accommodation, 368.
burden of proof in such cases, 369.
corporation has no implied authority to execute, 387.
but is bound to *bona fide* holder without notice, 387.
acceptor for accommodation can not sue drawer on bill, 532.
but may sue for money paid at his request, 532.
may be indorsed after maturity, and pass good title, 726, 786, 790.
fact that holder knew nature of paper does not vitiate his title, 726, 786, 790.
what amounts to diversion of, 792.
whether diversion of shifts burden of proof, 790, 791.
use of, in paying pre-existing debts and as collateral security, 793*a*.
holder of as collateral security can only recover to extent of his debt against accommodation party, 832*a*.
generally governed by law of place of delivery and not of date, 868.
but purchaser without notice may presume ostensible character to be real, 869.
purchaser's knowledge that bill or note was drawn, made, accepted, or indorsed for accommodation does not generally affect right of recovery, 790.

ACCOMMODATION BILLS AND NOTES — *continued.*
unless such knowledge infect the transaction with usury, 750 to 753.
usury in the negotiation of. *See* SALE, and 750 to 768.
what amounts to diversion of, 792.
if executed for general accommodation, party may use them in any legal way, 793.
when may be applied in payment of pre-existing debt, 793*a*.
use of as collateral security, 793*a*.
recovery by accommodation party limited to amount paid, II., 1342.
this rule applicable to accommodation indorser who is payee, II., 1342.
indorser of entitled to notice, II., 995.

ACCORD AND SATISFACTION. *See* DISCHARGES.

ACCIDENT as excuse for non-presentment, protest, and notice. *See* EXCUSES, and II., 1067, 1125 to 1127.

ACTION OR SUIT ON NEGOTIABLE INSTRUMENTS. *See* EVIDENCE.
1. *General principles as to who may sue*, II., 1181.
any holder who can trace clear title may sue, II., 1181*a*.
so may receivers, assignees, trustees, and personal representatives, II., 1181*a*.
donee *causa mortis* may sue on name of donor's personal representative, II., 1181*a*.
mere depositary can not sue, II., 1181*a*.
under special indorsement only special indorsee can sue, II., 1181*a*.
party for accommodation paying may sue prior parties, II., 1181*a*, 1206.
but can not sue subsequent parties, 1181*a*.
acceptor or maker for accommodation can not sue drawer or indorser on bill or note, II., 1181*a*.
but may sue for money paid at their request, II., 1181*a*.
partnership cases, II., 1182.
copartner can not sue firm on bill payable to himself, II., 1182.
if one partner die, survivor must sue, II., 1182.
under indorsement in blank, any partner may sue, II., 1182.
if firm composed of one person trading under copartnership style, indorsement unnecessary, 1182.
if single woman marries, husband must join in suit on bill or note payable to her before marriage, II., 1184.
right of single woman to sue survives to personal representatives, II., 1184.
if husband dies, right of action survives to her, II., 1184.
on bill or note payable to married woman after marriage, husband may sue or join in suit with wife, II., 1184.
if payable to husband or wife in alternative he should sue, II., 1184.
married woman can not sue husband on note executed to her by him after marriage, II., 1184.
nor on his joint and several note made with others, II., 1184.
in latter case, if husband dies, widow may sue others, II., 1184.
if payable to "A. for use of B.," "A." must sue, II., 1185.
indorsee of payee may sue maker though guarantor, II., 1185.
as to party who pays *supra protest*, II., 1186.
banker paying acceptance unprovided for, not on same footing, II., 1186.
cause of action indivisible, II., 1186*a*.
what constitutes entire or single demand, II., 1186*a*.
2. *If payable to agent (as to "A. B., agent of C. D.,") suit may be in name of agent*, II., 1187.
agent without legal title can not sue, II., 1187.
doctrine that either principal or agent may sue, II., 1187.
whether undisclosed principal may sue, II., 1187.
rule as to official agents of States and corporations, II., 1188.
conflicting authorities, II., 1188, 1189.

ACTION OR SUIT ON NEGOTIABLE INSTRUMENTS — *continued.*
5. *When agent's name is used by adoption for principal's, principal may sue,* II., 1189*a*.
4. *Who may sue on instrument payable to one party and indorsed by another,* II., 1190.
5. *On instrument payable in blank or indorsed in blank, nominal holder may sue,* II., 1191.
and whether such holder receive amount as trustee, agent, or pledgee, II., 1192.
payee may maintain suit on note indorsed by him in blank, 1192.
evidence that plaintiff has no interest in instrument admissible when defence against owner would be available, II., 1192.
rule in England, II., 1192*a*.
statute in New York, II., 1192*a*.
indorsement in blank confers joint right of action on those agreeing to sue, II., 1193.
various cases, II., 1193.
holder of blank note may fill it up with his own name and sue on it, II., 1194.
holder of indorsement in blank may fill up before or at trial of suit, II., 1195.
blank indorsement need not be filled at all, II., 1195. But *query*, II., 1195.
if plaintiff omit statement of all indorsements in his declaration, he may strike out intervening ones, II., 1196.
whether plaintiff may avail himself of title of indorsement stricken out, II., 1196.
if not payable to bearer or indorsed in blank, holder can not sue in his own name, II., 1197.
if transferrer indorse, his name can not be used by holder, II., 1197.
rule where plaintiff has indorsed, and there appear subsequent indorsements to his, II., 1198.
holder may always strike out special indorsement and bring suit under any indorsement in blank, II., 1198.
if plaintiff's indorsement be on bill he may sue, II., 1198.
6. *Right to sue in one's name must exist at time of suit,* II., 1199.
plaintiff must allege that he is payee, indorsee, or holder, II., 1199.
indorsement after suit will not avail to give right of action, II., 1199.
transfer pending suit may be with agreement that action shall continue for benefit of transferrer, II., 1199.
in absence of evidence such agreement presumed, II., 1199.
possession with legal title is *prima facie* evidence of right to sue, II., 1191, 1200.
possession in such only *mala fides* can defeat suit, II., 1200.
is not always necessary to institute suit, II., 1201.
by pledgee who is indorsee gives right to sue, II., 1201.
7. *As a general rule, holder may sue all prior, but not subsequent parties,* II., 1202.
when general rule does not apply, II., 1202*a*.
at common law must prosecute several actions against several prior parties, II., 1203.
by statutes prior parties may be sued jointly, II., 1203.
indorser can not sue acceptor or maker until he has paid bill or note, II., 1204.
when drawer may maintain action, II., 1205.
drawer must have paid bill, II., 1205.
acceptor for accommodation who pays, may sue for money paid at his request, II., 1181*a*, 1206.
but can not sue on bill unless he accepted for honor, II., 1206.
production of bill by acceptor is not evidence of payment by him, unless it passed into circulation after acceptance, II., 1206.
receipt on back of bill, handwriting must be proved, II., 1206.

ACTION OR SUIT ON NEGOTIABLE INSTRUMENTS — *continued.*
8. *Query, whether suit may be brought on last day of grace,* II., 1207.
action lies against maker on day of maturity after demand and refusal, II., 1208.
questionable when note is payable without grace, II., 1209.
when demand is necessary, it must be made prior to institution of suit on last day of grace or day of maturity, II., 1210.
and must have been made in reasonable hours, II., 1210.
on due bill suit may be brought on day of date, II., 1211.
action against indorser lies as soon as notice is transmitted, II., 1212.
notice must precede suit, II., 1212.
otherwise premature suit not cured by reception of notice, II., 1212.
on bill dishonored for non-acceptance, right of action against the drawer accrues at once, II., 1213.
9. *How statute of limitations affects actions on negotiable instruments,* II., 1214.
begins to run from time action accrues, II., 1215.
various cases as to when it commences, II., 1215.
indorsement of overdue note, statute runs from date of, 1215.
whether payment by party jointly or jointly and severally bound will remove bar of the statute, a vexed question, 1215*a*.
better view, if obligation be joint payment will extend statutory limitation, but not if it be joint and several, 1215*a*.
cosurety may maintain action for contribution when, 1215*a*.
payment by indorser does not prevent bar of statute against maker, 1215*b*.
part payment by maker will not render indorser liable, but by principal binds surety, 1215*b*.
payment by surety of note barred will not revive it against principal, 1215*b*.

ADDRESS. *See* DRAWEE, and 96, 97, 98.
of check, II., 1568.
of party entitled to notice, II., 1023.

ADMINISTRATORS. *See* FIDUCIARIES; PRESENTMENT; NOTICE.

ADMISSION. *See* EVIDENCE; EXCUSES; ACCEPTANCE; ACCEPTOR.
as to genuineness of paper. *See* FORGERY, and II., 1352.
of fact dispenses with further proof, II., 1220.
may be shown to have been made under mistake, II., 1220.

ADOPTION.
party bound by any name he adopts, 141, 304, 363, 399, 485. II., 1189*a*.
firm may adopt name of one partner, 363.
corporation may be bound by several names, 399.
may adopt agent's name, 399.
may be bound by president's name, 399*a*.
cashier's name, 417. II., 1188.
when principal may sue, agent's name having been used for his, II., 1198*a*.

ADVICE, words of, frequently inserted in bills, 109.
use of such words, 109.
sometimes "without further advice" is inserted, 109.
if "as per advice" is inserted, the drawee is warned not to pay until advised, 109.
if he disregards the intimation, acts at his peril, 109.

AFTER SIGHT.
in bill means after acceptance or protest for non-acceptance, 619.
in note means payment not to be demanded until it is exhibited to maker, 619.
bill or note payable a certain time after sight is entitled to grace, 617.
bill payable one day after sight, counting grace, is really payable four days after sight, 617.

AGENTS. *See* "BANKS AND OTHER AGENTS FOR COLLECTION"; *also*, BROKER; BONA FIDE HOLDER; CORPORATIONS; MUNICIPAL BONDS.
1. *Competency and authority of, and general principles respecting,* 272.
infants, married women, outlaws, aliens, and slaves may be, 272.
whether imbeciles, lunatics, and children of tender years may be, 272.
no particular form of authority necessary to constitute, 273.
unless authority be to execute sealed instrument, in which case it must be under seal, 274.
authority generally may be verbal or written, 274.
if written, authority can not be disputed by parol proof of contrary instructions, 274.
if authority be to two or more jointly, then conjoint action is necessary, 275.
instances, 275.
authority to bind party means authority to bind him separately, 277.
unless authority to, be coupled with an interest, it can not be delegated, 277.
using amanuensis not delegation of authority, 277.
if agency general, acts within its scope bind principal, although against his instructions, 278.
unless party dealing with agent had notice, 278.
if agent to sell note indorse it without authority, principal not bound, 279.
party chargeable with notice of extent of agent's authority, when it purports to be exercised under written instrument, 280.
party not put on inquiry as to agent's private instructions, 280.
limitations of general authority, 281.
good faith essence of agency, 282.
party having notice of fraud by, affected by such notice, 282.
agent transcending power to transfer fraudulently, party with notice can not recover against principal, 282.
but principal may recover paper from him, 282.
"pay A. B. or order, on account of plaintiff," carries notice that A. B. can not pledge paper for private debt, 283.
power to draw, indorse, or accept is no power to draw on party without funds, 283.
nor is it power to draw, indorse, or accept for accomodation, 283.
but principal bound to holder without notice, 283.
general authority may be evidence for jury to consider on latter question, 283.
so that clerk had given paper on similar transactions, is evidence, 283.
construction of authority "to sell, indorse, or assign notes," 284.
agent betraying trust does not affect *bona fide* holder without notice, 284, 854.
can not contract with himself, 282.
corporation note to its trustees void, 282.
agent may prove his agency, 284.
but his declarations not admissible against principal until agency proved, 284.
transferring paper warrants genuineness, unless he discloses his agency, and principal's name, 284.
contracting in his own name warrants genuineness of paper sold, 740*a*. *See* BROKER.

AGENTS — *continued.*
principal not bound by criminal acts of, 286.
whether bank liable for bonds on special deposit and stolen, 286*a*.
conflicting authorities, 286*a*.
bank liable if guilty of negligence, 286*a*.
losses by fraud or failure of third party, when agent not liable for, 287.
when party not liable for remittance by post, 287.
signature by agent sustains allegation of signature by principal, 287.
general authority presumed to continue until revoked, 288.
special authority otherwise, 288.
when principal should give notice of revocation of authority, 288.
death revokes authority, 288*a*.
war does not, 288*a*.
notice to agent is notice to principal, 802. II., 998.
2. *Implied authority of agent*, 289.
authority may be inferred from circumstances, 289.
authority to draw bill is not authority to indorse, or accept, 290.
authority to agent to draw bill does not authorize drawing in agent's name, 290.
authority to bind principal in one form may be evidence of authority, under the circumstances, to bind him in another, 290.
authority to sell note does not authorize guaranty of payment, 290.
collect does not authorize sale or indorsement, 290, 293.
transfer does not authorize indorsement, 290.
make note does not authorize renewal, 291.
sign and indorse paper payable at a particular place does not apply to any other, 291.
nor is authority to sign for one purpose good for another, 291.
authority specifying time of payment can not be varied, 291.
qualification of rule, 291.
authority strictly construed, 292.
effect of authority "to transact business," 291.
"to transact all business," 291.
"to conduct commercial business," 291.
"to collect debts and give discharges," 292.
"to demand and receive all moneys, and do all other business," 292.
"to advance a certain sum of money," 294.
"to make purchases and pay for them," 294.
"to buy and sell goods," 294.
other phrases construed, 294.
what agents have implied authority to sign negotiable instruments, 294.
rule as to merchant clerks, store managers, attorney-at-law, collecting agents, farm managers, masters of ships, supercargoes, etc., 294, 295.
effect of course of business, and usual conduct of principal, 296.
when jury may infer authority to indorse from authority to draw, 296.
prior similar transactions are evidence, 296, 297.
when necessary to show that instrument was taken on faith of prior similar transactions, 297.
3. *How agent should sign paper, and how it is construed*, 298.
"A. B. by C. D.," or "A. B. by his agent C. D.," is proper form of signature, 298.
"C. D. for A. B.," effect of these words, 298.
C. D. [for A. B.] in brackets, effect of these words, 298.
agent may sign principal's name and show authority by parol, 299.
this style not favored, 299.
"C. D. by procuration of A. B." equivocal, 299.
the words "by procuration" intimate special limited authority, 299.
person taking paper so signed is put upon inquiry, 299.

AGENTS — *continued.*
negotiable instrument must be construed by its face, 300.
as to acceptance by. *See* ACCEPTANCE, and 487.
General principles of construction:
(*a*) If name of principal and agent on paper, signer is bound unless it appear that he acted for another, 300.
Lord Ellenborough says, signer bound unless he says plainly, "I am the mere scribe," 300.
test question is, does signer apply hand as instrument of another or as contracting party? 300.
views of Chief-Justice Shaw, 300.
word "agent" added to name is mere *designatio personæ*, 301, 305.
indorsements by agents, 301.
peculiar case in New York, 302.
(*b*) No party can be charged as principal unless his name is on paper, 303.
different rule as to contracts not negotiable, 303.
(*c*) Not necessary to use principal's peculiar name, 304, 363, 399.
principal may adopt and use agent's name, or agent, by authority, use his own name for principal's, 304.
(*d*) If agent sign his own name without disclosing principal's, he binds himself, 305.
suffix of "agent," is *designatio personæ*, 301, 305.
this principle applies although payee knew of agency, 305.
but in such case, if note not paid, principal may be sued on original consideration, 305.
if payee rely on agent's sole credit, principal not bound, 305.
(*e*) If agent exceed authority in signing principal's name, or his own name for principal, agent not bound as party to paper, 306, 307.
but must be sued in tort, 306, 307.
party signing fictitious name must be sued in tort, 307.
if agent not authorized to bind principal, and there be no apt words to charge himself, instrument is void, 307.
if paper be ambiguous, intent of agent to bind himself may be inferred, 308.
if principal ratify act, agent can not be sued in tort, 308.
when undisclosed principal bound, 308*a*, 740*a*.
4. *Liability of agent who draws on account of principal or indorses to him,* 254.
whether agent of drawee who draws bill on principal in favor of drawee's creditor is bound personally, 310.
semble, that he is, 310.
conflicting authorities, 310, 311.
presumption in such cases, 311.
if drawer add "agent" to his name, in such case the rule *may* be different, 311.
question affected by peculiar circumstances, 311.
whether drawer of bill in favor of his principal, or purchaser of goods from himself as agent, is bound to principal, 312, 313.
conflicting authorities, 312.
question may turn on course of business, 313.
whether agent taking bill or note payable to himself on principal's account, and indorsing it to principal, is bound by his indorsement to him, 314.
English view, 314.
if indorsement be for principal's accommodation, agent not bound, 314.
so if indorsement be by principal's instructions, 314.
factor under *del credere* commission is liable to principal for debt of party purchasing goods, 314.

AGENTS — *continued.*
and hence bound on indorsement of bill or note to principal given in payment, 314.
whether agent bound when not acting under *del credere* commission, 314.
there is no consideration for indorsement if he acted without commission or compensation, and without violating instructions, 314.
and hence, in such cases, agent indorsing to principal not bound, 314.
5. *Ratification, by principal, of agent's unauthorized acts,* 316.
corporation or individual may ratify, 317.
ratification may be express, or implied by acts or circumstances, 317.
party can not ratify without capacity to contract, 318.
if contract can only be in prescribed mode, it can not be ratified in disregard of it, 318.
ratification is equivalent to previous authority, 318.
instances as to ratification, 318, 322.
principal not bound unless he knew facts as to transaction, 319.
when he must restore consideration, 319.
contract must have been originally lawful, 320.
ratification must be integral and not partial, 321.
what acts amount to ratification, 322.
long silence may amount to with other circumstances, 322.
effect of subsequent unconditional promise to pay, 322.
6. *Effect of delivering negotiable paper by, in violation of instructions,* 706–710.
duty of, in presenting bill, 476.
7. *Evidence inadmissible to discharge when contract is in agent's name,* 740*a*.
but admissible to charge undisclosed principal, 740*a*.

AGREEMENTS. *See* COLLATERAL AGREEMENTS.
to retire, effect of, II., 1243.
the word "retire" has various meanings, II., 1243.
how construed, II., 1243.

ALIENS AND ALIEN ENEMIES AS PARTIES.
aliens may contract with citizens, 216.
war between nations interdicts contracts between their citizens, 216.
contracts between alien enemies utterly void, 216.
war interdicts all interchanges, removals, negotiations, contracts, and communications between citizens of hostile countries, 216.
bills can not be drawn between citizens of hostile countries, 217.
illustrations, 217.
conflicting decisions, 217.
citizen can not accept bill drawn by alien enemy, 218.
nor indorse bill or note to him, 218.
nor execute note to him, 218.
cases during late conflict between the States, 218.
subject can not be indorsee of bill drawn by alien enemy on another subject, unless he was not aware of the circumstances affecting it, 219.
exceptions in cases of neutrals, 220.
prisoners of war, 221.
ransom, or repair of ships, 221.
war does not revoke agency to act for alien enemy, 222.

ALLONGE. Meaning of, 690.
indorsement may be upon, 690.

ALMANAC is judicially noticed, 70.

ALTERATION OF NEGOTIABLE INSTRUMENTS. *See* CHECKS.
1. *Meaning and effect of alteration,* II., 1373.
in England, any material change, whether made by party to instrument or a stranger avoids an executory contract, II., 1373*a*.
in United States, *spoliation* by stranger does not avoid it, unless it renders paper utterly incomprehensible, II., 1373*a*.
may be before delivery, II., 1373*a*.
as to alteration, negotiable instruments stand on footing of those under seal, II., 1374.
in what alteration consists, II., 1375.
what are material alterations, II., 1375.
that alteration is favorable is no defence, II., 1375.
2. *Change of date is material as to prior parties and sureties,* II., 1376.
may be in year, month, day, or all three, II., 1376.
even if altered to one day previous, so as not to affect *time of maturity,* it is fatal, II., 1376.
query, whether altering date of indorsement vitiates instrument, II., 1376.
alteration in *time of payment* has same effect as change of date, II., 1377.
writing extension of time of payment not an alteration, 1377, 1397.
alteration in *place of payment* is ordinarily fatal as against parties not consenting, II., 1378.
change in place of date is material alteration, II., 1378.
what is deemed "general acceptance" by statute in certain States, II., 1379.
such statutory provisions do not affect general rules respecting alteration, II., 1379.
if bill be addressed to drawee at a particular city, he may accept payable at a *particular place* in said city, 414. II., 1380.
but if he accepts to pay in *another city,* drawer or indorser is discharged, 414. II., 1381.
ruling in Kentucky as to right of acceptor in blank to insert place of payment in bill indorsed for his accommodation, II., 1382.
whether *memorandum* of place of payment is part of contract, II., 1383.
alteration in *amount* of principal, making it greater or less, is material, II., 1384.
so changing a bill or note to make it bear interest, or changing time when interest should run, or the percentage of interest, II., 1385.
so inserting greater rate of interest than legal rate in blank left for interest, 1385.
alteration in the medium of payment avoids instrument, II., 1386.
3. *Any change in the personality, number, or relations of parties, is material,* II., 1387–1390.
query, whether addition of another maker discharges the others, II., 1388, 1389.
as to addition of another acceptor, II., 1388, 1389.
acceptor and indorsers stand on same footing as other parties in respect to effect of alteration, II., 1390.
writing waiver of demand and notice over indorsement discharges indorser, II., 1390.
striking out indorsee's name, II., 1390.
4. *Changing instrument so as to affect its obligation or weight as evidence is material,* II., 1391.
effect of adding to a note, after delivery, names of witnesses attesting its execution, II., 1392.
where witness himself afterward attests at request of holder, II., 1393.
effect of erasing witness' name, II., 1393.
effect of an addition made to the statement of the consideration, II., 1394.

ALTERATION OF NEGOTIABLE INSTRUMENTS — *continued.*
adding the words "to order," or "bearer," if accidentally omitted, is not material, II., 1395.
but otherwise it is, II., 1395.
and if non-negotiable is rendered a negotiable instrument, alteration is material, II., 1395.
adding words "without defalcation or set-off" may be material, II., 1395.
effect of words written on back of bill or note, II., 1396.
effect of obliterating material memoranda, II., 1397.
5. *Alteration to be material must change the legal effect of the instrument,* II., 1398.
examples of immaterial changes, II., 1398, 1399, 1400.
immaterial memoranda, II., 1399.
appendix to name immaterial, II., 1399.
parties who consent to alteration can not complain, II., 1401.
consent may be express or implied, II., 1401.
may be before change, or afterward by ratification, II., 1401.
when may be inferred or implied, II., 1402, 1403, 1404.
effect of change is a question for the court, II., 1401.
whether consent was given is a question for the jury, II., 1401.
decisions under the English *Stamp Act* respecting such changes, II., 1401.
evidence of consent, II., 1402.
effect of subsequent acknowledgments and promises to pay, II., 1402.
changes made to correct mistakes, supply omissions, or carry out intentions of parties, do not vitiate, II., 1403, 1404.
6. *If party gives opportunity by negligence for alteration of instrument, he is bound to a bona fide holder,* II., 1405, 1409.
when party deemed guilty of negligence, II., 1405, 1406.
examples in point, II., 1406, 1409.
rule applies to the addition or subtraction of memorandum on bill or note, II., 1407.
changes in paper perfected — conflicting decisions, II., 1407*a*.
if alteration is made without fault on part of maker, drawer, or acceptor, he is not bound, II., 1408.
erasures, and other marks of alteration, convey constructive notice, II., 1408.
7. *Effect of fraudulent alteration is to destroy instrument and extinguish debt,* II., 1410*a*.
as to alterations *innocently made*, there is conflict of authority, II., 1411.
effect of *immaterial* changes with *fraudulent* intent, II., 1416.
immaterial alteration is no alteration, II., 1416.
when instrument may be restored, II., 1414, 1415.
8. *If alteration is apparent on face of instrument, burden of proof is on the holder to explain it,* II., 1417.
but this rule not invariable, II., 1421*a*.
all surrounding circumstances regarded, II., 1421*a*.
slight circumstances may shift burden of proof, II., 1421*a*.
impossible to fix cast-iron rule, II., 1421*a*.
presumption must conform to experience of mankind, II., 1421*a*.
in California, held that plaintiff need not explain alteration made in printed words of note, II., 1419.
query, as to alterations made against the interests of party claiming under it, II., 1420.
where alteration does not appear on face of instrument, burden of proof is on the party alleging it, II., 1420.
of checks. *See* CHECKS, and II., 1658.

ALTERNATIVE DRAWEES.
if bill be drawn on A. and B. "or either of them," acceptance by one suffices, 488.

ALTERNATIVE PAYEES.
instrument payable to A. or B. not negotiable, 103.
if payable to A., B., and C., or to their order, or major part of them, is negotiable, 103.

AMBIGUOUS INSTRUMENTS. *See* IRREGULAR INSTRUMENTS.

AMOUNT, OR SUM. *See* SALE, and 749, 754.
when full amount recoverable on negotiable instruments, 1.
usually specified in left-hand corner of instrument in figures, 86.
if specified in words, they overrule figures, 86.
difference between words and figures can not be explained by evidence, 86.
if words indistinct, figures may be looked to, 86.
if expressed in figures only it suffices, 86.
but query, if expressed in marginal figures only, 86.
whether figures suffice, if amount in body be left blank, 86.
when holder has authority to make blank correspond to figures, 86.
when "dollars" are understood to apply to figures, 86.
in England when pounds understood, 86.
informalities of spelling not fatal, 76, 86.
marginal figures not part of instrument, 86. II., 1499*a*.
dollars mean lawful money of United States, 87.
when term dollars may be explained by parol evidence, 87.
cases arising out of late war, 87.
if donee transfer bill or note for less than full value, holder can only recover amount paid, 181.
sales of bills and notes as to amount of recovery, 749, 754.
surety, or accommodation party, can only recover what he pays, II., 1342.

AMOUNT OF RECOVERY. *See* SALE; COLLATERAL SECURITY; ACCOMMODATION BILLS AND NOTES.
when whole amount recoverable. *See* SALE, and 754, 761.
on coupon bonds, II., 1517*a*.
on bank notes. *See* BANK NOTES, and II., 1682.

ANTECEDENT DEBT. *See* CONSIDERATION, 184, and PRE-EXISTING OR PRECEDENT DEBT, 827 *et seq.*

APPRAISEMENT LAWS.
whether waiver of, in bill or note, impairs negotiability, 61.
it does not, 61, and note.

APPLICATION OF PAYMENTS. *See* PAYMENT, and II., 1250, 1253.

APPROPRIATION OF PAYMENTS. *See* PAYMENT, and II., 1250, 1253.

ASSIGNMENT OF FUND BY BILL OR ORDER. *See* BILLS OF EXCHANGE AND EQUITABLE ASSIGNMENT.
whether unaccepted bill of exchange for whole amount operates as assignment of fund, 15, 17, 20.
accepted bill for whole amount so operates, 18.
order for whole amount so operates, 21.
whether bill for part of fund so operates, 22.
order for part of fund so operates, 22, 23.
New York decisions, 23*a*.
whether check operates as assignment of fund in bank *pro tanto*, II., 1643.

ASSIGNMENT OF PROPERTY. *See* EXCUSES, and II., 1129, 1141.
as excuse for non-presentment or notice, II., 1129, 1141.

ASSIGNMENT, TRANSFER BY.
1. *Term "assignment" is usually applied to transfer of paper not negotiable, and to transfer of such as is negotiable without indorsement,* 729.
it is also applied to transfers by delivery, 729 and note.
bill or note payable to particular person may be transferred without indorsement, 729.
but such assignment passes only equitable title, 729.
and is not according to mercantile custom, 729.
what is assignment of *legal* and what of *equitable* title, 729, 730, 741.
2. *Assignor of legal title warrants*—(1) *the genuineness of the bill or note,* 731.
English cases, 731*a*.
when instrument forged it matters not that some signatures are genuine, 731*a*.
distinction between assignment for debt due or then created and sale by delivery, 731*b*.
distinction not well taken, 731*b*.
contrary view in Maryland, 731*b*.
(2) its validity and legal operation, 733.
English cases, 732, 733.
decision in New York that *scienter* as to usury is necessary to render assignor liable, 733*a*.
(3) the competency of the parties to contract, 734.
decision of U. S. Sup. Court and comments, 734*a*.
in Nebraska and comments, 734*a*.
(4) that transferrer has a title to instrument and right to transfer same, 735.
(5) that he knows of no facts which show the paper originally valid to be worthless, 736.
no implied warranty in, that paper was not made for accommodation, 736*a*.
query, whether assignor warrants the solvency of the principal, 737.
in such case, if both transferrer and transferee are ignorant of insolvency of principal at time of transfer, the loss should rest where it falls, 737.
doctrine of text as stated in Rhode Island, 737, 738.
doctrine in England, 739.
distinction where bill or note of third party was assigned in payment of antecedent debt, and dishonored, not considered tenable, 739, 740.
oral warranty of solvency, and guaranty of payment valid, 739*a*.
liability of broker or agent making transfers by delivery. *See* BROKER, and 740*a*.
3. *Where bill or note payable "to order" is transferred without indorsement, transferrer acquires only an equitable title,* 741.
holder, in such case, must aver and prove the assignment, 741.
possession, in such case, not evidence of ownership, 741.
holder can only recover subject to such existing defences as were available against his assignor, 741.
but he is protected against all defenses *subsequently* arising, 741.
doctrine as to bills and notes not negotiable, 742.
bills and notes not payable to bearer or to order cannot be transferred, by indorsement or delivery, so as to enable transferee to sue in his own name, except by express statute, 742, 743.
transferee, who has promised, upon good consideration, to indorse, may be sued for breach of promise, or compelled, by decree in equity, to indorse, 744.
whether indorsement relates back to time of assignment, 745.
indorsement at any time before suit brought cuts out right of maker or acceptor to plead set-off, 746.

ASSIGNMENT, TRANSFER BY — *continued.*
second assignee who gives notice of his assignment is protected against prior one who fails to do so, 747.
assignment of a particular claim carries with it all securities held by assignor, 748.
negotiable instruments may be assigned by a separate and distinct paper, deed, or mortgage, conveying them or all "choses in action," 748*a*.

ASSIGNOR. *See* ASSIGNMENT, *supra*, and 741, 746.
by what law it is determined whether party is assignor or indorser, 902.

ASSIGNS.
instrument payable to certain party or assigns is negotiable, 99, 104. II., 1496.

ATTACHMENT. *See* ASSIGNMENT.
when assignment has priority over, 18, 19, 20 to 23*a*.
whether negotiable note subject to for debt of payee, 800*a*.
better opinion to contrary unless note be in hands of payee, 800*a*.

AT SIGHT. *See* AFTER SIGHT.
bills payable at sight entitled to grace by law merchant, 617.
effect of statute or custom, 618.
"on demand at sight" same at "at sight," 621.

ATTESTATION.
not necessary bill or note should be attested by witness, 112.
desirable where paper signed by mark or initials, 112.
if there be attesting witness, he must prove signature or mark, 112.
exceptions to this rule, 112.
admission of party, good evidence, 112.
when no chance for mistake, evidence of attesting witness not necessary, 112.
statute in England, 112.
when secondary evidence admissible, 112.
witnessed and unwitnessed notes, II., 1392.
when adding or obliterating witness' name is material alteration, II., 1392.

ATTORNEY, POWERS OF. *See* CERTIFICATES OF STOCK.
to execute sealed instrument must be sealed, 274.
to transfer certificates of stock may be in blank, II., 1708*g*.
whether, if sealed, may be in blank not discussed, II., 1708*g*.

ATTORNEY'S FEES.
whether agreement in bill to pay impairs negotiability, 62, 62*a*.
when agreement in bill to pay, binds acceptor and indorser, 62*a*.
when holder may recover them, 62*a*.
holder must prove amount, 62*a*.
if in bill, do not render it usurious, 62*a*.
conflicting and various views as to effect of agreements to pay, 62, 62*a*.
whether agreement to pay is in the nature of a penalty, 62, 62*a*.

AU BESOIN.
meaning of term, 111.
indicates resort to second drawee if first refuses to honor the bill, 111.
if drawee "au besoin" honors bill, drawer is liable to him for full amount, 111.

BANKS AND OTHER AGENTS FOR COLLECTION.
1. *Rights, duties, and liabilities of,* 323 *et seq.*
duties of collecting agents of commercial paper, 323.
banks have implied power to collect commercial paper, 324.
they frequently charge commissions for collections, 324.
but temporary use of money is consideration for undertaking to collect, 324, 328.
no special contract necessary when paper deposited in bank for collection, 324, 328.
bank at which paper is payable and deposited for collection is agent to receive payment at maturity, 325.
demand of payment and notice of dishonor by cashier acting as notary, 325.
designation of bank as place of payment imports that holder will have paper there at maturity, 325.
payment may be made to bank by debtor unless he has notice not to do so, 325.
if not lodged there, and payer has funds there to meet it, he is not bound for future damages or costs, 325.
mere designation of bank as place of payment does not *per se* make it agent of payee to receive the amount, 326.
paper must be lodged with it, or indorsed to it for collection, in order to make bank payee's agent, 326.
without such or equivalent authority, bank receives money as agent of payor, 326.
bank where paper payable is agent of payor to make payment, 326*a*.
need not have payor's check, or draft, to make payment, 326*a*.
contrary view expressed in previous editions of this work the author now deems erroneous, 326*a*.
criticism of conflicting decisions, 326*a*.
whether bank must pay note or acceptance of depositor there payable, 326*b*.
if bank holds paper it may apply depositor's funds in payment, 326*b*.
when presumption of authority to apply funds in payment does not arise, 326*b*, 326*c*.
special agreement or instruction must be pursued, 326*b*.
when trust is impressed on deposit, 326*c*.
when it may offset funds against note, 326*c*.
duty of bank or other collecting agent to take prompt steps for acceptance or payment, 327.
must attend to protest and notice, and fix liability of parties, 327.
failure in these regards makes agent liable to holder in damages, 327.
no defence to bank that it was unaccustomed to such duties, 327.
no defence that error resulting in loss was unintentional, 327.
receipt by bank of paper for collection creates implied undertaking, 324, 328.
use of money good consideration, 324, 328.
measure of damage from default of agent is actual loss, 329.
loss is *prima facie* amount of paper, 329.
agent bound to greater diligence than principal, 330.
duty of in presentment for acceptance, 330, 476, 477.
principal exonerating holder as between other parties and himself does not apply as between agent and holder, 330.
2. *How collecting bank should present for payment,* 328*a*.
must not transmit by mail to party who is to make payment, 328*a*.
must employ a suitable sub-agent in distant place to make presentment for payment, 328*a*.
3. *How collecting bank should give notice of dishonor,* 331.
sometimes sends notice to indorser from whom paper received, 331.
to all parties looked to for payment, 331.
incloses notices for all indorsers to last indorser, 331.

BANKS AND OTHER AGENTS FOR COLLECTION — *continued.*
only necessary for bank to notify immediate indorser, 331.
agreement, usage, or special circumstances may vary this rule, 331.
bank holding check for collection may present it at any time before close of business hours on day following its receipt, 332.
holder of check bound to present it in like time, 332.
if holder instead of presenting check puts it in bank for collection, he takes peril of loss by delay, 332.
may forward check to bank at distance on which it is drawn by post, 654*a*.
bank receiving check for collection not bound to pay holder until amount received, or would be received but for his default, 333.
habit to pay before collection creates no right of holder to require it, 333.
if bank receiving bill for collection puts it to drawer's credit, subsequent failure of such bank before collection gives holder right to recover back his bill, 332.
as soon as bank collects paper it becomes depositor's debtor, 334.
especially if it uses funds, 334.
and although instructed to hold amount to holder's order, which deposit implies, 334.
if bank takes payment in specific bills by order, and then uses them, it is liable for subsequent depreciation, 334.
depreciation at time of payment falls on holder depositing paper in bank, 334.
collecting agent has no authority to receive payment in other than legal currency of country, 335. II., 1245, 1625.
nor to take certification of check instead of payment, 335.
4. *Manner of placing paper in banks for collection, and rights of collecting bank,* 336.
better to indorse paper to bank specially "for collection," 336.
necessity for this precaution, 336.
whether subsequent collecting bank could retain proceeds against real owner for debt of prior collecting bank, 337.
doctrine of U. S. Supreme Court, 338.
in New York, 339.
in Connecticut, 339.
of U. S. Supreme Court approved, 340.
rights as between holder and agent under blank indorsement, 340*b*.
circumstances from which a purchase is implied, 340*c*.
agreements affecting title to proceeds of paper when indorsed "for collection," 340*d*.
amount of recovery against insolvent collecting agent, 340*e*.
5. *How far bank is liable for default of notary, sub-agent, or correspondent bank,* 341 *et seq.*
several classes of cases on the question, 341, 343.
doctrine of the U. S. Supreme Court, 341.
first class maintains absolute liability of collecting bank for negligence of notary, correspondent, or other sub-agent, 341, 342.
this view adopted in New York, 341.
second class hold collecting bank liable only to prove due care and diligence in selecting sub-agent, 341.
this view adopted by U. S. Supreme Court, 341, note.
third class holds bank bound when it receives paper of drawer or maker resident at place of its location, 341.
but not bound for default of correspondent or other agent at distant place, if due diligence is exercised, 341.
first class of cases, and New York doctrine, approved, 342.
general usage may vary rule, 342.
stress sometimes laid on fact that notary is public officer, and may always be safely employed, 343.

BANK AND OTHER AGENTS FOR COLLECTION — *continued.*
Professor Parsons compares notary to mail service, 343.
duty of bank in selecting proper notary, 343.
if notary is bank officer, bank liable, 343.
remedy of holder against collecting banks, 344.
whether holder can sue several or all of a series of collecting banks for default of one, 344.
classification of cases, 344.
distinction between putting paper in bank for "collection" and "to be transmitted for collection," 345.
when any person interested may sue collecting bank for negligence, 346.
instructions to bank or other collecting agent must be complied with, 347.
express companies may undertake collections, 348.
holder has right to anticipate that paper will be paid, 349.
he need not inform holder for collection where to send notices of dishonor, 349.
it might be otherwise if collecting agent were servant of holder, 349.
duty in making presentment for acceptance, 476.
must be more diligent than principal, 476.
6. *How far liable for money collected on forged paper,— not liable if paper indorsed "for collection,"* 349*a*.

BANK CHECKS. *See* CHECKS, and II., 1556 to 1663.

BANKER'S DRAFTS.
intended for circulation, 1595*a*.
immediate presentment not necessary, 1595*a*.

BANK BILLS OR BANK NOTES, II., 1664.
1. *Definition of,* II., 1664.
may be described as promissory notes, II., 1664.
usually payable to bearer, II., 1665.
are payable on demand, II., 1666.
style of execution, II., 1667.
without statutory prohibition, right of banking pertains to every one, II., 1668.
form should correspond to statutory requirements, II., 1669.
if completed and then stolen bind bank, II., 1669.
otherwise if stolen incomplete, II., 1669.
figures denoting number of bank note no part thereof, 1669.
alteration of figures immaterial, 1669.
2. *Banker's cash notes,* II., 1670.
3. *Post notes of bank,* II., 1670.
4. *How far similar to money,* II., 1672.
pass as cash, II., 1672.
whether sheriff may take in execution or discharge of execution, II., 1672, 1673*a*.
are legal tender unless objected to, II., 1672*a*.
differ from money and are not legal tender if objected to, II., 1672*a*.
but are negotiable, like money, II., 1672, 1674.
bill or note payable is not negotiable, 55. II., 1673.
5. *Liability of transferrer of bank notes,* II., 1675.
transferrer warrants genuineness, II., 1675.
does not warrant solvency, II., 1675, 1676, 1677.
transferrer may indorse, II., 1675, 1676.
but party receiving forged bank note must act diligently, II., 1675.
what diligence required. II., 1675.
if forged are nullities, II., 1675.
query, whether solvency of bank is warranted, II., 1676, 1676*a*, 1677.
doctrine approved that it is not, II., 1677.

BANK BILLS OR BANK NOTES — *continued.*
exception where transferrer *knows* that bank is insolvent, II., 1678.
effect of warranty of solvency of bank, II., 1679.
duty of transferee in such cases, II., 1679.
upon whom loss of insolvent notes falls, II., 1677.
6. *Rghts, duties, and remedies of holder of bank notes,* II., 1680.
possession *prima facie* evidence of ownership, II., 1680.
distinction between bank notes and other negotiable instruments, II., 1680.
holder regarded as original promisee, II., 1680*a*.
holder of bank bill must have acquired it in the usual course of business, II., 1681.
holder has no preference to assets, II., 1681.
holder is entitled to recover full amount of bank note without reference to what he paid for it, II., 1682.
also interest from time of demand, II., 1682.
bank notes are never overdue, II., 1683.
whether statute of limitations applies to, II., 1684.
rule as to presentment and demand, II., 1685.
may be presented in packages, II., 1685.
but each note is separate debt, II., 1686.
trover lies against finder of bank notes by owner, II., 1687.
when assumpsit lies, II., 1687.
if finder has passed the note to a *bona fide* transferee for value, the owner can not recover, II., 1687.
if bank receive in payment or on deposit *counterfeit* notes purporting to be its own, innocent party who pays or deposits them is not bound, II., 1688.
7. *Payment in bank notes, and set-off,* II., 1689.
at common law nothing but *money* is legal tender, II., 1689.
by statute in many States banks are compelled to receive their own notes in payment, II., 1689.
as to bank notes required after bank goes into liquidation, II., 1689, 1690.
weight of authority is that notes acquired after and with notice of assignment are not valid tender to assignee, II., 1689.
contrary view stated and approved, II., 1689.
while bank is solvent, debtor can plead as offsets its own notes, II., 1691.
when bank is insolvent, its assets must be marshaled, II., 1691.
when note is payable in bank bills, holder is entitled to recover its face value, II., 1692.
8. *Rule respecting lost or destroyed bank notes,* II., 1693.
contract of bank is to pay amount on surrender of note, II., 1693.
claim of owner, who can not comply with this condition, is equitable, II., 1693.
one who *loses whole* of a bank note, must bear the loss, II., 1693.
but if note *be destroyed,* he can recover amount of the bank on clear proof of such destruction, II., 1694.
rule when *part* of a bank note is lost, II., 1695.
view that action at law in such case is not maintainable, II., 1695.
and that bond of indemnity is requisite, II., 1695.
view that action at law is maintainable, II., 1695.
view approved that action at law is maintainable on half note, II., 1695.
that payment on such action is good, II., 1695.
and that holder of other half takes it subject to defence in first action, II., 1695.
mutilated notes enforceable, II., 1695.
bank can not escape responsibility by publishing notice that it will not be responsible for *severed* notes, II., 1695, note I, 1696.

BANK BILLS OR BANK NOTES — *continued.*
equity will entertain suit on half note, II., 1696.
half notes sued on must be identified, II., 1697.
facts necessary to support case must be proved, II., 1697.

BANKER'S LIEN. *See* CERTIFICATES OF STOCK.
bank receiving customers' bills for collection are holders for advances on faith thereof, 183*a*.
balances upon account are consideration for bills and notes deposited as security with banker, 183*a*.
illustrations, 183*a*.
bank advancing money to customer has a lien on his securities in its hands, 334*a*, 337.
but particular trust or agreement may affect it, 334*a*.
under what circumstances such stock lien exists, II., 1708*c*, 1708*d*.
has no common-law lien on its own stock, held by debtor, for his debt, II., 1708*d*.

BANKRUPT.
as to indorsement by, 182, 260.
property of, goes to assignee, 260.
can not sue on his choses in action, or transfer them, 260.
maker of note to, can not deny his right to transfer, 260.
if he has transferred bill or note before bankruptcy, he or his assignee may be compelled to indorse afterward, 260.
incapacities of bankrupt, 260.
as to promise to pay, after discharge, 182.
binds the promisor, and is on sufficient consideration, 182.
as to note given after discharge, 260.
notice to, II., 1002.

BANKRUPTCY. *See* EXCUSES.
no excuse for non-presentment and notice, II., 1171, 1172.

BEARER. *See* PAYEE.
bill or note may be payable to, 99.
check may be payable to, 99.
bonds and coupons may be payable to, 99.
certificates of stock often inure to benefit of, II., 1708.
instrument payable to bearer A., same as payable to A. simply, 99.
A., or bearer or holder, same as bearer, 99.
indorsement in blank makes instrument payable to, 693.
with legal title may sue, II., 1191.
burden of proof when suit brought by, 812, 814*a*.
negotiable instruments payable to, transferable by delivery, 729 *et seq.*

BILL BROKER. *See* BROKER.

BILLS OF CREDIT.
provision of Constitution of United States that no State shall emit bills of credit, II., 1715.
applies to States only, II., 1715, 1724.
emit is appropriate term, II., 1715.
bill of credit is negotiable paper designed to pass as currency and circulate as money, II., 1716.
Chief-Justice Marshall's definition of, II., 1717.
Justice Johnson's dissenting views, II., 1718.
bearing interest makes instrument none the less a bill of credit, II., 1718.
not necessary for bill of credit to be a *legal tender*, II., 1719.
comment on views of Mr. Madison, and of Hon. R. M. T. Hunter, Treasurer of Virginia, II., 1720.
the name is immaterial, II., 1721.

BILLS OF CREDIT — *continued.*
being bottomed on a fund does not make instrument any less a bill of credit, II., 1723.
States of Union only prohibited from emitting bills of credit, II., 1715, 1724.
State may charter corporation to issue, and take all the stock, II., 1725.
and the issues of the corporation are not deemed bills of credit, II., 1725.
bonds and coupons of States not bills of credit, II., 1726.
although receivable for dues, 449. II., 1726.

BILLS OF EXCHANGE.
1. *Origin, history, and use of,* 1, 2, 3, 4.
rules of common law that choses in action were not assignable, first relaxed as to, 1.
probably first negotiable instruments, 2.
origin and history of, 3, 4.
term derived from French, 4.
used to perfect contract of exchange, or bargain, 4.
how employed to assign funds, 4.
2. *Foreign and inland bills,* 6.
are foreign or inland, 6.
are foreign when drawn in one State or country, and made payable in another, 6.
inland when drawn and payable in same State or country, 6.
derive negotiability from custom of merchants, 6.
foreign bills *must* be protested to charge drawer, 7.
inland need not be, 7.
come within rule that contracts are governed by law of place where made, 7.
England and Ireland are foreign as to bills, 8.
what bills deemed foreign in England, 8.
several States of the Union are likewise foreign, 9, 10.
rules of decision of Federal courts, 10.
date of bill may show whether it is foreign or inland, 11.
but to do so must show State or country where drawn, 11.
courts do not take notice of location of places, such as Dublin, Philadelphia, New Orleans, 11.
which must be shown to be in foreign States, 11.
whether bill dated in foreign State, where not drawn, is foreign bill, 13.
innocent third parties may regard it as its face purports, 12.
query, as to parties having notice, 13, 14.
bill inland on face does not become foreign by being drawn and delivered abroad, 13.
bill purporting to be, is presumed to have been drawn abroad, 13.
but it may be shown that bill purporting to be foreign is really inland, and void for want of stamp, 14.
3. *Effect of bill of exchange,* 15.
whether negotiable bill for whole of fund in drawee's hands is assignment thereof, 16*a*, 17.
is assignment as between drawer and payee, 17.
whether without acceptance bill for whole fund is an assignment as between payee and drawer, 18, 19, 20.
doctrine that without acceptance bill is not an assignment, 18, 19, 20.
accepted bill operates as an assignment, 18.
after acceptance, no subsequent bill, transfer of, or process against fund, will affect it, 18.
query, 19.
holder can not sue drawee without acceptance in his own name, 19.
whether holder may use drawer's name to sue drawee, 19.

BILLS OF EXCHANGE — *continued.*
whether, after presentment to drawee, subsequent assignment or process will take priority, 19, 20.
bill may be evidence of assignment, 20.
view of author that bill for whole fund operates as equitable assignment, 20.
order on drawee for whole of a fund is an assignment thereof, 21.
such order not defeated by subsequent assignment or process, 21.
whether bill for part of fund is assignment, 22, 23, 23*a*.
whether order for part of fund is assignment, 22, 23, 23*a*.
decisions in New York as to order for part of fund, 23*a*.
4. *Definition and essential requisites of*, 27.
who are the parties to bills, 27.
similarity between bills and notes, 29.
bill must be open — that is, unsealed, 31.
whether seal to bill is surplusage, 31.
whether draft of corporation under seal is a bill, 31.
statutes in some States put sealed instruments on same footing as those unsealed, 33.
5. *Direction or order to pay must be certain*, 35.
mere request to pay, not good bill, 35.
"please pay" is a mere civil order, 35.
what phrases are requests, and what orders to pay, 35.
the fact of payment must be certain, 41.
conditions which destroy negotiability, 41 to 52.
providing for extension of time of payment, non-negotiable, 41.
in England order payable at certain day, "or when realized," not deemed a bill, 42.
in U. S. instrument deemed negotiable if time must certainly come, 43, 44, 45.
various and conflicting authorities, 43 to 45*a*.
in Massachusetts time of payment must be definite, or be made definite at holder's election, to make instrument negotiable, 45*a*.
if payable when A. comes of age or dies, is negotiable, 46.
is negotiable if payable at certain time after notice, 47.
so if payable when required, 47.
payment out of particular fund destroys negotiability, 50.
phrases which make payment out of particular fund, 50.
"on account of brick-work on certain building," 50.
"out of any money in drawee's hands," 50.
"this being intended to stand as offset," etc., 50.
phrase "out of rents, 50.
"out of growing substance," 50.
"out of a certain claim or certain proceeds," 50.
other phrases, 46, 47, 48.
if fund be merely indicated as source of reimbursement, negotiability not affected, 51.
instances of this kind, 51.
if phrase impairs certainty, it destroys negotiability, 52.
6. *Amount to be paid must be certain*, 53.
not negotiable if added to sum certain:
"all other sums which may be due," 53.
"whatever sum you may collect, 53.
"proceeds of certain shipment," 53.
"demands of sick club," 53.
"deducting all advances and expenses," 53.
"such additional premium as may be due on policy," 53.
if sum ascertainable from face of bill, it is certain, 53.
7. *Effect of addition "with current exchange,"* 54, 54*a*.
when these words may be regarded as surplusage, 54.
better opinion that such words do not destroy negotiability, 54, 54*a*.

BILLS OF EXCHANGE — *continued.*
8. *The medium of payment must be money,* 55.
not negotiable if payable in:
"cash or specific articles," 55.
"merchantable whiskey at trade price," 55.
"ginned cotton at 8 cents per pound," 55.
"work," 55.
"good East India bonds," 55.
"foreign bills," 55.
"notes of United States, or either of the Virginia banks," 55.
"Bank of England notes," 56.
"current bank bills or notes," 56.
"office notes of a bank," 56.
"current money," or "good current money," unexceptionable phrases, 56.
whether negotiable if payable in currency, 56.
better doctrine is against negotiability in such cases, 56.
doctrine not affected by legal tender act, 57.
money may be that of any country, 58.
decisions where payment was *to be "in Canada money,"* and in "Canada currency," 58.
contract must be only for payment of money, 59, 60.
reservation of title to chattels in note, effect of, 60.
9. *Effect of power on instrument to confess judgment,* 61.
stipulation to pay attorney's fees, 62.
waivers of benefit of appraisement and exemption laws, 61.
conflicting decisions, 61, 62.
views of author that such clauses do not destroy negotiability, 62*a*.

BILLS OF LADING.
1. *Definition and nature of,* II., 1727.
generally classed amongst negotiable instruments, II., 1727.
are not strictly negotiable, though *assignable* and possessed of certain capacities of negotiation, II., 1727.
are deemed *quasi*-negotiable, II., 1727.
bill of lading is carrier's receipt for goods, making him responsible as their custodian, and an express contract for their transportation and delivery, II., 1728.
is at once receipt for goods and contract for transportation, II., 1728.
it is *prima facie* evidence of quantity and quality of goods, II., 1729.
extends only to external condition of goods, 1729.
clear proof requisite to show goods were not received, II., 1729. See also, II., 1733, 1733*a*.
as a *receipt,* how far is it open to explanation or contradiction, II., 1729*a*.
as a *contract* can not be contradicted by parol evidence, II., 1729*a*.
as against master of ship, conclusive evidence in favor of consignee advancing money, II., 1729*a*.
not conclusive as to receipt of goods against owner of ship, II., 1729*a*.
how idea of negotiability of bills of lading arose, II., 1730.
when consignor has right to stop goods *in transitu* on hearing of vendee's insolvency, II., 1730.
if bill of lading has been assigned by consignee to a *bona fide* third party, vendor's right of stoppage is defeated, II., 1730.
but a sale of goods not yet received by vendee, without a transfer of bill of lading, does not divest the right of stoppage, II., 1730*a*.
stoppage *in transitu* is an equitable remedy for protection of the vendor, II., 1730*a*.
but yields to the superior equity of a *bona fide* purchaser of the bill of lading, II., 1730*a*.

BILLS OF LADING — *continued.*
bill of lading, when indorsed, passes property in same manner as a direct delivery of the goods, II., 1731.
it is a symbolic and constructive delivery, II., 1731.
when delivery of bill without indorsement sufficient to pass title, 1731.
whether *functus officii* as soon as the goods are landed and warehoused in the holder's name, II., 1731*a*.
any common carrier, whether by land or water, may issue bills of lading, II., 1732.
paper signed by consignor only, is not a bill of lading, II., 1732.
extent of carrier's obligation, II., 1732.
he is not bound to specify the freight, II., 1732.
master of ship subscribes bill of lading as agent of the owners, II., 1733.
he has no authority to do so unless the goods are actually on board, II., 1733.
is deemed agent with limited authority, II., 1733.
parties dealing with carrier chargeable with notice of the limitation, II., 1733.
master or shipping agent bound if he issues bill without receiving goods, II., 1733.
conflicting authorities on question of carriers' obligation when agent issues bill without receiving goods, II., 1733*a*.
2. *Bills of lading accompanying bills of exchange drawn on shipments*, II., 1734.
effect of bill of lading sent to consignee with bill of exchange drawn for purchase money of goods, II., 1734.
in such case, consignee can not retain bill of lading without honoring bill of exchange, II., 1734.
when payee of bill of exchange drawn on vendee is holder of bill of lading, he may require payment of bill of exchange before surrendering bill of lading, II., 1734*a*.
if goods be deliverable by bill of lading to consignee, holder is chargeable with notice of his rights, II., 1734*a*.
if allowable to order of consignor, consignee is chargeable with notice, II., 1734*a*.
what rights of parties may be is open to inquiry, II., 1734*a*.
if bill of lading be indorsed to agent for collection of bill of exchange drawn on vendee with instructions to hold bill of lading until bill of exchange is paid, payment must be made before title passes, II., 1734*b*.
acceptance of bill of exchange in such case will not entitle vendee to goods, II., 1734*b*.
if carrier in such case deliver goods it is unauthorized, and consignor may recover them., II., 1734*b*.
otherwise, if there be agreement that goods shall be delivered on acceptance of bill of lading, II., 1734*b*.
agent for collection may, without special instructions, deliver bill of lading upon acceptance of bill of exchange, II., 1734*b*, 1734*c*.
indorsee of bill of lading attached to draft takes it subject to agreement between consignor and consignee, II., 1734*c*.
in absence of agreement, when time draft accompanies bill of lading, it is presumed that acceptance entitles consignee to bill of lading, II., 1734*c*.
holder of bill of lading can not withhold its delivery unless shipper could, II., 1734*c*.
generally holder of bill of lading with draft attached can not require acceptance of draft without delivering bill of lading, II., 1734*c*.
and if he protests draft, it is without cause, II., 1734*c*.
party discounting bill of exchange on faith of indorsement of bill of lading acquires lien on goods, II., 1734*c*.

BILLS OF LADING — *continued.*
party discounting bill of exchange need not inquire into genuineness of bill of lading in order to hold liable drawer of letter of credit, II., 1734*d*.
3. *Form and contents of bills of lading*, II., 1735.
usually issued in sets of three; one for consignor, one for consignee, and one for the carrier, II., 1735.
the carrier's bill of lading (or "ship's bill") is not evidence respecting the agreement of the parties, II., 1735.
usually bill of lading mentions *consignee* to whom the goods are to be delivered, II., 1736.
sometimes made out for delivery to the *consignor* or his assigns or in blank, II., 1736.
effect in each case, II., 1736.
use of negotiable words, II., 1736.
bill of lading transferable by delivery, whether such words be used or not, II., 1736.
if consignee advance money on bill of lading, he is owner to extent of reimbursement, II., 1736.
if the several sets of a bill of lading are indorsed to different parties, the property passes by the bill first indorsed, II., 1737.
bill of lading should contain the quantity and marks of merchandise, names of shipper, consignee, and master of ship, places of departure and discharge, and the price of the freight, II., 1738.
limitations usually inserted in the contract public enemies, fire, and other dangers and accidents of seas, rivers, and nagivation, are acts of God, II., 1738.
payment of demurrage sometimes stipulated, II., 1738.
effect of stipulation in bill of lading that goods immediately upon delivery by carrier shall be at shipper's risk, II., 1739.
if a particular vessel be designated in bill of lading, carrier can not send goods by another without being responsible for whole risk of loss or damage, II., 1740.
carrier can not exclude liability for negligence, II., 1740*a*.
liability of railroad corporation for damage by fire or explosion, occasioned by sparks from its own locomotive, II., 1740*a*.
where the goods are deliverable to order, carrier should require the production of the order, II., 1740*a*.
in case of losses by perils of sea, what is incumbent on carrier to show, II., 1741.
where loss from "rust, leakage, or shrinkage" is excepted, shipper must show negligence on part of carrier, II., 1741.
carrier is always liable for negligence in case of loss, II., 1741.
exclusion of liability for theft does not apply to theft by purser of ship, II., 1741.
recital that goods were "received in good order and condition" is merely presumptive evidence that they were free from internal injuries, II., 1742.
if the admission be limited to the apparent condition of the goods, a latent defect may be shown by the carrier, II., 1742.
rule where delay of vessel is caused by the forcible detention of the government, II., 1742.
damage to goods in possession of carrier presumed *prima facie* to have been by his fault, 1742*a*.
burden of proof upon carrier to show he is not responsible, 1742*a*.
4. *Who may transfer bills of lading*, II., 1743.
strictly speaking, only the consignee, when bill is made out in his name, can pass legal title to the goods by indorsement of bill, II., 1743.
but if shipment is made on account of, and at the risk of consignor as owner of goods, he, by assignment of bill of lading or by separate instrument, may pass the legal title to the same, II., 1743.

BILLS OF LADING — *continued.*
bill of lading must be delivered in order to pass the goods, II., 1743.
putting it in the post-office addressed to the indorsee or to another for him is a valid delivery, II., 1743.
indorsement for value presumed, II., 1743.
no difference between bill of lading indorsed in blank, and one indorsed to a particular person, II., 1744.
indorsement of bill of lading with conditions is of same effect as like indorsement of bills of exchange and promissory notes, II., 1745.
instances of such restricted indorsement, II., 1745.
bill of lading as contract with carrier is chose in action, II., 1745*a*.
transferee might sue carrier for conversion of goods, II., 1745*a*.
but at common law could not sue carrier for breach of contract of transportation, II., 1745*a*.
statute in England allows suit by transferee on carrier's contract, II., 1745*a*.
in United States, assignee of chose in action can generally sue in his own name, II., 1745*a*.
between original vendor and vendee, the transmission or indorsement of bill of lading only serves as evidence of their relations, II., 1746.
the transfer is important only as between consignor and consignee on the one hand, and the transferee as the representative of the goods to a *bona fide* purchaser on the other, II., 1746.
how the common law on the subject of bills of lading has been modified by statute in England, II., 1747.
although statute makes bill of lading negotiable, all incidents applicable to negotiation of bills and notes do not arise, II., 1747*a*, 1750.
purchaser of lost or stolen bill of lading acquires no title, II., 1747*a*, 1750.
and is not like purchaser of bill or note, II., 1747*a*, 1750.
difference between consignee and vendee, II., 1748.
at common law, a mere consignee or factor differed from vendee in respect to his power to pass the property therein by indorsement of bill of lading, II., 1748.
now, in England, factor may give validity to *pledge* as well as to sale of goods, II., 1748.
consignor's right of stoppage will be defeated by assignment of bill to one from whom money has been borrowed on the faith of it, II., 1748.
rights of consignee and indorsee under the bills of lading act, II., 1748.
transfer of bill of lading to affect vendor's right of stoppage *in transitu*, must be to a *bona fide* third party, II., 1749.
bona fide of such person is not affected by notice that the goods have not been paid for, II., 1749.
it is otherwise where transferee knew at time of transfer that the consignee was insolvent, or was in anywise party to a fraud upon the consignor, II., 1749.
mere possession of bill of lading indorsed in blank, is not such a title to the goods as like possession of bill of exchange or negotiable note, II., 1750.
but if bill of lading be fraudulently obtained, transferee may acquire good title, II., 1750*a*.
if it be lost or stolen, the finder or thief can not confer a title on innocent third party, II., 1750*a*.
but title of *bona fide* third party is good against vendor who has *actually* transferred bill of lading to the vendee, though induced to do so by vendee's fraud, II., 1750*a*.
transfer obtained by fraud is not void, but voidable, II., 1750*a*.
indorsee of bill of lading may libel vessel in which goods are shipped for failure to deliver them, II., 1751.

BILLS OF LADING — *continued.*
though he be an agent or trustee for another, II., 1751.
consignee may libel both the carrier vessel and one by whose tortious collision with carrier vessel the goods were lost, II., 1751.

BLANK, NEGOTIABLE INSTRUMENTS EXECUTED IN. *See* ALTERATION.
parties may sign names as makers, acceptors, drawers, or indorsers, to blank papers, 142.
they then operate as letters of credit for indefinite sums, 142.
if so intrusted to third party's custody, whether for his accommodation or not, the purchaser may recover on them, although the custodian exceeds authority in filling them up, 142, 143.
authority implied by signature to blank, 143.
party will be bound, although holder pervert it to unintended use, 143.
or pervert his authority as to time or conditions prescribed, 143.
if date blank, holder may insert true date, 143.
and *bona fide* holder not affected if wrong date be inserted, 143.
marginal figures are not limits of authority to fill up blanks, 143.
blanks left for interest must be filled with legal rate, 143.
acceptance of bill blank as to drawer is valid in hands of creditor, 143*a*.
holder for value of such bill may insert his name, and so may his personal representative, 143*a*.
acceptor of such instrument is bound to *bona fide* holder, though name of drawer be wrongfully inserted, 143*a*.
blank may be filled as negotiable or non-negotiable instrument, 144.
if blank intended for bill, party will be bound to *bona fide* holder, although it be filled up as note, 144.
if payee be left blank, holder may insert his own name, 145.
such instruments intended to facilitate transfers without recourse, 145.
they pass by delivery, 145.
holder must actually fill blank before he can recover, 145.
his apparent privity with maker or drawer may be shown not to be real, 145.
unless filled up, paper can not be described in indictment as bill or note, 145.
holder, where there is indorser, but no payee, may insert indorser's name as payee, 146.
skeleton notes and bills may be filled up, 146.
holder knowing authority has been exceeded can not recover, 146.
if holder exceeded authority, he can acquire no benefit from it, 147.
whether knowledge that paper was blank in custodian's hands puts holder on inquiry as to extent of his authority, 147.
better doctrine is, it does not, 147.
views of Mansfield, Story, and Parsons, 147.
bond stands on different footing from negotiable instruments, 148.
but if bond be negotiable, rule applicable to bills and notes applies, 148.
action on paper indorsed in blank, II., 1191 to 1196.
bona fide holder of, II., 1758.

BONA FIDE HOLDER, RIGHTS OF. *See* COLLATERAL SECURITY; MORTGAGE NEGOTIABLE INSTRUMENTS EXECUTED IN BLANK; SALE.
1. *Nature and rights of bona fide holder,* 769 to 862.
general principle as to immediate parties to contract, 769.
who is a "purchaser" or "holder" of negotiable paper, 769*a*.
summary of recognized principles which establish the title to negotiable instruments, and the right to recover upon the same, 769*a*.
holder must have acquired the paper in good faith from his predecessor, 769*a*, 770, 775.

BONA FIDE HOLDER, RIGHTS OF — *continued.*
and when so acquired, no equitable or other defences pleaded by prior parties affect his title, 769*a*.
early English rule made *bona fides* test of holder's superior rights, 771.
option rule was adopted that if circumstances were such as to excite suspicions of prudent man, holder could acquire no superior title, 772.
this rule carped at, and "gross negligence" made the test, 773.
early rule as to *bona fides* restored in England, 774.
this rule generally prevails in the U. S., 775.
and is adopted by U. S. Supreme Court, 776. II., 1503.
gross negligence not now considered to affect holder's title, 774, 775, 776. II., 1503.
meaning and effect of "gross negligence" on part of holder, 772, 773, 774, 775, 776. II., 1503.
may be evidence of *mala fides*, 774, 776.
but is not the same thing, 774, 776.
history of the existing rule, 771, 776.
2. *Holder must have acquired instrument for a valuable consideration*, 777.
meaning of phrases "valuable consideration," "full value," "fair value," and "for value," 777.
when value shown, amount of consideration only important as bearing on question of notice, 777.
loanee not a purchaser for value, 777.
presumption of bad faith where the price paid is utterly trifling, 777*a*.
various cases, 778, 779, 779*a*.
line of demarcation between negligence and notice, 779.
how knowledge of solvency of parties may affect question of notice, 779*a*.
mere discount and credit do not constitute purchaser for value, 779*b*.
3. *Holder must have acquired paper in the usual course of business*, 780.
transfer in payment of pre-existing debt is good, 780.
query, where transferred as mere collateral security, 780. *See* COLLATERAL SECURITY, and 820 to 833.
receivers of courts do not acquire title to negotiable instruments in regular course of commercial dealing, 781.
nor does assignee of a bankrupt or insolvent person, 781.
nor trustee for benefit of creditors, 781.
in Iowa, it was held that indorsement of a note by sheriff, who had levied on it, was of same effect as if made by the holder, 781.
4. *Who can ostensibly transfer good title.*
drawer of bill payable to his order can, 781*a*.
whether acceptor of bill indorsed in blank may, 781*b*.
held that he can in England and South Carolina, 781*b*, 782.
held otherwise in New York, 781, 781*b*.
author's views changed, and now coincide with English decision, 781*b*, and notes.
party not payee of unindorsed bill or note can not, 781*a*.
5. *Holder must become possessed of instrument before maturity to have a better title than his transferrer*, 782.
unless he received it after maturity from a *bona fide* holder for value and without notice before maturity, 782. See also 726, 786, 803, 805.
when bills at sight and bills and notes on demand are deemed overdue, 783.
cancellation or destruction of such paper when paid, 783*a*.
it is always presumed that holder acquired instrument before maturity, 784.
presumption slight in its nature, 784.

BONA FIDE HOLDER, RIGHTS OF — *continued.*
held not to apply where note is payable in one day after date, 785.
the rule that if the paper is overdue at time of transfer, it is of itself notice to holder, does not apply to accommodation paper, if indorser's title unimpeachable, 786.
and indorsee may acquire good title after maturity of accommodation paper, 786. See also 726, and notes.
note payable by instalments is overdue when first instalment is unpaid after maturity, 787.
rule is different if mere instalment of interest is overdue, 787. II., 1506.
rule where there are several notes upon same consideration, 787.
whether note is current up to close of business hours on last day of grace, query, 787*a*.
what defences available against purchaser after maturity, 724*a*, 725 *et seq.*
6. *Holder must have acquired instrument without notice of its dishonor*, 788.
actual notice of dishonor of bill by non-acceptance before maturity, 788.
marks of dishonor apparent on face of bill or note are "death wounds," 788.
knowledge by holder of fraud, defect of title, illegality of consideration, or other fact impeaching instrument in transferrer's hands, vitiates same, 789.
constructive notice sufficient, 789*a*, 795*a*, 795*b*.
notice must exist at time paper is acquired, 789*a*.
subsequent notice will not affect holder, 789*a*.
if notice is communicated before paper is paid for, although contracted for, it charges purchaser, 789*a*.
and if he has paid part when he receives notice, is only protected *pro tanto*, 789*a*.
mere want of consideration between original parties does not prevent purchaser from becoming a *bona fide* holder, 790.
even when he is purchaser after maturity, 790. See also 726, 782, 803, 805.
nor where the consideration is an executory contract, without notice to him of its breach, 790.
purchaser of accommodation paper not *prima facie* a *bona fide* holder when he knows terms have been violated, 790.
in such case burden of proof is on defence to show diversion, without holder's knowledge, 790, 814.
in New York the rule is different, 791.
to constitute misappropriation or diversion of accommodation paper, there must be a fraudulent diversion from its original purpose, 792.
precise conformity with agreement in such case is not material, where no fraud, 792, 793.
rule, accommodation paper is applied to payment of pre-existing debt, 793*a*.
and where pledged as collateral security, 793*a*.
when note is designed to take up other paper of person giving accommodation, it is a misappropriation not to have it discounted, 794.
express notice of transferrer's defective title destroys purchaser's better position, 795.
7. *Implied, constructive, or circumstantial notice*, 795*a* to 800.
in what cases notice may be implied by appearance of paper, 795*a*.
rule as to paper payable to a trustee, 795*a*.
notice as to relation of parties, 795*a*.
effect of indorsement "for collection" as notice, 795*a*.
constructive notice from extrinsic circumstances, 795*b*.
may be as effectual as personal observation, 801.
views of Story as to circumstantial notice, 796.

BONA FIDE HOLDER, RIGHTS OF — *continued.*
circumstances must create presumption of fraud, 796.
mere statement of nature of consideration in a bill or note does not put the holder on inquiry, 797.
on taking note, knowing the maker to be dead, but not that it was for accommodation, may recover, 798.
father who bought note of daughter given her by her betrothed, held a *bona fide* holder, 798.
notice of particular fraud, etc., not necessary to affect purchaser, 799.
sufficient if he be told that there is "something wrong" about the note, 799.
so if he knows that maker denies liability, 799.
8. *Public records and legal proceedings not notice,* 800 to 801.
holder not bound to take notice of public records or litigation, 800.
doctrine of *lis pendens* does not apply to negotiable instruments, 800*a*.
but if transferred overdue pending suit are subject to equities, 800*a*.
if compelled by law to pay to another party, holder can not recover, 800*a*.
better opinion is that garnishment, attachment, and trustee process can not affect indorser before maturity without notice, 800*a*.
notice of fraud or other defence between prior parties, derived from circumstances, may be as effectual as personal observation or hearing of facts in question, 801.
notice to agent is notice to principal, 802.
qualification of this rule, 802.
notice to officers of corporation and members of a firm, 802.
9. *Purchaser, as a general rule, can not be placed on worse footing than his transferrer,* 802*a*.
holder can recover, whatever may be defences between prior parties, if his indorser is a *bona fide* holder for value, without notice of such defences, 803.
illustrations of doctrine in Louisiana and Indiana, 804.
exception where payee is purchaser of note invalid between him and maker, 805.
defences against which a *bona fide* holder is not protected, 806, 809.
(1) incapacity of party assuming to contract, 806, 806*a*.
(2) interdiction of contract by statute, 807.
(3) forgery or subsequent alteration of instrument, 809.
(4) when agent exceeds authority in certain cases, 809.
(5) when party signed under duress, 809.
holder stands to his transferrer on same footing as payee to maker, 810.
10. *Burden of proof on party impeaching consideration,* 810.
negotiable instrument imports consideration, 810.
consideration open to inquiry between parties in privity, 810.
rule wholly different as to anterior parties, 811.
possession of instrument as to them *prima facie* proof of acquisition for full value, 812.
no difference in case of notes and bills to bearer, 812.
presumption of *bona fide* ownership for value does not arise unless instrument be payable to bearer or duly indorsed, 812.
what defendant can not deny, 813.
holder not affected by proof of want of consideration between original parties, 814.
nor by proof of failure of consideration, 814.
nor of misapplication of instrument, 814.
when bearer must show he was not payee, 814*a*.
when payee procures note by fraud, holder must prove full value paid, 815.
so if consideration illegal, 815.
so if loss of instrument be shown, 815.

BONA FIDE HOLDER, RIGHTS OF — *continued.*
what circumstances may shift burden of proof, 815*a*.
no fixed and invariable rule practicable, 815*a*.
fraud must be committed upon maker to shift burden of proof, 818.
defendant must prove actual notice to holder of facts impeaching instrument, when holder shows he gave value, 819.
11. *Holder under various circumstances*, 837 to 862.
delivery of complete instrument is necessary to consummate its validity, 837.
but when stolen and put in circulation, whether payable to thief or bearer, a *bona fide* holder is entitled to recover, 837. II., 1582.
maker must have done some act which ought to seal his mouth, 838.
when instrument is perfected and laid away in desk or safe of maker, it is at his risk, 839.
conflicting decisions, 839, 840.
when incomplete instrument, which is signed, is stolen, maker is not bound unless guilty of negligence, 841, 842.
English decision as to stolen blank acceptance, 842*a*.
maker bound when blank instrument is intrusted to another and filled up, and a *bona fide* holder acquires it, 843, 844.
English decision as to filling blank, 844.
if note or bill is written over signature of party on blank paper without authority, it is invalid, unless agency or trust was reposed, 845.
instrument has no validity if procured by imposing on infirm or illiterate person, there being no negligence in signing party, 847.
otherwise, if executed by mistake or misrepresentation under circumstances which imply negligence, 850.
what amounts to negligence, 849*a*, 850, 851, 851*a*, 852.
conflicting decisions, 851, 851*a*, 852.
rule as to note, whether perfect or in blank, which has been negotiated by custodian thereof contrary to instructions, 854.
authorities at variance on this subject, 854, 855, 856.
if instrument be intrusted to payee, negotiation by him is binding, though condition be violated, 855.
diversion by agent from purpose for which delivered, 855*a*.
distinction between perversion of negotiable instruments and those under seal, 856.
duress between immediate parties annuls instrument, 857, 858.
must be such as to influence man of ordinary constancy to affect *bona fide* holder, 857.
when holder is protected by estoppel *in pais*, 859.
estoppel is whereby party is concluded by his own act from saying the truth, 859.
instances where the rule is held not to apply, 859, 860.
estoppel exacts good faith, and if holder commits fraud, he can not claim benefit of estoppel, 861.
certificates of validity, 862.
bona fide holder of checks, II., 1582, 1583.
altered bills and notes, II., 1405.
bank notes, II., 1680.
lost and destroyed bills and notes, II., 1461.
coupon bonds, II., 1502, 1550.

BONDS. *See* CORPORATIONS; COUPON BONDS; MUNICIPAL CORPORATIONS; ESCROW.
not negotiable at common law, 31, 32.
are by statute in some States, 33.
registered, II., 1501*b*.

BROKER.
transferring bill or note without disclosing agency is principal, 740*a*.
may expressly warrant genuineness of instrument, 740*a*.
may agree not to be liable for genuineness of instrument, 740*a*.
selling bill or note in his own name is bound as principal whether he discloses principal or not, 740*a*.
contract in his own name in writing binds him, and parol evidence is inadmissible to discharge him, 740*a*.
exception when his name is by adoption used to bind another, 740*a*.
evidence generally admissible to charge undisclosed principal, 740*a*.
but inadmissible to discharge agent contracting in his own name, 740*a*.

BURDEN OF PROOF. *See* EVIDENCE; BONA FIDE HOLDER; PARTNERSHIP.
as to partner's liability, 368, 369, 370.
mere possession of negotiable instrument under ostensible title sufficient to recovery, 812.
proof of want of consideration, or misapplication of paper, does not shift burden on plaintiff, 814.
when bearer must show he was not original payee, 814*a*.
what circumstances shift burden on plaintiff, 815.
what circumstances restore plaintiff's *prima facie* case, 819.
plaintiff not bound to prove negative, 819.
as to notice, II., 1047 to 1058.
signature, II., 1218.
payment, II., 1227 to 1229.
alteration, II., 1417 to 1421.
is upon defendant if he allege failure of consideration, 164.

CALENDAR MONTH. *See* MONTH.

CANCELLATION. *See* ACCEPTANCE.
effect of, 549.
when instrument regarded as cancelled and incapable of reissue, 549.
of instrument when paid, necessity of, 783*a*.

CASHIER. *See* CORPORATIONS.
authority of cashier of bank, 392.
effect of signature, "A. B., cashier," 417.
when payee is "A. B., cashier," II., 1188.

CAPACITY. *See* INFANTS; LUNATICS; ALIENS; BANKRUPTS; MARRIED WOMEN; FIDUCIARIES; PERSONS UNDER GUARDIANSHIP.
maker warrants payee's capacity to indorse, 93, 136, 139, 227, 242.
acceptor warrants payee's capacity to indorse, 536.
drawer's capacity to draw, 585.

CAUSE OF ACTION. *See* ACTION.
is indivisible, II., 1186*a*.
what constitutes entire demand, II., 1186*a*.

CERTAINTIES OF NOTES OR BILLS.
of engagement to pay, 35, 36.
of fact of payment, 41.
amount to be paid, 53.
medium of payment, 56.

CERTIFICATE OF PROTEST. *See* PROTEST.
lost certificate of deposit payable to order, unindorsed, II., 1481, note.

CERTIFICATES OF DEPOSIT.
lost certificate of deposit payable to order, unindorsed, II., 1481, note.
origin and nature of certificates of deposit, II., 1698.
is a promissory note for the payment of amount which it certifies to be deposited in bank, II., 1698.

CERTIFICATES OF DEPOSIT — *continued.*
very similar to goldsmiths' or bankers' cash notes, II., 1698*a*.
Mr. Chitty's description of them, II., 1698*a*.
usual for depositor to take certificate of deposit if he wishes his fund to run on interest, II., 1698*a*.
represents money to be held for depositor, II., 1698*a*.
what Morse says as to power of banks to issue certificates of deposit, II., 1699.
the criterion in such case is its authority to issue promissory notes or drafts payable a certain time after date, II., 1699.
effect of signature by cashier in his individual capacity, II., 1699.
bank which pays amount of certificate to a *bona fide* holder on a forged indorsement of depositor's name can not recover amount so paid from depositor, II., 1700.
when certificate is signed by bank president in his own name, depositor may show that the bank itself is bound, II., 1700.
transfer of certificate of deposit for a debt is presumably only conditional payment, II., 1701.
if payment is refused, creditor may resort to the original consideration, II., 1701.
but, query, when he makes use of it for his own purposes, not demanding prompt payment, II., 1701.
transfers of certificates of deposit are governed by the rules which obtain in other promissory notes, II., 1702.
if payable to bearer, may be transferred by delivery; if to order, must be indorsed, II., 1702.
liability of indorser same as in other promissory notes, II., 1702.
if transferred when overdue, transferee takes it subject to equitable defences, II., 1702, 1702*a*.
when regarded as overdue, II., 1702*a*.
certificates of deposit are negotiable if expressed in negotiable words, II., 1703.
certificate which contains no word of promise to pay amount is only a receipt, II., 1704.
and can not be basis of action against bank, nor a transferable security, II., 1704.
the word "certify" is of no weight as purporting a contract, II., 1704.
where certificate is payable to "A. B. or order," or to bearer, there is no doubt of its negotiability, II., 1705.
to be negotiable, it must be certain in respect to parties and to time and mode of payment, II., 1706.
whether negotiable in States where there are certain statutory acts of negotiability, II., 1706*a*.
causes which deprive bills and notes of negotiability affect it in a like manner, II., 1706.
for example, if payable "in currency" or "U. S. six per cent. interest-bearing bonds," II., 1706.
when statute of limitations runs against, II., 1707.
true principles applicable, II., 1707*a*.

CERIFICATES OF RECEIVERS.
not regarded as negotiable, 50*a*.

CERTIFICATES OF STOCK.
1. *Definition and nature of*, II., 1708.
are not negotiable, II., 1708.
are termed "quasi" negotiable, II., 1708.
are assignable, II., 1708.
are not debts, money, nor securities for money, II., 1708*a*.
are incorporeal personal property, II., 1708*a*.
are muniments of title, II., 1708*a*.

CERTIFICATES OF STOCK — *continued.*
are choses in action, II., 1708*a*.
stockholders' interest subject to execution and attachment, II., 1708*a*.
usual method of levy, II., 1708*a*.
2. *Beneficial interest generally passes by assignment and delivery*, II., 1708*b*.
between parties equitable interest transferable whatever be rights of others, II., 1708*b*.
statutory restrictions not generally applicable to immediate parties to transfer, II., 1708*b*.
3. *When corporate charter gives corporation lien on stock for debt of holder, assignment can not defeat it*, II., 1708*c*, 1708*d*.
corporation has no lien on stock for holder's debt at common law, II., 1708*d*.
whether corporation may create such lien by by-laws, II., 1708*d*.
policy of law opposed to secret liens, II., 1708*d*.
when lien enforceable against parties with notice, II., 1708*d*.
notice of lien on face of certificate is effectual, II., 1708*d*.
4. *Assignment of, defeats subsequent attachment or execution*, II., 1708*e*.
assignment of certificate defeats subsequent assignment, II., 1708*f*.
usual method of transfer of, II., 1708*g*.
transfers by agents, under blank powers of attorney, II., 1708*g*.
holder trusting agent with blank powers of attorney to transfer, confers apparent ownership of, II., 1708*g*.
such agent may pass good title to *bona fide* holder without notice, although guilty of fraud, II., 1708*g*.
this doctrine rests on principles of estoppel, II., 1708*g*.
if certificate with blank assignment and power of attorney be lost or stolen, purchaser can not acquire title, II., 1708*g*.
lis pendens does not apply to, II., 1708*g*.
sealed powers of attorney in blank not discussed, II., 1708*g*.
5. *Corporation should require surrender of, before making transfer on books*, II., 1709.
else, may be liable to *bona fide* purchaser of certificates, II., 1709.

CERTIFICATES OF VALIDITY.
effect of, 862.

CERTIFICATION OF CHECKS. *See* CHECKS.

CERTIFIED NOTES. *See* IRREGULAR INSTRUMENTS, and 132, 133.

CHARGES. *See* EXCHANGE; COSTS; PROTEST.
what recoverable, II., 1457.
notarial charges, when recoverable, II., 933.

CHECKS FOR BAGGAGE.
not negotiable, II., 1711.

CHECKS.
1. *Definition and description of a check*, II., 1566.
(1) it is a draft or order, II., 1567.
(2) on a bank or banker, II., 1568.
(3) purports to be drawn on a deposit, II., 1569.
(4) for the payment at all events of a certain sum of money, II., 1570.
(5) and is payable to a certain named person, or to him or order, or to him or bearer, or to bearer, II., 1571.
check payable to "the order of bills payable," or to a certain number, is payable to bearer, II., 1571.
bank has reasonable time to ascertain genuineness of indorser's signature if the check is payable to order, II., 1571.
(6) check is instantly payable on demand, II., 1572.
which feature is its essential characteristic, II., 1572.
query, whether a draft on a bank, payable at future day named *after date*, is check, II., 1573.

CHECKS — *continued.*
semble, as to draft payable so many days after sight or date, II., 1573.
draft or order on bank not immediately payable, has the qualities of bill of exchange, II., 1574.
check is not entitled to grace, II., 1575.
whether particular usage can control general, II., 1576.
that a draft payable at future day is not check, II., 1576.
2. *Formal parts and varieties of checks,* II., 1576.
check should be dated, II., 1577.
may be *ante* or *post* dated, II., 1578.
need not be expressed in any set form of words, II., 1579.
sufficient if bank be plainly directed to pay, II., 1579.
amount should be designated in words and figures, II., 1580.
check may be addressed to the bank or to the cashier, II., 1581.
must be delivered, II., 1582.
it is *issued* as soon as it is in hands of party who can demand payment, II., 1582.
if lost or stolen, finder or thief can not demand payment of drawer, II., 1582.
bank held harmless if it pay lost or stolen check payable to bearer, II., 1582.
what are "memorandum" checks, II., 1583.
examples of these, II., 1584.
ordinary check can be proved by parol to have been intended as a memorandum check, II., 1584, 1585.
crossed checks, and English statutes and decisions, II., 1585*a*.
when indorsed by party as "surety" considered in Louisiana not to be used in usual manner, II., 1585*b*.
3. *Presentment, protest, and notice,* II., 1586.
duty of bank or other collecting agent as to presentment, 332.
holder has no recourse upon drawer until check is presented and payment refused, II., 1586.
distinction as to presentment and notice between bills and checks, II., 1587.
drawer not discharged unless injured by delay in presentment or notice, II., 1587.
if due presentment and notice is not made, burden of proof is on plaintiff to prove no injury to drawer by such default, II., 1588.
if bank be solvent and check is refused, drawer is liable as in other cases of debt on protested note, II., 1589.
check should be presented within reasonable time, II., 1590.
if drawer and payee and *the bank* are in the same place, check received in course of one day should be presented the next, II., 1590.
stoppage of payment by bank during business hours is excuse, II., 1591.
if received at place distant from bank, it should be forwarded by mail the day after, II., 1592.
if check is presented on day it is drawn, and payment be tendered, holder's refusal to receive it is at his own risk, II., 1593.
between indorser and indorsee, the rule is same as between drawer and payee, II., 1594.
as between indorser or assignee, and the drawer, no transfer or transfers can prolong drawer's risk, II., 1595.
check intended for immediate payment, II., 1595.
what will excuse failure or delay in presenting check and giving notice of dishonor, II., 1596.
(1) when no funds of drawer are in bank, II., 1596.
(2) when drawer directs bank not to pay, II., 1596.
(3) when bank is restrained by order of court, II., 1596.
indorser in such case stands on different footing from drawer, II., 1596.

CHECKS — *continued.*
holder should notify drawer if he be prevented from presenting check by removal of bank or other cause, II., 1596.
failure to do so discharges drawer, II., 1596.
if bank remove, and check returned, debt remains due, II., 1596.
drawer of *over-check* is bound without demand or notice, II., 1597.
drawer may waive neglect or delay, II., 1598.
time for presentment not prolonged by check being put in agent's hands, II., 1598.
bank has right to actual presentment, II., 1599.
whether sending check by post with demand of payment is a good presentment, II., 1599.
presentment by post to drawee bank is proper, II., 1599*a*.
rule respecting protest of checks, II., 1600.
whether on same footing as bills, II., 1600.
4. *What is meant by "certification" of checks*, II., 1601.
effect of certification of checks, II., 1601*a*.
certification of acceptance, 1601*a*.
recent origin of custom to certify checks, II., 1602.
bank by certifying becomes principal and only debtor, II., 1601*a*, 1603.
acknowledges funds, II., 1603.
certified check is shorthand certificate of deposit, II., 1603.
bank certifying can not plead forgery of drawers' names, II., 1603.
drawer can not revoke after certification, II., 1603.
bank does not warrant terms of check by certification, II., 1603.
holder by taking certificate of bank discharges drawer, II., 1601*a*, 1604.
certified check circulates as cash by usage of merchants, II., 1605.
no particular form of certification is requisite, II., 1606.
ordinary mode of certifying is to write "good" across face of check, II., 1606.
whether promise to pay is equivalent to certification, II., 1606*a*.
when communicated to holder it is, II., 1606*a*.
if certificate state time of payment, it binds holder, II., 1606*b*.
officer of bank should not certify check unless there be funds to meet it, II., 1607.
officer or agent of bank can not certify his own check, II., 1607.
special authority required by officer to certify other than commercial, II., 1607.
certified without indorsement of payee in hands of third party, II., 1607*a*.
if holder be assignee for valid consideration entitled to recover money, II., 1607*a*.
bank protected in paying, II., 1607*a*.
certification made through mistake or fraudulent misrepresentation may be revoked, II., 1608.
unless in hands of holder without notice, II., 1608.
what officers of bank may certify checks, II., 1609.
president or board of directors may, II., 1609.
cashier and teller may, II., 1610.
assistant cashier can not, II., 1610*b*.
limitation on implied power of president or other officer to certify checks, II., 1611.
officer certifying his own check — certificate carries notice, II., 1611.
5. *Whose check should be paid by bank*, II., 1612.
bank should require signature to be identical with depositor, II., 1612.
in case of partnership, check should be signed in copartnership name, II., 1613.
in cases of joint depositors, II., 1613.
lawful for bank to show that deposit in name of one partner belongs to firm, II., 1614.

CHECKS — *continued.*
as to personal representatives and trustees, II., 1615.
deposits by corporations, II., 1616.
usage and custom of corporations may justify payment of checks though not signed by proper officers, II., 1616*a*.
6. *What checks should be paid by bank,* II., 1617.
holder can demand payment on presentment, II., 1617, 1617*a*.
checks should be paid in order of presentment, II., 1617*a*.
"first come first served," II., 1617*a*.
must pay in usual course of business, II., 1618*a*.
must pay to actual payee, II., 1618.
bank should not pay check after notice of loss or before it is due, II., 1618*a*.
query, whether it should pay after death of drawer, II., 1618*b*.
review of the question and the decisions, II., 1618*a*.
if not in funds, it should at once refuse payment, II., 1619.
how long bank may retain check, II., 1619.
custom of London, II., 1619.
holder is not bound to receive part payment, II., 1620.
bank not bound to pay in part unless holder surrenders check, II., 1620.
passing amount of check to holder's credit is payment, II., 1620.
when so credited, whether bank can return check on discovery of no fund to meet it? II., 1621.
per contra, if discovery of no funds or overdraft is made before drawee is debited and holder credited with amount? II., 1621.
7. *Payment by checks,* II., 1623.
taking check implies that it is regarded as payment only *when cashed,* II., 1623.
rule in England when bank or other agent of collection receives check as payment, II., 1624.
in the United States, agent acts at his peril in so doing, II., 1625.
bank as agent may receive its own certificate of deposit, II., 1625.
party authorized to receive "cash checks" can not receive "time checks," 1625.
certified checks taken for debts are not payment, II., 1626.
effect of certification is only to give additional credit and currency to check, II., 1627.
bank on which check is drawn can not plead as offset amount due holder, II., 1628.
8. *Over-checks,* II., 1629.
fraud to draw them, II., 1629.
if drawn with authority from bank, they are in the nature of a loan, II., 1630.
bank officer should not pay, II., 1630*a*.
9. *Cancelled, dishonored, and stale checks,* II., 1631.
are taken at holder's peril, II., 1632.
what are "marks" of dishonor, II., 1631.
when check is deemed "stale" depends upon circumstances, II., 1633, 1634.
excuse for want of presentment and notice, II., 1634*a*.
a declaration that check would not be paid by drawer before maturity would excuse want of presentment and notice, 1634*a*.
10. *Whether holder of uncertified check can sue bank for refusal to pay,* II., 1635.
review of conflicting authorities, II., 1636, 1636*a*, 1636*b*, 1637.
views of text, II., 1638, 1639.
general conclusions are — (1) holder may sue drawer and bank in one action, II., 1640.
(2) he may sue drawer on the dishonor of check, and the bank for money had and received, II., 1641.

CHECKS — *continued.*
depositor may recover nominal damages from bank for dishonoring his check, II., 1642.
and a trader substantial damages, II., 1642.
11. *How far check is an assignment of the fund in bank*, II., 1643.
generally deemed assignment *pro tanto*, II., 1643.
English rule, II., 1645.
general assignment for benefit of creditor does not defeat checkholder, II., 1643.
nor does appointment of receiver, II., 1643.
nor does garnishment or attachment of fund, II., 1644.
English doctrine, II., 1645.
12. *Checks as evidence*, II., 1646.
check imports debt from drawer to payee after payment is demanded and refused by bank, II., 1646.
semble as to indorsee, II., 1646.
the natural inference is that check is given in payment of debt from drawer to payee, II., 1646.
what check imports in hands of *bank*, II., 1647.
in hands of *drawer* it is a *receipt*, II., 1648.
custom of banks to *cancel* checks when paid, II., 1649.
when money is lent *by check*, statute of limitations runs from time the money *is paid*, II., 1650.
13. *Negotiability of checks*, II., 1651.
check payable "in current funds" held negotiable by the U. S. Supreme Court, 57.
check payable in "bank bills" or in "currency" is not negotiable paper, II., 1651.
check when *negotiable* is subject to same principles as obtain in bills of exchange as to rights of *bona fide* holder, II., 1652.
check payable to bearer may be transferred by indorsement, II., 1653.
effect of such indorsement, II., 1653.
14. *Forgery of checks*, II., 1654.
in what it differs from forgery of other negotiable paper, II., 1654.
bank is bound to know signature of the drawer, II., 1654*a*.
not bound to know other signatures, II., 1654*a*.
whether bank can recover back amount paid on forgery of drawer's name, II., 1655, 1655*a*.
views of Chitty and Parsons, II., 1655*a*.
doctrine approved that bank may recover where it acts promptly and holder can lose nothing, II., 1656.
general application of the doctrine in the United States, II., 1656.
certain exceptions to the rule where bank has certified or paid forged check, II., 1657.
15. *Alterations of checks after issue*, II., 1658.
"raised" checks, II., 1658.
generally bank can only credit drawer with original sum, II., 1658.
bank may credit drawer with entire amount of "raised" check when drawer by carelessness afforded opportunity for the fraud, II., 1659, 1660.
when it may recover back excess paid on altered check, II., 1661.
after certification bank may show alteration, II., 1661.
doctrine approved that it may recover back unless holder would be injured, II., 1662.
bank not bound to know signature of indorser, II., 1663.
holder of checks warrant genuineness of all prior indorsements, II., 1663.
if bank pays check on forged indorsement of payee's name, it can recover back, II., 1663.
semble as to special indorsee, II., 1663.

CHOSE IN ACTION. *See* ASSIGNMENT, AND EQUITABLE ASSIGNMENT.
meaning of, 1, 15.
not assignable at common law, 1.
first relaxation of rule as to non-assignability made as to bills of exchange, 1, 15.
rule gradually disappeared, 1, 15.
difference between ordinary chose in action and negotiable instrument, 1.
what operates a reduction into possession by husband, 257.
certificates of stock are, II., 1708*a*.

CHRISTMAS DAY. *See* HOLIDAY.

CIRCULAR NOTES.
description and use of, II., 1657.

CIRCUMSTANCES. *See* EXCUSES.
may amount to notice to purchaser of negotiable instrument, 789*a*, 795*a*, 795*b*, 796, 801, 815*a*.

CLEARING-HOUSES.
definition, object, origin, and growth of, 1712*a*.
scheme and mode of operation of, 1712*b*.
certificates of, defined, 1712*c*.
sometimes called "clearing-house due bills," 1712*c*.

CLERK.
whether notary's clerk may make presentment as ground of protest, 579 to 587.
effect of custom on question, 587.
whether presentment may be to clerk of drawee, 588, 600.
whether notice may be given to clerk, II., 1017.

COLLATERAL AGREEMENTS.
contemporaneous contract affecting bill or note is construed with it, 156.
thus if note bear interest, mortgage securing it, making interest payable annually, will control, 156.
so contract to pay additional sum in certain contingency will be binding, 156.
after bill or note executed, it is subject of contract, like other contracts, and choses in action, 157.
evidence admissible to show subsequent bargains, 157.
as for instance, to extend time of payment, or that payment be made by third persons, or rescinding prior contract for which paper was given, 157.
when subsequent agreement on valid consideration, is to do or receive something else instead of note, it discharges it, 158.
but if agreement be executory, it can only be enforced in another suit, 158.
instances, 158.
agreement to renew note is binding, 159.
but one renewal, unless otherwise specified, will be presumed to be intended, 159.
contemporaneous agreement to renew not binding unless written, 159.
subsequent oral agreement binding if on valid consideration, 159.
if agreement for renewal on separate paper, can not be noticed in declaration, 159.
in England held that, if there is valid subsequent agreement for renewal, defendant must show he applied for renewal, 159.
agreement between maker and payee, not on face of paper, will not affect *bona fide* holder for value without notice, 159.
payee indorsing estopped from showing restrictions on negotiability, 159.

COLLATERAL SECURITY. *See* MORTGAGE.
passes by transfer of paper it secures, 834.
when holder of bill and note transferred as collateral security for debt is *bona fide* holder for value without notice, 820, 834.
should be first determined whether holder has formal legal title, 821.
should be next ascertained whether or not he holds as agent of owner, or has agency coupled with interest, 822.
if he is agent only, defendant may plead any defence available against transferrer, 822.
if agent only, authority revocable at any time, 823.
should be ascertained if there has been change of legal title, 823.
indorsee is entitled to full protection as *bona fide* holder:
(1) when bill or note has been indorsed to him for debt then contracted, 824.
same rule as to transferee by delivery of paper payable to bearer, 824.
(2) so if debt not due, and there be agreement for delay, 825.
when agreement for delay presumed, 825.
no presumption of agreement for delay when collateral matures later than debt secured, 825*a*.
if title to, and property in paper transferred, pre-existing debt is good consideration, and holder protected, 826.
(3) when pre-existing debt is novated, or securities surrendered, holder protected, 827.
views of U. S. Supreme Court, 827.
State decisions, 827.
if present consideration at time of transfer, holder protected, 827.
views of Story, Byles, and Willis, JJ., 827, 828.
rights of holder accompany duty of holder, 828.
(4) rule when no novation of pre-existing debt, and no security surrendered, 829.
agreement for forbearance is good consideration, 825, 829*a*.
views of Redfield, C. J., 829*a*.
so is implied suspension of debt, 830.
note indorsed on account of pre-existing debt impliedly suspends it, 830.
when such implication does not arise, 831.
becoming a party to the instrument transferred as collateral for pre-existing debt alone protects transferee as *bona fide* holder, 831*a*.
the question so decided by United States Supreme Court, 831*b*.
New York decisions, 831*c*.
when instrument is transferred in absolute payment, 832.
if paper indorsed in payment of pre-existing debt, purchaser protected against equities, 832.
amount and mode of recovery, 832*a*.
holder of bill or note as collateral security can only recover to extent of his debt when there is defence to bill or note, 832*a*.
holder of collateral may generally file bill in chancery, or sell collateral after giving notice of sale, 833.
holder of bill or note as collateral must sue upon it, or file bill in chancery, 833.
maker entitled to return of collateral security when payment is demanded, 833.
demand insufficient without return, 833.
fact of, indorsed on note destroys negotiability, 60.

COLLECTING AGENTS. *See* AGENTS; BANKS.

COMITY OF NATIONS. *See* CONFLICT OF LAWS.

COMMERCE.
interdiction of, as excuse for non-presentment, protest, and notice. *See* EXCUSES, and II., 1063.

COMMISSIONERS OF COURTS.
indorsements by, 271*a*.

COMMON LAW.
interdicted assignment of choses in action, 1, 15.
whether promissory notes were negotiable by, 5.
presumptions as to, 891*a*, 892.

COMPOUNDING FELONY. *See* CONSIDERATION, WHAT IS ILLEGAL CONSIDERATION, 196.

COMPROMISE.
of doubtful claim good consideration, 196.
by part payment. *See* II., 1289.

COMPUTATION. *See* TIME; DAYS; GRACE; MONTH; STYLE; USANCE.

CONDITION.
what destroys negotiability, 39, 40, 52.
right to show delivery on, 68.

CONDITIONAL ACCEPTANCE. *See* ACCEPTANCE, and 508, 521.

CONDITIONAL AND ABSOLUTE PAYMENT.
1. *Presumption of payment from taking bill or note*, II., 1259.
debtor's note taken for precedent debt not presumed to discharge it, II., 1260.
but there may be express or implied contract of discharge, II., 1260.
query, whether debtor's note for *contemporaneous* debt discharges it, II., 1261.
whether taking bill or note of stranger for *precedent* debt indorsed or unindorsed discharges it, II., 1262.
party indorsing must have notice of dishonor, else it is payment, II., 1262.
stranger's note for *contemporaneous* debt *unindorsed* operates as discharge, II., 1264.
note of same description *indorsed* is only conditional payment, II., 1265.
new bill or note in renewal of another, which is retained, only suspends original debt, II., 1266.
effect of renewing note at bank, II., 1266.
whether delivery of old note creates presumption of payment, II., 1266*a*.
when debt would be lost, renewal not deemed payment, II., 1266*b*.
whether renewal of note in bank extinguishes prior note, II., 1266*c*.
presumptions of payment are always open to rebuttal, II., 1267.
how intention of parties affects question, II., 1267.
receipt of payment, or payment in full, not conclusive, II., 1267.
but query, II., 1267.
presumption of payment does not apply where creditor abandons previous security, II., 1267.
agreement to take bill or note in payment need not be expressed, II., 1268.
all the circumstances may be looked to, II., 1268.
misrepresentation of debtor as to solvency of parties to bill or note is fraud upon creditor, II., 1269.
it is sufficient defence to action on a debt to plead delivery of note or bill for amount payable to order or bearer, II., 1270.
if paper payable to agent without authority, it is not payment, II., 1270.

CONDITIONAL AND ABSOLUTE PAYMENT — *continued.*
if bill of third person, *taken by direction of debtor,* is dishonored, liability revives, II., 1271.
no notice of dishonor is necessary in such case, II., 1271.
other cases, II., 1271.
2. *Suspension of original debt by taking bill or note,* II., 1272.
debt is suspended until dishonor of bill or note, II., 1272.
upon dishonor for non-acceptance or non-payment debt revives, II., 1272.
and creditor may retain and collect it, or proceed on original cause of action, II., 1272.
if debtor fails to perform entire agreement, there is no suspension of debt, II., 1273.
it is better to have written agreement as to effect of taking bill or note, II., 1273.
remedy on sealed instrument not suspended by bill or note, II., 1274.
even though judgment be gotten on the bill or note, II., 1274.
taking bill or note for arrears of rent does not prevent distress for same, II., 1274.
taking forged bill or note does not discharge original, although surrendered up, II., 1274.
nor is indorser of original discharged if fixed by notice, II., 1274.
usurious security stands on same footing as forged, II., 1274.
3. *Rights and duties of holder of bill or note taken in conditional payment,* II., 1275.
in suit on original cause of action must produce or account for bill or note, II., 1275.
if note lost and negotiable, suit must be in equity, II., 1275.
if draft on third party given on conditional payment, creditor must present it duly, and give notice of dishonor, II., 1276.
default in either respect makes loss fall on creditor, II., 1276.
same rule when creditor takes paper by indorsement, II., 1276.
if bill or note given as collateral security, creditor may pursue his remedy on the collateral and on principal debt at same time, II., 1276.
whether creditor loses original right of action when in default as to presentment or notice, II., 1276.
conflict of authorities, II., 1277.
if transferrer indorse as collateral security merely, loss of creditor limited to damage occasioned by his negligence, II., 1277*a*.
when debtor transfers bill or note to creditor by delivery, he is not entitled to require strict presentment and notice, II., 1278.
he is bound, however, to use due diligence, II., 1278.
debtor in such cases must show laches of creditor, II., 1278.

CONDITIONAL INDORSEMENT. *See* INDORSEMENT, and 424.

CONFEDERATE STATES.
accorded beligerent rights, 49.
war between, and United States, gave rise to numerous peculiar cases, 49.
effect of bill or note payable "six months after peace is declared between C. S. and U. S.," 49.
similar cases, 49.
term "dollars" used in, during war, explainable by parol testimony, 87.
stamp act of U. S. held not applicable in, during war, 127.
during war citizens of, alien enemies to citizens of United States, 218, 219.
effect of war between, and U. S., as excuse for delay in presentment and notice, 218.

CONFLICT OF LAWS. *See* FEDERAL COURTS.
each State sovereign under Federal Constitution, 863.
each State foreign as to others, 863.
Federal courts enforce contracts between citizens of different States, 864.
general principles as to validity and interpretation of contracts, 865.
comity of nations leads to enforcement by one country of laws of another, which are not binding, *per se*, beyond its territory, 866.
but no nation should enforce laws of another violating its own, or against sound morals and public policy, 866.
place of contract regulates its validity, interpretation, and legal effect, 867.
note void where made, void everywhere, 867.
bill indorsed in France, but not passing property by French law, would have no greater effect in England, though sued on there, where such indorsement sufficed, 867.
bill drawn in Michigan, on drawee in Illinois — held, parol acceptance binding according to Illinois law, though not by Michigan law, 867.
note of married woman valid where executed, enforced where invalid, 867.
place of contract is place of delivery, and not of signature or date, 868.
limitations of doctrine, as to holder without notice, 869, 870.
nature, obligation, and terms of contract ascertained according to their meaning and effect at place of contract, 871, 872, 873.
law in force at time of contract controls it, 871.
defence or discharge impeaching validity, governed by law of place of contract, 874.
discharge of contract by law of place where it was not made will not be valid in any other country, 875.
under what circumstances law of parties' domicile determines nature of contract, 876, 877, 878.
place where contract is to be performed is real place in regard to which it was made, and will control, 879.
thus if note made in Massachusetts, payable in Virginia, it would not be negotiable unless payable at bank, although if payable in Massachusetts it would be negotiable, 879.
what law determines negotiability, 879.
law presumes paper payable where made, 880.
rule as to paper payable generally and negotiated in foreign country, 881.
remedy on contract controlled by law of the forum where suit is brought, 882.
this rule controls:
as to who may sue, 883.
the time within which suit may be brought, 884.
the form of action, 885.
the extent of the remedy, 886.
the competency of evidence, 887, 888.
the admissibility of set-off, 890.
exemption laws are part of remedy, 890.
but as to the *effect* of evidence, the law of place of contract controls, 888.
so law of place of contract fixes the relations of the parties, 888, 889.
courts take no judicial notice of foreign laws, 891.
foreign law, whether presumed same as local, 891.
presumption as to common law, 891*a*, 892.
presumption as to law merchant, 891*b*.
real estate, in respect to validity and form of conveyance, governed by law of its location, 893.

CONFLICT OF LAWS — *continued.*
whether mortgage in one State to secure loan in another is governed by law of place where property is located, or that where loan is to be paid, 894.
when married women may bind separate estate, and it consists of realty, law applicable to note given is that where realty situate, 894*a*.
law of place of execution controls liability of maker of note, 895.
same rule as to acceptor of bill, 896.
and letters of credit, 897.
liability of drawer of bill and of indorser of bill or note different from that of maker or acceptor, 895.
as to maker of note, 895.
as to acceptor of a bill, 896.
contract of drawer is to pay at place where bill is drawn, 898.
rate of interest that of place where bill drawn, 898.
indorser undertakes to pay at place of indorsement, 899.
even though note expressly payable elsewhere, 899, 900.
doctrine as to liability of drawer and indorser subject of criticism, 901.
whether transferrer is liable as indorser or as assignor determined by law of place of transfer, 902.
questions as to what law determines validity and effect of transfer, 903.
transfer in country where note is made not of same efficacy where suit is brought, 904.
suit can not be brought anywhere as between *transferrer* and *transferee* on instrument made in one country and transferred in another, if transfer is not valid by law of latter place, 905.
as between transferee and maker, law of place of contract prevails, 905.
each holder has same rights against maker or acceptor as original payee, 906.
if note is non-negotiable where made and negotiable where indorsed, right of action by indorsee against maker is controlled by law of forum, 907.
what constitutes due presentment is governed by law of place in which bill is drawn, or at which note is payable, 908.
protest should be at time, in manner, and by persons prescribed, where bill not accepted and note refused payment, 909.
notice distinguished in America from presentment and protest, 910.
in England, placed on same footing, 911.
latter view adopted in text, 912.
general principle as to revenue laws of different countries, 913.
if unstamped bill or note be absolutely void by law of place where made, it is void everywhere, 914.
contra, where it is only admissible in evidence, 914.
whether stamp be necessary to render contract valid, determined by law of place where made, 914, 915.
amount to which party entitled depends upon currency of place where, according to contract, the debt is payable, 916.
must be calculated by *real*, not *nominal*, par of exchange, 916.
different rule in some States, 916.
rate of interest determined by law where bill or note expressly or impliedly to be paid, 918.
if no place specified, interest computed by law of place where drawing, making, indorsement, or acceptance was, 918.
interest as much part of debt as principal, 919.
may be allowed as damages, though note payable "without interest," 919.
distinction between drawer of bill and indorser of bill or note 920.
rule as to interest applies to "damages," 921.

CONFLICT OF LAWS — *continued.*
what rate of interest surety bound for, 921.
election of law of place as to interest, 922.
1. where contract is valid in one place and invalid in another, 922.
2. where rate of interest greater than allowed at the place where contract made, but allowable at place of payment, 923.
3. if usurious at both places, law of place where made governs legal consequences of usury, 924.
when contract is a mere shift to cover usury, it is void everywhere 925.
when corporation may plead usury, 925.

CONSIDERATION OF NEGOTIABLE INSTRUMENTS. *See* RENEWAL; BILLS OF EXCHANGE; BONA FIDE HOLDER.
1. *What instruments import consideration,* 160.
meaning of consideration, 160.
the phrase "valuable consideration," 160.
by common law, promise without invalid, 160.
most ancient exception, instrument under seal, 160.
negotiable instruments *prima facie* import, 160.
and it is unnecessary to aver or prove consideration of them, 161.
if bill payable out of particular fund, it does not *per se* import consideration, 161.
nor if payable on condition, or in other thing than money, 161.
words "value received" import, 161.
if terms consistent with want of consideration, it does not import it, 161.
if order imply funds in drawee's hands, his acceptance is admission, 161.
at common law, action not sustainable on note as importing debt, 162.
and plaintiff must declare in assumpsit, and aver and prove consideration, 163.
note might be given in evidence, 162.
by statute of Anne, action of debt sustainable on note without alleging or proving consideration, 162.
statutes and decisions in United States, 163.
burden of proof, and preponderance of evidence, 164.
against indorsee, party prior to indorser must not only show want or failure of consideration between himself and his successor, but also between indorser and indorsee, 165.
plaintiff not obliged to prove consideration by proof of party antecedent to indorser, either, that paper was executed without consideration, 165.
or for accommodation, 165.
or was intended as a gift, 165.
or for an erroneous balance, 165.
subsequent failure of consideration stands on same footing, 165.
rule as to accommodation paper, 165.
fraud and illegality of original consideration shifts burden of proving *bona fide* ownership for value on plaintiff, 166.
defendant need not give plaintiff notice to prove consideration, 167.
obsolete rules on the subject, 167.
consideration of guaranties. *See* GUARANTY, and II., 1765 to 1767.
2. *By what laws consideration governed,* 168.
laws in force at time paper is executed govern it, 168.
laws of State or country where paper executed are applied to it, 169.
the comity of nations, as to. *See* CONFLICT OF LAWS.
principles applied to Confederate contracts, 170, 171, 172, 173.

CONSIDERATION OF NEGOTIABLE INSTRUMENTS — *continued.*
3. *Between what parties consideration open to inquiry,* 174.
between drawer and acceptor, 174.
drawer and payee, generally, 174.
maker and payee, 174.
indorser and immediate indorsee, 174.
but want or failure of consideration can not be shown in suit by indorsee against maker, 174.
nor indorsee against prior, but not immediate indorser, 174.
payee against acceptor, 174.
in the last class of cases, defendant to prevail must challenge
(a) the consideration which he received originally, and
(b) the consideration which plaintiff gave subsequently, 174.
who are immediate parties to paper not always disclosed on its face, 175.
instances where apparently remote are really immediate parties, 176.
between parties privy, it is good defence
that bill or note was lost or stolen, 177.
that it was executed under duress, 177.
or under fraudulent misrepresentation, 177.
or for fraudulent or illegal considerations, 177.
other instances, 177.
renewal subject to same defence as original, 177.
consideration of bills purchased for remission of money, 178.
four parties contemplated in such transaction, 178.
how such bills differ from others, 178.
4. *What are sufficient and legal considerations,* 179.
love and affection insufficient, 179.
note made as gift can not be enforced against donor or his estate, 180.
nor can indorsee enforce against indorser note indorsed as a gift, 180.
evidence as to what was gift, 180.
pecuniary circumstances not evidence of want of, 1180.
gift of negotiable instrument of third party is not negotiation in usual course of business, 181.
if donee transfer it for less than value, his indorsee can only recover from prior party having defence against donor, what he himself paid, 181.
but donee or his indorsee might recover whole amount against party without defence against donor, 181.
moral obligation insufficient, 182.
but sufficient if coupled with precedent duty, 182.
thus promise of adult to pay for necessaries furnished in infancy suffices, 182.
so promise to pay debt discharged by bankruptcy, 182.
or barred by limitation, 182.
or voluntary release, 183.
where contract *voidable*, bill or note to pay it is valid, 182.
generally otherwise, if it were void, 182.
if usury law repealed, note to pay debt with usurious interest is valid, 182.
so note to discharge contract void under statute of frauds, 182.
what promise of bankrupt does not revive liability, 182.
money paid, advances made, credit given, work and labor done, dismissal of pending suit, release of inchoate right of dower, and compromise of supposed cause of action, are sufficient considerations, 183.
so receiving bill or note for collection, 183*a*.
balance upon account with banker consideration for bills and notes deposited as security, 183*a*.
rule as to precedent debt, 184.
rule as to collateral security, 184.
debts of third persons, 185.

CONSIDERATION OF NEGOTIABLE INSTRUMENTS — *continued.*
goods furnished to a third party by one at the request of another, 185.
note by widow to husband's creditor without consideration, 186.
otherwise if estate solvent and widow entitled to administration, 185.
or if she has elected to take under husband's will instead of under the statute of distributions, 186.
Massachusetts, Maryland, and Alabama cases, 186.
forbearing to sue, or guaranty or assumption of debt, valid consideration, 185.
cross-notes and acceptances sufficient considerations for each other, 187.
so agreement between accommodation indorsers to share losses, 187.
other and miscellaneous instances, 187.
marriage and promise to marry a good legal consideration, 187*a*.
professional and other services sufficient, 188.
service to procure enactment of law illegitimate, 188.
rule as to service to procure pardon, 188.
subscription to fund to induce others to subscribe constitutes binding obligation if founded upon sufficient consideration, 188*a*.
so held in Indiana and New York, 188*a*.
5. *Accommodation bills and notes,* 189.
between accommodation and accommodated parties without consideration, 189.
but as to remote parties, accommodation party must impeach their title, 189.
payee may recover against accommodation maker or acceptor, although he knew it to be accommodation paper when he took it, 190.
amount of recovery by accommodation indorser against maker, 190.
if member of firm obtains accommodation note payable to himself, and indorses it to third party, who reindorses it to firm, it can not recover against maker, 190.
until negotiated, any party to accommodation paper may withdraw, 191.
accommodation indorser for payee of note made for his accommodation is subject to obligations and rights of ordinary indorser, 192.
if obliged to take up such note, accommodation maker can not set up fraud, 192.
6. *Fraudulent consideration,* 193.
"fraud cuts down everything," 193.
inadequacy of consideration an element of evidence of fraud, 193.
when consideration must be returned, 193.
fraud on third parties vitiates consideration, 194.
fraud in composition with creditors where one stipulates for all of his debt, 194.
whether maker of note may plead fraud upon others, 194.
7. *What are illegal considerations,* 195.
those which violate rules of religion, morals, or public decency, 195.
public policy, 195.
numerous instances, 196.
when instrument void by statute, no one can recover on it against original contracting parties, 197.
but *bona fide* holder may recover against indorser, 197.
policy of making negotiable paper void in all hands no longer prevails in England, 197.
but does in many of the States, 197.
various statutory provisions considered, 198.
if paper capable of legal interpretation, it must be so construed, 198.
patent right, as consideration, 199*a*.
effect of knowledge of illegal use of article sold, 200.
8. *Partial want, failure, and illegality of consideration,* 201.
when defendant can go into question of consideration, he may show partial as well as total want of it, 201.

CONSIDERATION OF NEGOTIABLE INSTRUMENTS — *continued.*
when breach of warranty of value of article may be pleaded in action on paper given in payment, 202.
total failure of consideration is good defence, 203.
failure of title to real estate, 203, note.
and partial failure is good *pro tanto*, 203.
but partial failure must be distinct and definite, 203.
worthless patented machines, 203.
partial illegality of consideration distinguishable from partial failure, 204.
partial illegality vitiates bill or note "*in toto*," 204.
mortgage to secure paper based on partial illegal consideration is void, 204.
if legal portion distinctly severable, party may recover it by action, though not on bill or note, 204.
where legal part of consideration exceeds amount of note, it is valid, 204.
decision where bill given in renewal of others, one of which was illegal, 204.
renewal bills and notes open to same defence as original, 204, 205, 206.
how illegality of consideration may be purged, 207.
9. *Statement or recital of consideration in bill or note does not affect its negotiability*, 51*a*, 60*a*.

CONSOLIDATION OF RAILROADS.
effect of, on municipal subscriptions, II., 1523*a*.

CONSTITUTION. *See* BILLS OF CREDIT, and II., 1715.
forbidding legislatures to subscribe to certain public purposes does not forbid their conferring such power on municipalities, II., 1524.
the converse is equally true, II., 1524.
of U. S. prohibits States from emitting bills of credit, II., 1715. *See* BILLS OF CREDIT, II., 1715.
of U. S. prohibits States from impairing obligation of contracts, II., 970*a*.
therefore State can not change law of notice as to existing instruments, II., 970*a*.
what is considered to impair obligation of contracts, II., 970*a*.

CONTRACTING CAPACITY. *See* CAPACITY.

CONTRACTS, OBLIGATION OF.
can not be impaired by States, II., 970.

CONTRIBUTION. *See* PRINCIPAL AND SURETY.
whether indorser bound for, 704.
when co-sureties bound for, II., 1340, 1341.

CONVERSION.
who may be sued for, 748*a*. II., 1468, 1469.
whether finder may sue for, II., 1674.

COPARTNERSHIP. *See* PARTNERS, and 350 to 375.

CORPORATIONS AS PARTIES TO NEGOTIABLE INSTRUMENTS. *See* COUPON BONDS; MUNICIPAL CORPORATIONS; MUNICIPAL BONDS; DRAFTS OR WARRANTS.
1. *Power of corporation to execute negotiable instrument, first inquiry*, 377.
corporate act beyond its powers is called "*ultra vires*," and is void, 377.
definition of corporation by Chief-Justice Marshall, 378.
express and implied powers of, 378.
powers must be express or incidental to its existence, 378.
nature of private and public corporations, 379.

CORPORATIONS AS PARTIES, ETC.— *continued.*
trading and banking corporations may issue bills and notes, 380.
corporation to supply city with water can not in England, 380.
nor can railway company, 380.
authorities in United States liberally uphold corporate powers to issue negotiable instruments, 381.
whenever it can contract debt, may give bill or note in payment, 381.
views of Parsons, 381.
in this country these principles regarded as settled, 382.
first, that corporation may contract like individual, when necessary or convenient in its legitimate business, 382.
second, when it may contract debt, it may borrow to pay, 382.
third, when it may contract debt or borrow money, it may give bill or note in payment, 382.
Vice-Chancellor Sandford's views, 382.
in United States, it has been held that debts may be contracted and money borrowed by companies incorporated to build railroads, 382, 383.
to build plank roads, 383.
to hold real estate and erect buildings, 383.
have power to hold property for religious purposes, 383.
may borrow money to operate flouring mill, 383.
build a monument, 383.
buy and sell lands or goods, 383.
advance money on goods, 383.
manufacture glass, 383
carry on building fund association, 383.
may take bill or note for debt due it, 384.
but can not generally loan out funds, 384.
prohibition of banking powers is prohibition of making discounts, 384.
insurance companies can not execute negotiable instruments, 384.
corporations with power to take bills and notes may indorse them, 385.
borrow money may borrow bill or note and and indorse it, 385.
power to "sell and convey" bills and notes implies power to indorse, 385.
when corporation has power to execute negotiable instruments, they are presumed to have been executed in scope of its business, 386.
can not impliedly execute or indorse or guarantee paper for accommodation, 386.
but *bona fide* holder of its accommodation paper without notice may recover, 386.
if corporation bound by paper, agent or officer exceeding his powers can not be sued by holder, 386.
accommodation transaction not presumed, 386.
corporator can not plead illegality of corporation, 386.
2. *Authority of agent to bind corporation*, 387.
if charter prescribes what agents shall sign for corporation, none others can, 387.
if charter prescribes what forms must be pursued, they must be followed, 387.
instances, 387.
substantial compliance with charter or statute suffices, 387.
instances, 387.
whether or not parties so describing themselves are really officers or agents of corporations, 388.
best evidence of agency is record of appointment, 388.
officers acting and recognized by corporation may be regarded as such, 388.
common-law doctrine that corporation must contract under seal obsolete, 388.
whether or not officer or agent may do particular act, 389.

CORPORATIONS AS PARTIES, ETC.— *continued.*
general agents bind corporation within scope of authority, 389.
special agents can only act within special authority, 389.
official agents may bind corporations within usual sphere of duties, 389.
doctrine of United States Supreme Court on the subject, 389.
cases illustrating it, 389, 390.
corporation held bound where president of railroad overissued stock certificates, 390.
cashier issued false certificate of deposit, 390.
cashier and teller wrongfully certified checks, 390.
where treasurer issued fraudulent stock certificate, 390.
where one of two innocent parties must suffer, loss falls on one who created trust, 391.
this doctrine applies between original parties and also in favor of indorsers and holders without notice, 391.
if instrument all right on its face, it is binding in favor of all holders *bona fide* without notice of defect, 391.
what officers have implied power to bind corporation as party to negotiable instruments, 392.
cashier of bank may indorse for collection, 392.
but can not transfer non-negotiable paper, judgments, or personal property, 392.
may draw bills and checks on funds of bank, 392.
may certify checks, 392.
receipt for and issue certificates of deposit, 392.
borrow money and issue certificates of deposit, 392.
accept bills. But query? 392.
buy, sell, and indorse bills and notes, 392.
but can not release debt, 392, 393, 394, 395, 396, 397.
nor prefer creditors of the bank, 392, note.
or execute paper for accommodation, 392.
but accommodation paper would be valid to *bona fide* holder without notice, 392.
president of bank may take charge of its litigation, 393.
receipt for deposits, 393.
can not release a debt, 392, 393.
query, if he may draw checks, 393.
if president of mining company may bind it by note, 393.
bank president by authority of directors may indorse bills or notes payable to bank, 393.
semble, he may indorse bank's negotiable paper, 394.
ratification by corporation by accepting benefit of president's acts, 394.
effect of usual course of business as to president of insurance company, 394.
power of treasurer, 394.
secretary, 396.
allegation that corporation contracted by treasurer or other officer sufficient, 394.
president and cashier of bank can not release its debts, 395.
officers have no implied authority beyond sphere of official duty, 396.
their authority rests on general usage, 396.
joint authority to two or more officers must be exercised jointly, 397.
if all agree to the act, it may be carried out by paper signed by one, 397.
case of irregular execution of note held valid, 398.
3. *Interpretation of instrument,* 398.
if marks of official character predominate, paper is deemed to be corporate, 398.
corporations may adopt and use several names, 399.

CORPORATIONS AS PARTIES, ETC.— *continued.*
misnomer immaterial if corporation identified, 399.
firm may style itself as corporation, 399.
and may use firm style or corporate name, 399.
corporation may adopt and use agent's name, 399.
illustration, 399*a*.
as to who is maker of a note, 400.
corporation name should be signed after words importing corporate promise, 400.
if officer or agent add "for company" it suffices, 400.
if obligatory tenor of paper indicate corporate obligation, official signature will be deemed affixed for corporation, 400.
4. *Effect of words:*
"I promise — signed for A. B. & Co., C. D. (the agent)," 401.
"We, the subscribers, jointly and severally promise" — "signed for A. B. & Co., C. D.," 401.
"We jointly and severally — signed A. & B. for C. D.," 401.
"The President and Directors of the A. B. Company promise," 402.
other instances, 402.
addition of official character *at foot* of instrument not alone sufficient to indicate intention to bind corporation, 403.
but will be deemed an earmark or *descriptio personæ*, 403.
numerous cases, 403.
Parsons' views, 404.
official designation *in body* of instrument often deemed sufficient to indicate that instrument binds corporation, 405.
numerous cases, 406.
English and Kentucky cases, 406.
sometimes additional indications of intent to bind corporation are sufficient, 407.
certain indicia; corporate seals, 408.
English and Indiana cases, 407, 408.
same principle applies to drawer of bill as to maker of note, 409.
where direction is to place to official account on bill, it does not *alone* make it bill of corporation, 410.
but direction to place to particular account is often material indication, 411.
instances, 411.
can be but one acceptor of bill unless for honor, 412.
who is drawee of bill often satisfies inquiry who is drawer, 412.
if bill be drawn on drawee individually, he can not by official designation, or words of procuration, bind corporation as acceptor, 412.
and if bill be drawn on corporation and accepted by officer or agent, with appropriate designation, only corporation will be bound, 412.
if drawee's full official character be added to his designation, he is nevertheless bound personally by acceptance, 412.
English cases strongly sustaining this doctrine, 413.
in United States authorities conflict, 413.
if drawee be addressed as "A. B., agent," and accept in like manner, he is personally bound, 414.
if drawee addressed personally as H., and he writes across bill, "*Accepted; Empire Mills, by H., Treasurer*," he is not personally bound, because it is not his acceptance, 414.
nor is company bound, because it is not drawee, 414.
as to whether corporation or its agent is payee or indorser, 415.
if official designation added to agent's name, he is nevertheless deemed personally the payee, 415.
so held where payee designated as "A. B., Treasurer of C. D. Company," 415.
and as "A. B., for value received of C. D. Company," 315.
contrary decisions in New York, 315.

CORPORATIONS AS PARTIES, ETC.— *continued.*
if corporation be payee, and indorsement be by officer with official designation, he is deemed to act for company, 416.
instances, 416.
cashiers of banks exceptions to general rule, 417.
designation of "cas.," or "cash.," or "cashier," added to name intimates that signer acts for bank, 417.
parol evidence admissible in some cases to explain obscure and ambiguous instruments, 418.
as between original parties, it may be shown who was intended to be bound on equivocal and uncertain instruments, 418.
instances, 418.
doctrine of U. S. Supreme Court, 419.

COSTS. *See* EXCHANGE.
what recoverable, II., 1459.
when attorney's fees recoverable, 62.

COUPON BONDS. *See* MUNICIPAL CORPORATIONS; CORPORATIONS; and MUNICIPAL BONDS.
1. *Definition and nature* of, II., 1486.
coupon serves as voucher when interest is paid, but contract is in bond, II., 1444.
individuals, private and municipal corporations, and governments may issue them, II., 1487.
"coupon bond" is complete in itself, but consists of obligation to pay money, with coupons annexed for interest, II., 1488.
meaning of "coupon," II., 1489.
may be severed from bond, and pass as separate and independent security, II., 1489.
legacy of bond carries coupon with it, II., 1489.
authority to issue bond implies coupons also, II., 1490.
coupons are assimilated to promissory notes, II., 1490.
not intended for indefinite circulation, II., 1490.
conflicting decisions, II., 1490, 1506.
are not intended for acceptance when drawn on banks, II., 1490*a*.
not entitled to grace, II., 1490*a*.
are simply notes payable on very day of maturity, II., 1490*a*.
bonds and coupons not bills of credit, II., 1491.
coupon is part of mortgage debt, when bond it, II., 1491*a*.
all of same series share ratably, II., 1491*a*.
if bond is repudiated, original consideration revives, II., 1491*b*.
the bonds of a county are debts, II., 1491*c*.
2. *Formal parts of bonds and coupons*, II., 1492.
how such instruments are generally framed and signed, II., 1492*a*.
expressions in coupons immaterial if they indicate by whom due, and amount and time of payment, II., 1493.
coupons sometimes in form of notes, II., 1493.
checks, II., 1493.
drafts or bills, II., 1493.
ticket, token, or warrant, II., 1493.
in all such cases are authority to receive interest and may be sued on without producing bond, II., 1494, 1509, 1510, 1511.
no payee need be named in coupon, II., 1494.
bond need not be sealed, II., 1495, 1501.
idea that States and corporations must contract under seal obsolete, II., 1495, 1501.
coupons and bonds may be payable to bearer, or to order, or to holder, or to certain party, or his assign, II., 1496.

COUPON BONDS — *continued.*
county bonds payable to a corporation "or its assigns" not negotiable, II., 1496.
if bond contain no negotiable words, not negotiable, II., 1496, 1500.
may be payable at particular place in or out of State, II., 1497.
must be delivered, II., 1498.
if stolen incomplete not binding, II., 1498.
otherwise, if complete, II., 1498.
payee may be blank, II., 1499.
if payee blank, citizen of foreign State may insert his name and sue in Federal court, II., 1499.
if coupons refer to bonds, holder chargeable with notice of what bonds contain, II., 1499.
figures marking series not part of bonds, II., 1499*a*.
indorsement of bonds, II., 1499*b*.
where bonds prepared for issue and sale promise payment in lawful money and guaranteed by a State, II., 1499*b*.
that they shall be paid in coin subsequently indorsed, binds only corporation, II., 1499*b*.
interest on bond not recoverable without producing coupons, II., 1509.
words of promise in, not essential, II., 1511.
3. *Negotiability of, and rights of holder,* II., 1500.
bonds and coupons with negotiable words are negotiable, II., 1500.
bond not so expressed is not negotiable, II., 1500.
necessarily sealed, II., 1495.
registered bonds, II., 1501*b*.
the provision "registered and made payable by transfer only on the books of the company," II., 1501*b*.
does not of itself make it non-negotiable, II., 1501*b*.
if for uncertain sum not negotiable, II., 1502.
holder stands on same footing as holder of bill or note, II., 1502.
should inquire (1) as to right of party to execute, II., 1502.
(2) as to right of agent to act for principal, II., 1502.
(3) as to formalities being complied with, II., 1502.
(4) as to usury in inception, II., 1502.
gross negligence will not defeat purchaser or holder of, II., 1503.
rules as to right of *bona fide* holder, II., 1503.
holder with notice not affected if his transferrer had good title, II., 1503.
English decisions about similar instruments, II., 1504.
coupon becomes due on every day of maturity, II., 1505.
after maturity is dishonored, and purchaser is subject to equities, II., 1505.
whether entitled to grace, II., 1505.
one instalment of interest being overdue does not disgrace bonds or other coupons, II., 1506*a*.
but terms of bond may alter this, II., 1506*a*.
holder of, presumed to be *bona fide*, before maturity, and without notice of defects, II., 1506.
lis pendens does not apply to this class of securities before maturity, II., 1506*b*.
coupons need not be presented on day of maturity to bind maker, II., 1507.
must be presented in reasonable time to charge guarantor, II., 1507.
meaning of words making coupon payable when "presented," "surrendered," or "delivered," II., 1508.
provision by statute in Alabama, II., 1508*a*.

COUPON BONDS — *continued.*
4. *Action on negotiable bonds and coupons,* II., 1509.
holder of, may sue in his own name, if payable to bearer or holder, II., 1509.
interest on bond can not be collected without producing coupon, II., 1509*a*.
coupons should be identified, II., 1510.
coupon may be sued on without producing bond, II., 1501, 1506, 1509, 1509*a*, 1510, 1511.
payment or surrender of bond does not affect coupon, II., 1510.
words of promise in coupon immaterial, II., 1512.
coupons admissible in evidence under money counts, II., 1512*a*.
aggregate amount of coupons determines jurisdiction of Federal courts, II., 1512*a*.
interest on coupons recoverable from maturity, II., 1513.
contrary decisions, II., 1513.
prior demand of payment not necessary to the recovery of interest on coupons, II., 1514.
semble, as to exchange, II., 1514.
demand at particular place not necessary to recover interest, II., 1514.
but if defendant show readiness to pay at such place, interest is abated, II., 1515.
statute of limitations applies to coupon in same manner and time as to bond, II., 1516.
but runs against coupon from *its* maturity, II., 1516.
when coupon bonds pledged as collaterals, they may be sold after demand and notice, II., 1517.
debtor entitled to notice of time and place of sale, II., 1517.
but if he has knowledge, no formal notice is necessary, II., 1517.
when negotiable bonds wrongfully put in circulation, purchaser may recover full amount, II., 1517*a*.

COVENANT NOT TO SUE.
maker or acceptor extinguishes debt as to them, II., 1291.
and discharges drawer and indorsers, II., 1291.
does not discharge joint party, II., 1291.
given by one of two creditors does not operate as release, II., 1291.
for limited time will not effect release between the parties, unless stipulated that it may be pleaded in bar, II., 1291.
but will discharge sureties, II., 1291.
for limited time is not discharge, II., 1291.

COVERTURE. *See* MARRIED WOMAN.

CROSS-NOTES AND ACCEPTANCES. *See* CONSIDERATION, and 188.

CROSSING CHECKS. *See* CHECKS, and II., 1585*a*.

CURRENCY.
instrument payable in, whether negotiable, 56, 57, 58. II., 1245, 1651.
judgment on such instruments, II., 1245, and notes.
what law applies to currency of payment, 916.

CURRENT FUNDS.
check payable in "current funds" held negotiable, 57.

CUSTOM.
of merchants made bills negotiable, 6.
as to presentment by notary's clerk, 579.
mode of presentment, 658, 662.
grace, 621, 622.
mode of notice, II., 1007, 1012.
grace on drafts, and as to whether draft is check, II., 1576.

DAMAGES. *See* EXCHANGE, and II., 1438, 1460.
for negligence in collection, 329.
for breach of agreement to accept for accommodation, 564.
what law applies to, 918, 921.
for laches in respect to presentment and notice, II., 1277*a*.
on coupon bonds, II., 1513.

DATE OF NEGOTIABLE INSTRUMENTS. *See* SUNDAY.
delivery on day of date presumed, 65.
or at least before maturity, 65.
presumption may be rebutted, 65.
if delivery subsequent to date, instrument only binding from delivery, 65.
but time computed from date by relation, 66, 630.
not necessary to aver, but sufficient to state it was drawn, or made on certain day, 66.
on Sunday does not vitiate, if delivery on other day, 69.
usually written in right-hand corner of instrument, 83.
is usual, but not essential, 83.
no consequence where it is written, 83.
if dated, presumed to have been executed on day of date, 83.
evidence admissible to show when executed, or to show mistake in date, 83.
if note be made for accommodation, and undated, party accommodated may fill in date as he sees fit, 83.
indorsee may prove mistake of date, 83.
even though it cuts off defence valid against payee, 83.
undated indorsement presumed to have been made as of date of note, 83.
maker can not show mistake of date against innocent holder without notice, 83, 630.
mistaken date may be rectified in equity, 83, 630.
if no date, will be presumed to have been dated when executed, 83, 630.
may drawee refuse to accept undated bill? 84.
negotiable instruments may be post-dated or ante-dated, 85. II., 1578.
negotiation prior to date not a suspicious circumstance, 85.
if party die before ostensible date, holder not affected, 85.
if dated before maker comes of age, but really executed afterward, instrument is valid, 85.
so in respect to other incapacities, 85.
if instrument is void for incapacity when executed, date as of time when incapacity did not exist will not cure it, 85.
if date be false to evade law, instrument is void in hands of all having notice, 85.
if date does not accord with declaration, discrepancy must be explained, 85.
no variation to allege instrument to have been made on certain day, when it bears date on another, 85.
holder may fill in true date if it be omitted, 143.
and though he put wrong date, *bona fide* holder without notice not affected, 143.
of acceptance. *See* ACCEPTANCE, and 494.
if date of paper be impossible — as for instance, 31st September, computation will be from 30th, 625.
place of date *prima facie* place of payment, 639, 879.
law of place of delivery controls paper dated elsewhere, 867, 868, 869.
alteration of. *See* ALTERATION, and II., 1376.
of bank notes not evidence when issued, II., 1666.
of checks, II., 1577.

DATE OF NEGOTIABLE INSTRUMENTS — *continued.*
checks may be post-dated or ante-dated, II., 1666.
as evidence of drawer's residence, II., 1030.
indorser's residence, II., 1031, 1032.
misdate as excuse in respect to presentment and notice, II., 1180.

DAYS. *See* SUNDAY; HOLIDAYS; GRACE.
how computed, 626.
day of date excluded in computing number of days paper has to run, 626.
if paper payable so many days after sight, demand, or certain event, the day of sight, demand, or happening of event, excluded, 626.
if paper presented one day and accepted on another, day of acceptance excluded, 626.
"in thirty days"—"in thirty days from date"—"at thirty days"—and "thirty days after date"—mean same thing, 626.

DEATH. *See* DELIVERY; EXCUSES.
of drawer of check, 26. II., 1618*b*.
otherwise if paper not previously delivered, 64.
revokes agency not coupled with interest, 288.
dissolves partnership, 369*a*.
right of surviving partner, 370*b*, 371*b*.
of drawer no revocation of bill, if delivered before, 498*a*.
of party as excuse for non-presentment and notice, II., 1177.
of joint party. See II., 1298.

DEBT. *See* PRE-EXISTING DEBT.
execution of note imports contemporaneous debt, 71.
also imports settlement of previous demands — this presumption open to rebuttal, 71.
and does not include previous notes, 71.
drawer and indorser released from, by failure in respect to demand and notice, 452. II., 971, 1276.

DEBTOR.
effect of making debtor personal representative, 269.

DEFENCES.
between privy parties, 179.

DELAY. *See* EXCUSES; DILIGENCE.
in presentment for acceptance when excused, 469, 473, 474, 478.
payment when excused, II., 1060, 1068*a*.
in giving notice when excused, II., 1060, 1068*a*, 1069, 1070.
when cause of delay ceases, diligence should be exercised, II., 1070.

DEL CREDERE.
agent acting under *del credere* commission, how bound, 314.
in Pennsylvania only warrants solvency of principal, 314.
in England and generally in United States regarded as bound for debt, and on indorsement of bill remitted, 314.

DELIVERY. *See* SUNDAY; ASSIGNMENT; SALE.
bill, note, or check, or other negotiable instrument must be delivered, 63.
bill or note in hands of agent not delivered, 63.
wrongful delivery by agent, 63.
not necessary to aver, 63.
if maker die before delivery, instrument void, 63.
even though he leave directions to deliver, unless they are valid as a testament, 63.
may be constructive, 63*a*.

DELIVERY — *continued.*
drawee accepting, but detaining bill, delivery unnecessary, 64.
presumed to have been on day of date, or at least before maturity, 65.
presumption may be rebutted, 65.
instrument takes effect *by* and *on* delivery, 65.
bill or note in payee's hands presumed to have been delivered, 65.
if delivery after date, only binding them, 65.
but time of maturity is computed from date, 65.
is computed from date, 65.
instrument should be described as dated, 66.
if no date, time computed from delivery, 66.
not necessary to aver date, 66.
sufficient if to father of minor son, 67.
trustee of *cestui que trust*, 67.
agent, 67.
by one of two joint makers, 67.
both minds must concur in assent to, 67.
insufficient to leave check on clerk's desk, or bank counter, without knowledge of clerk or officer, 67.
when sufficient to deliver to postman, 67.
deposit in post-office, 67.
right of stoppage *in transitu*, 67.
a party to a note after delivery and passage of consideration between original parties incurs no liability, 67*a*.
unless there be a new consideration and a redelivery of the note, 67*a*.
signing in presence of payee is not delivery, 67*a*.
delivery as escrow, 68.
upon condition precedent, 68, 81*a*.
difference between negotiable and other instruments delivered as escrow, 68.
by surety to principal upon condition unknown to payee, 68, note.
by common law may be on Sunday, 69.
statutes changing common law, 69.
bills, notes, and indorsements coming within statutory interdictions, 69.
must be in lifetime of party to be bound, 266.
if firm dissolved before delivery, paper does not bind it without assent of all, 371.
by indorser necessary, 664.
not necessary to sale, 753.
by third persons in violation of instructions, 854.
law of place of delivery controls, and not that of place of date, 868, 869.
exception to rule as to holder without notice, 869.

DELIVERY ORDERS.
differ from bills of lading, and are not negotiable, II., 1712.

DEMAND. *See* PRESENTMENT.

DEPOSITS.
general and special, defined, II., 1611*a*
general, creates relationship of debtor and creditor — not trustee and *cestui que trust* between bank and depositor, II., 1611*a*.
otherwise with special deposit, II., 1611*a*.
may constitute gift *inter vivos*, II., 1612*b*.

DEPOSIT-BOOK.
of savings bank not negotiable, II., 1185.

DESTROYED BILLS AND NOTES. *See* LOST BILLS AND NOTES.
whether destruction of bill by drawee is acceptance, 500.
how maker sued for destroying, II., 1468.

DILIGENCE.
whether question of law or fact, 466. II., 1100.
in presentment for acceptance, 467, 475.
in seeking maker or acceptor to present for payment, 640. II., 1115, 1116.
in giving notice, II., 1058.

DIRECTORY.
consulting to ascertain party's residence, II., 1115, note.

DISEASE, EPIDEMIC.
as excuse for want of presentment, protest, and note. *See* EXCUSES, and II., 1066, 1125.
when epidemic excuses delay in presentment, protest, and notice, II., 1066.

DISCHARGES OF BILLS AND NOTES. *See* ACCEPTANCE; PAYMENT; CONDITIONAL AND ABSOLUTE PAYMENT; MERGER; RELEASE; PART PAYMENT; COVENANT NOT TO SUE; JOINT BILLS AND NOTES; PARTNERS; PRINCIPAL AND SURETY.
1. *Discharge by payment*, II., 1221 to 1282. *See* PAYMENT.
2. *Discharges by operation of law*, II., 1283.
(1) by a general bankrupt or insolvent law, II., 1283.
(2) by merger of bill or note in a judgment, II., 1283.
(3) by appointment of maker or acceptor as executor of holder, II., 1283.
(4) by gift or bequest to maker or acceptor, II., 1283.
(5) by any matter of discharge by local law, II., 1283.
cases other than judgment obtained which operate to extinguish debt by merger. *See* MERGER, and II., 1284, 1285.
legacy by drawer to payee who is holder does not satisfy bill, II., 1286.
what entry in testator's book amounts to discharge, II., 1286.
3. *Discharges by agreement between the parties*, II., 1287.
(1) an accord and satisfaction between maker or acceptor and the holder, II., 1288.
satisfaction by one partner discharges all, II., 1288.
if one executory contract consideration for another, both may be rescinded, II., 1288.
contract upon an executed consideration cannot be discharged before or after breach, save by a release or satisfaction for valuable consideration, II., 1288.
part payment of a bill which has fallen due only extinguishes it *pro tanto*, II., 1289.
but will not discharge whole debt, although so agreed, unless the agreement was by way of compromise, II., 1289, 1289*a*.
when part payment is compromise, II., 1289.
when part payment will support agreement to accept it in satisfaction, II., 1289*a*.
if before maturity, II., 1289*a*.
if made by stranger, II., 1289*a*.
if made by bill or note with a surety, II., 1289*a*.
or collateral security, II., 1289*a*.
if in any way more advantageous to creditor, II., 1289*a*.
(2) release of party to bill or note by any agreement for valuable consideration is as effectual as if made under seal, II., 1290.
it discharges joint party and all subsequent parties, II., 1290.
(3) general covenant not to sue maker or acceptor operates extinguishment as to him, II., 1291.
(4) what is effect of substitution of other debtor or security depends upon special agreement between parties, II., 1292.
(5) bill or note, as other simple contracts, is merged in bond or covenant taken to secure claim, II., 1293.

DISCHARGES OF BILLS AND NOTES — *continued.*
4. *What constitutes a joint note,* II., 1294.
when maker of a *joint note,* or a joint acceptor or indorser is discharged, by release, those jointly bound with him are discharged, II., 1294.
agreement to look to one of two joint parties, when invalid, II., 1295.
rule in case of *partnership,* II., 1295.
judgment against joint promisor is bar to action against both, II., 1296.
otherwise where liability is *joint and several,* II., 1296.
covenant not to sue one of joint makers does not discharge others, II., 1297.
nor does giving time to one discharge others jointly bound, II., 1297.
at common law death of one obligor discharges obligation as to him, II., 1298.
rule changed by statute in many States, II., 1298.
5. *Whether giving separate note by one of several partners, for partnership debt, discharges other partners,* II., 1299, 1300.
burden of proof on party alleging it to show that note in such case was taken in extinguishment of debt, and not as collateral security, II., 1300.
renewal in firm's name after dissolution, II., 1300*a*.
if after dissolution creditor, without notice, take from one of the former partners bill or note in firm's name, binding on firm, II., 1300*a*.
but not so if notice of dissolution to creditor, II., 1300*a*.
when no new security taken, a mere promise to look to one partner only not binding, II., 1301.
if third parties induced to enter into arrangement on faith of promise would be otherwise, II., 1301.

DISCOUNT OF BILLS AND NOTES. *See* SALE.

DISHONOR OF NEGOTIABLE INSTRUMENTS. *See* BONA FIDE HOLDER; OVERDUE.
what amounts to, 782. II., 930, 931, 932.
effect of, 724*a*, 782, 787*a*, 788.
if shown on paper is "death wound," 788.
statement of, in protest, II., 954.
to whom notice of, should be given, 995.

DISSOLUTION. *See* PARTNERS.

DIVERSION. *See* BONA FIDE HOLDER.
whether it shifts burden of proof on plaintiff to show *bona fide* ownership for value, 790, 791, 814.
what amounts to, in respect to accommodation paper, 792, 793, 794.

DIVIDEND WARRANTS.
whether negotiable, II., 1710*a*.

DIVORCE. *See* MARRIED WOMAN.

DOCK WARRANTS.
unlike bills of lading and not negotiable, II., 1713.

DOLLARS.
meaning of term, 87.

DONATIO MORTIS CAUSA.
gift in contemplation of death, 24.
requisites to validity of such gifts —
(1) Must be made in view of donor's death, 24.
(2) Donor must die of his then ailment or peril, 24.
(3) Must be a delivery, real or symbolic, 24.
(4) Must be accepted by donee, and take effect in the lifetime of the donor, 24.

DONATIO MORTIS CAUSA — *continued.*
such gift originally limited by law to chattels passing by delivery, 24.
bank notes, lottery tickets, and securities transferable by delivery, or indorsement then permitted, 24.
subsequently extended to bonds, 24.
later cases hold notes not negotiable, or if negotiable not indorsed, but delivered, to pass by such donation, 24.
right to use name of representative of promisee also passed to done, 24.
rule so extended that if donor indorse bill or note of third party, donation will be valid, but not bind donor's estate as to indorsement, 24.
in England held that donee could compel donor's executors to indorse, 24.
death need not result immediately from anticipated cause, 24, note.
in United States held that bank deposit book may be subject of, 24*a*.
also certificate of deposit, 24*a*.
rule in relation to *cestui que trust*, 24*a*.
delivery may be to donee or to another for him, 24*a*.
deposit to another's credit, effect of, 24*a*.
donee's note may be, 25.
donor's own note not subject of, 25.
check of another may be, 25.
nor is his draft on third person, 25.
theory of the law to guard against fraud, 25.
whether donor's check may be subject of, 26.
if collected in lifetime of donor donee may retain proceeds, 26.
but if not collected in lifetime of donor, or transferred for value, it has been considered that death revokes check, 26.
check to drawer's wife under peculiar circumstances held valid as, 26.
opinion expressed that check should be regarded as cash, 26.
donation cannot prevail against donor's creditors, 26.
nor can it prevail against his estate unless delivered, 26.
validity of gift *causa mortis* determined by the *lex loci*, 26.

DORMANT PARTNER, 369*a*.
when notice of retirement necessary, 369*a*.

DRAFTS OR WARRANTS. *See* IRREGULAR AND AMBIGUOUS INSTRUMENTS.
1. *Of private corporations*, 424.
sometimes corporation by one officer or agent draws on itself, naming another officer or agent as drawee, 424.
instrument in such case may be treated as note, or accepted bill, 424.
such instruments, often used as vouchers, and as convenient for keeping accounts, 424.
not necessary, in such cases, to aver or prove presentment to drawee, officer, or agent, 424.
instances of such drafts:
where president and secretary of water company drew on treasurer, 424.
secretary of railroad company drew on treasurer, 424.
president of railroad drew on treasurer, 424.
agent drew upon treasurer, 424.
conflicting cases, 425.
English case, 426.
2. *Of municipal corporations*, 427.
sometimes drawn by one officer, or set of officers, on another, as by selectmen or supervisors on officer, 427.
generally used as vouchers, 427.
and not deemed negotiable, 427.

DRAFTS OR WARRANTS — *continued.*
held not negotiable:
where selectmen drew order on treasurer payable to bearer, 427.
auditor drew on treasurer, 427.
county judges — where mayor and recorder — where supervisors — where clerk of township board — drew on treasurer, 427.
mayor and recorder have no implied power to execute negotiable warrants, 427.
when corporate authorities empowered to draw warrants or orders, if they be phrased in negotiable words, deemed negotiable, 428.
instances, 428.
when negotiable indorser is bound, as on other negotiable paper, 429.
but if mere voucher, transferrer not deemed indorser, 429.
but transferrer would be liable to refund consideration if instrument not valid, 429.
whether must be presented to disbursing officer, 430.
if payment refused, creditor may recover consideration, 430.
if officer authorized to issue, consideration presumed, 431.
otherwise can not be sued on, but original consideration may be sued for, 431.
creditor not bound to take town order, 432.
but if he takes order, must produce it to recover, 432.
if once paid can not be sued on by *bona fide* holder, 432.
when issued as vouchers, do not bear interest after demand and refusal, 432.
but *contra*, 432.
if payable out of particular fund, is charge against it only, 433.
if consideration, or source of reimbursement indicated, it is different, 433.
instances, 433.
when negotiable, transferee may sue in his own name, 434.
otherwise can not, 434.
in some cases held that equities not excluded against transferee, 435.

DRAWEE.
should be distinctly designated in bill, 96.
if no drawee pointed out, there is no bill, 96.
but holder of memorandum check may file it as evidence, though no drawee named, 96.
by acceptance party acknowledges himself the drawee, though none named, 97.
suffice to address bill to A., or, in his absence, to B., 98.
held sufficient to address to A. or B., in the alternative, if both at same place, 98.
if bill addressed to A., B., and C., and A. and B. only accept, they are bound as acceptors, 98.
no variance to allege such bill to have been drawn on A. and B., 98.
if bill addressed to A., it will bind him only as acceptor, if he and B. both accept, 98.
if drawer and drawee same person, no acceptance necessary, 98.
how drawee addressed, 98.

DRAWER. *See* ACCEPTANCE; BILLS OF EXCHANGE; PROTEST; NOTICE; SIGNATURE.
name of, must be on face of bill, 92.
can be no bill without, 92.
even acceptance on paper unsigned by drawer is mere inchoate, 92.
is generally a single person, or corporation, or firm, 93.
but there may be joint drawers, 95.

DRAWER — *continued.*
joint drawers may make bill payable to their joint order, or order of either of them, or to third person, 95.
sometimes there is "surety drawer," 95.
if several draw on drawee without funds, all are bound to acceptor, and neither can show he was mere surety for others, 95.
if A. and B. draw on C. without funds, and B. signs as surety, both he and A. are considered drawers as to all parties, 95.
but contrary doctrine obtains in New York, 95.
initials of name suffice, 688.
liability of, for re-exchange, interest, and damages, 898. II., 1444 to 1447.
what law applies to drawer, 898, 911.
notice to, II., 970, 970*a*, 971.
mere promise to look to one partner, no new security being taken, not binding, II. 1301.
discharge of acceptor's obligation, 541.
surety, II., 1326 to 1331.
guarantor, II., 1789.

DRUNKENNESS.
species of mental aberration, 214.
party in state of, can not contract, 214.
if he, in such state, sign negotiable instrument, it is void against all persons who had notice, 214.
when it makes instrument void in all hands, 214.
if party gets drunk for purpose of entering into and avoiding agreement, it is no defence, 215.
must be specially pleaded, 215.
if party when drunk buys goods, and keeps them when sober, he can not then plead drunkenness, 215.

DUE-BILL.
in England simple I. O. U. not negotiable, 36.
conflicting decisions in the United States, 36, 37, 38, 39.
words which amount to promise, and will make due-bill negotiable, 38.
effect of words "on demand," 39.

DURESS. *See* BONA FIDE HOLDER.
renders contract made under, void, 177, 857.
between immediate parties proof of, annuls instrument, 857.
whether instrument executed under, is void in hands of holder without notice, 857, 858.

EFFECTS. *See* EXCUSES; CHECKS.
when bill drawn without effects in drawee's hands is fraud, 17.
drawer of such bill bound without notice, 17.

ELECTION.
right of, in holder to treat ambiguous instrument as bill or note, 131.
of law of place as to interest, 922, 925.

ENTRIES.
in books, when admissible as evidence, II., 1057.

EPIDEMIC.
as excuse respecting presentment and notice, II., 1066.

EQUITABLE ASSIGNMENT. *See* ASSIGNMENT; TRANSFER BY ASSIGNMENT; BILL OF EXCHANGE; ORDER.
courts of equity recognize assignments of choses in action, 15.
courts of law follow equity, 15.
whether bill of exchange for whole amount is, 15, 17.
order for whole of fund is, 21.
whether bill for part of fund is, *pro tanto*, 22, 23, 23*a*.

EQUITABLE ASSIGNMENT — *continued.*
whether order for part of fund is, *pro tanto*, 22, 23, 23*a*.
of bills and notes payable to order, by delivery, 741 to 747.
of securities is effected by assignment of any claim, debt, bill, or note which they apply to, 748.
of negotiable by separate paper, 748*a*.

EQUITIES.
meaning of, and when they may be pleaded, 724, 725, 725*a*, 726.

EQUITY.
will enjoin illegal subscription by corporation, II., 1522*a*.

ERASURES.
when innocently made may be replaced, II., 1414, 1415.
burden of proof when apparent on face of instrument, II., 1417, 1421*a*.
of marginal figures immaterial, II., 1499*a*.

ESCROWS.
negotiable instruments delivered as, 68, 855.
difference between them and other instruments so delivered, 68, 855, 856.

ESSENTIAL REQUISITES OF BILLS AND NOTES. *See* BILLS OF EXCHANGE and PROMISSORY NOTES; also, FORMAL ELEMENTS.

ESTOPPEL IN PAIS. *See* BONA FIDE HOLDER; MAKER; ACCEPTOR, and CERTIFICATES OF STOCK.
as to forgery, II., 1351 to 1353.

EVIDENCE. *See* CHECKS; BROKER; BONA FIDE HOLDER; PROTEST AS EVIDENCE; ACTION.
parol, inadmissible to vary written instrument, 80.
can not show note payable on demand to have been agreed to be paid only after decease of testator, 80.
nor upon other conditions, or at other period, 80.
can not show that demand was not to be made at maturity, 80.
nor that different sum was to be paid, 81.
nor that certain account was to be deducted, 81.
nor that certain articles were to be credited, 81.
nor that "lawful money" meant silver, 81.
nor that "dollars" meant bank notes, 81.
can not engraft condition in instrument, 81.
can not show it was to be void in certain event, 81.
nor that it was to be paid out of particular fund, 81.
may show want of consideration between original parties, 81.
can not vary engagement in any respect, 81*a*.
contemporaneous written agreement may be shown, 81*a*.
parol evidence admissible to show parties are privy to bills and notes though they seem otherwise, 81*b*.
if instrument obscurely written, or so mutilated or erased as to render its meaning uncertain, can be produced to ascertain its terms, 81*b*.
as between privy parties mistakes can be rectified in court of equity, 81*b*.
if instrument given for too large a sum mistake can be shown, 81*b*.
ambiguities may be explained by, 87, 88.
when admissible to show real relations of parties, 175, 176.
burden of proof as to partnership paper, 369.
as to oral acceptance, 318. *See* PARTNERSHIP, 369.
when parol, or extraneous, admissible to show whether principal or agent is bound, 418, 419.
generally admissible to charge undisclosed principal, 740*a*.
but not to discharge agent contracting in his own name, 740*a*.
not admissible to show indorsement without recourse, 700.

EVIDENCE — *continued.*
how far admissible as to indorsements, 717 to 723.
protest as evidence, II., 959 to 969.
at common law interested party can not testify, II., 1216.
rule affected by statutes in many States, II., 1216.
in England at one time, no party to instrument could testify against its validity, II., 1217.
doctrine overruled, II., 1217.
view of U. S. Supreme Court, II., 1217.
whether indorser can show bill or note void for usury, II., 1217.
identity of party must be proved, II., 1218.
sufficient to show same christian and surname, II., 1218.
when further identity must be shown, II., 1218.
how signature proved, II., 1218.
expert testimony as to signature, II., 1219.
admission dispenses with other proof, II., 1220.
is *prima facie* evidence, but may be explained, II., 1220.
checks as evidence. *See* CHECKS, and II., 1646 to 1650.
of forgery. *See* FORGERY, and II., 1347 to 1350.
of alterations. *See* ALTERATIONS, and II., 1417 to 1421*a*.
postmark as evidence, II., 1052.
as to notice, II., 1047 to 1058*a*.
protest, II., 962 to 969.
right to sue, II., 1199 to 1201.
law of forum applies to competency, but not to effect of, 887.

EXCHANGE, RE-EXCHANGE, AND DAMAGES.
1. *General nature of exchange*, II., 1438.
statutory enactments on the subject, II., 1438.
statutory damages not given as penalty, but in lieu of re-exchange, costs, etc., II., 1439.
what bill of "exchange" imports, II., 1440.
what is meant by "rate of exchange," II., 1440*a*.
natural and artificial exchange, II., 1441.
"par of exchange," II., 1442.
Gilbert's definition of "real par of exchange," II., 1443.
2. "*Re-exchange*" *defined*, II., 1444, 1445.
drawer is liable therefor in case of dishonor of bill, II., 1446.
drawer may, by apt words, limit amount of re-exchange and other expenses, II., 1447.
holder may redraw on any indorser for re-exchange, II., 1448.
and an indorser who pays same may redraw on any antecedent indorser, II., 1448.
drawer and indorser are not liable for re-exchange unless it is allowed by law of country where bill drawn, II., 1448.
query, whether acceptor is liable for re-exchange, II., 1449.
better opinion is that he is, II., 1449, 1450.
what laws determine liability of drawer and drawee, II., 1451.
general rule in respect to damages, II., 1452.
3. *Promissory notes, by law merchant, are not within rule entitling holder to re-exchange and damages*, II., 1453.
what law applies to exchange and damages, 918 to 921.
doctrine of English courts, II., 1454.
measure of damages for conversion of note is, *prima facie*, the amount of note, II., 1454.
drawer is liable for charges of protest, postage, and provisions, II., 1457.
what is "provision," II., 1457.
interest is recoverable against all parties according to the law of place of their several contracts, II., 1458.
statutory and contract rates of interest, II., 1458*a*.
where one rate fixed by law and another by contract, II., 1458*a*.

EXCHANGE, RE-EXCHANGE, AND DAMAGES — *continued.*
what rate should be adjudged against parties bound after maturity, II., 1458*a*.
rule respecting costs, II., 1459.
whether damages inhere in contract, II., 1460.
exchange and damages on coupon bonds, II., 1513.

EXCUSES FOR NON-PRESENTMENT, PROTEST, AND NOTICE.
1. *Circumstances of general nature,* II., 1059.
(1) declaration of war between country of holder and that of party to whom presentment should be made, II., 1060.
cases arising during the late conflict between the States, II., 1061, 1062.
(2) public interdiction of commerce and intercourse, II., 1063.
(3) occupation by public enemy and military disturbances, II., 1064.
(4) political disturbances, such as riots or insurrections, II., 1065.
(5) prevalence of malignant diseases, such as cholera, smallpox, yellow fever, etc., II., 1066.
(6) overwhelming calamity and unavoidable accident, such as freshets, storms, tornadoes, and earthquakes, accidents to the mail, etc., II., 1067, 1068, 1068*a*.
if holder be himself in default, he will not be excused, II., 1068*a*.
must be shown that effect of either was to prevent presentment or protest being made or notice given, II., 1069.
when impediment of whatever description is removed, the duty to make demand or give notice revives, II., 1070.
cases arising out of the late war, II., 1070, 1071.
2. *Special circumstances of excuse arising from absence of right to require presentment, protest, or notice,* II., 1072.
drawing without right or expectation that bill will be honored, II., 1073.
fraud committed by drawer or indorser, II., 1073.
as to lack of funds, II., 1074.
true criterion not whether drawer had funds in drawee's hands, but whether he had right to expect honor of bill, II., 1074.
if drawer have funds in drawee's hands, drawee's representation that he can not provide for it will be no excuse, II., 1075.
want of injury to drawer no excuse for due demand and notice, II., 1075.
nor is fact that drawee owes drawer larger amount, II., 1075.
drawer's right not affected by attachment of funds after bill drawn, II., 1075.
cases in which drawer has right to draw, II., 1076.
want of funds no excuse when drawer or indorser can sue acceptor or other party for amount, II., 1077.
at what time reasonable expectation of bill being honored must exist, II., 1078.
Mr. Chitty's views, II., 1078.
criterion where there is a running account between the parties, II., 1079.
views of Marshall and Story, II., 1080.
rule where drawer withdraws or intercepts funds for meeting bill, or otherwise prevents due acceptance, II., 1081.
acceptance is *prima facie* admission of funds in hand, II., 1082.
but does not otherwise affect general rule, II., 1082.
indorser of a bill drawn without funds is ordinarily entitled to demand and notice, II., 1083.
but not if he indorses for drawer's accommodation, and neither expects bill to be honored, II., 1083.

EXCUSES FOR NON-PRESENTMENT, ETC.— *continued.*
drawer and indorser generally entitled to require demand, protest, and notice, unless they forfeit it by fraud, or what would amount to it, II., 1083.
holder has burden to show drawee was without funds, II., 1084.
showing no funds is *prima facie* excuse, II., 1084.
defendant must then show right to expect that bill would be honored, II., 1084.
3. *When party is under obligation to provide for payment,* II., 1085.
if bill be for drawer's accommodation, he is charged without presentment, protest, or notice, II., 1085.
if bill payable at drawer's house, it is presumed for his accommodation, II., 1085.
if for indorser's accommodation, same rule applies to him, II., 1085.
qualifications of the rule, II., 1085.
where party is partner in the transaction, it is an excuse, II., 1086.
but partner signing on individual account not within the rule, II., 1086.
when firms with a common partner, not within the rule, II., 1087.
when joint makers live too far apart, necessary delay in presenting for payment does not discharge indorser, II., 1089.
when drawer and drawee same person, no notice of dishonor necessary, II., 1088*a*.
whether chargeable without presentment, II., 1088*a*.
4. *Excuses arising from special waiver,* II., 1090.
general principles as to waivers of presentment, protest, and notice, II., 1090.
waiver need not be direct and positive, II., 1091.
may arise from implication and usage, II., 1091.
how waiver construed, II., 1091.
protest may be made notwithstanding waiver, if desired, II., 1091.
waiver may be embodied in instrument, II., 1092.
instances, II., 1092.
may be over indorser's signature, II., 1092*a*.
whether it binds subsequent indorsers, II., 1092*a*.
may be on separate paper, II., 1092*b*.
may be prior, contemporaneous, or subsequent to indorsement, II., 1092*b*.
may be verbal, II., 1093.
verbal by indorser at time of indorsement may be shown, II., 1093.
when waiver applies to presentment, protest, and notice, and when only to one of these steps, II., 1094.
words importing waiver, II., 1094.
effect of waiver of "protest" of foreign bills, II., 1095.
effect of waiver of "protest" of inland bills or notes, II., 1095*a*.
construction of waivers, II., 1096.
waiver stating reasons not affected thereby, II., 1097.
when waiver of demand written, verbal waiver of notice may be shown, II., 1098.
words "holden," "acountable," or "eventually accountable," II., 1099.
words constituting a guaranty deprive party of indorser's rights, II., 1099.
particular expressions amounting to waiver, II., 1099.
when question is for court to decide, II., 1100.
how laches or delay may be waived, II., 1101.
waiver of laches of holder by delay must be distinctly proved, II., 1102.
of special waivers made after execution of instrument, II., 1102.
waiver before maturity by act or agreement of party, II., 1102.

EXCUSES FOR NON-PRESENTMENT, ETC.— *continued.*
particular instances, II., 1102.
where indorser writes holder that maker has failed, and craves indulgence, II., 1104.
waiver before maturity by conduct, act, or agreement, II., 1103.
other instances, II., 1104.
where party puts an obstacle in way of demand and notice, as by stopping payment, II., 1105.
where drawer of dishonored bill gives his own note, II., 1106.
various cases of similar waivers, II., 1106.
as to waivers on day of maturity, II., 1107.
and before last day of grace, II., 1108.
as to whom and by whom waiver must be made, II., 1109.
must be made by party entitled to require diligence, II., 1110.
to party entitled to demand payment, II., 1110.
one copartner may waive, II., 1109*a*.
but if firm discharged, promise of one partner after dissolution will not bind it, II., 1109*a*.
nor will promise of one partner bind as to accommodation transaction, II., 1109*a*.
agent may waive, II., 1109*b*.
5. *Special circumstances which show inability to make protest and give notice*, II., 1111.
(1) where there is no person on whom demand can be made, II., 1112.
where note is void between maker and payee on ground of illegal consideration, II., 1113.
(2) when it is impracticable to find to whom presentment should be made and notice given, II., 1114.
burden of proving due diligence, upon whom, II., 1114.
what is due diligence to find party liable in this case, II., 1115.
inquiry must be made of parties likely to be informed, II., 1115.
holder not bound to inquire farther than reasonable and prudent man should, II., 1115.
when inquiry of bank officers suffices, II., 1115.
legibility of names, duty of notary, II., 1115.
in seeking acceptor or maker, inqury should be made of indorser, etc., II., 1116.
and *vice versa*, II., 1116.
holder should communicate information to notary acting for him, II., 1116.
presumed to know residence or place of business of immediate indorser, II., 1116.
when there is more than one indorser, inquiry should be of all, II., 1117.
exceptions to rule, II., 1117.
if business office of acceptor or maker be closed, protest may be made without further inquiry, II., 1118.
conflicting views on this question, II., 1118, 1119.
same if bank or other place of payment be closed, II., 1119.
inability to find maker or acceptor does not excuse want of notice to drawer or indorser, II., 1120.
different as to inability to find drawer or indorser, II., 1120.
delays excused under peculiar circumstances, II., 1120.
imprisonment of party no excuse, II., 1120.
as to general inquiries to find party, II., 1121.
rule when party is traveling, II., 1122.
when party has no place of abode, II., 1123.
(3) if bill or note be transferred or indorsed too late to communicate with prior parties by the regular channels, II., 1124.
qualifications of the rule, II., 1124.

EXCUSES FOR NON-PRESENTMENT, ETC.— *continued.*
(4) sickness or accident to holder, II., 1125, 1126, 1127.
illness must be of a character to prevent presentment by due diligence, II., 1127.
detention on voyage, or robbery of bill, II., 1125.
6. *Special circumstances of excuse arising from conduct of party,* II., 1128.
(1) when party has received means to take up bill or note, II., 1128.
(2) when party has received securities to provide for payment, II., 1129.
effect of accepting assignment of *all* maker's property, II., 1130.
whether it is waiver of right to require protest, etc., II., 1130, 1131.
not deemed sufficient excuse, II., 1131.
where security is sufficient to indemnify against loss, II., 1133.
not deemed sufficient excuse, II., 1133.
views of Story, Kent, and Parsons, II., 1133, 1134, 1135.
criticised, II., 1134.
when security is to full amount of note, II., 1135.
not deemed sufficient excuse, II., 1135.
discussion of the subject, II., 1136, 1137.
if indorser receive indemnity at time of indorsement, that does not dispense with demand, protest, or notice, II., 1138.
rule when security is given after indorsement, and before dishonor, II., 1139.
there must be obligation to take up note, to operate as excuse, II., 1139.
when given after dishonor, II., 1140.
as to form of assignment and character of security, II., 1141.
character of, has material bearing on question, II., 1142.
waiver as to one does not apply to other indorsements, II., 1143.
other cases, II., 1143.
when maker or acceptor absconds, presentment is excused, II., 1144.
but notice to indorser is not, II., 1144.
absconding of maker or acceptor to other place in same country, presentment excused if it be unknown to holder, II., 1144.
when drawer or indorser absconds, notice should be left at last place of abode, II., 1144.
if abode unknown, and can not be discovered, notice dispensed with, II., 1144.
when maker or acceptor has removed domicile to another State or country, II., 1145.
demand at his last place of business in such cases suffices, II., 1145.
query, whether this is necessary, II., 1145.
when removal to another locality in same State, holder must make demand at new place of residence or business, II., 1146.
when drawer or indorser has left State, notice should be left at last place of residence, II., 1146.
7. *Special waivers by promises to pay, and by part payments, after maturity,* II., 1147.
(1) promises of drawer and indorser to pay after maturity, with knowledge of holder's default, dispenses with protest and notice, II., 1147.
if promise be made with knowledge of laches, it makes no difference that promisor did not know its legal effect, II., 1147*a*.
promise may be made after suit brought, and pending motion for new trial, II., 1148.
knowledge on part of drawer and indorser of holder's default, is essential, according to American text-writers, and many decisions, II., 1149.
query, whether proof of promise to pay after maturity estops denial that demand has been only made, and notice given, II., 1150.
decision in Virginia, II., 1151.

EXCUSES FOR NON-PRESENTMENT, ETC.— *continued.*
(2) promise to pay after maturity is regarded as *prima facie* evidence of knowledge of laches, II., 1152.
inference as to knowledge in respect to presentment and notice, II., 1153.
distinction in case of the non-acceptance and the non-payment of bill presented for acceptance before it is due, II., 1154.
proof of knowledge apart from the presumption which arises from promise to pay, II., 1155.
(3) promise to pay is presumptive evidence that demand and notice were duly given, II., 1156.
discrimination between promise to pay as waiver of demand and notice, and as waiver *of proof* of demand and notice, II., 1157.
English authorities, II., 1158.
certain circumstances which operate as presumptive proof of demand and notice, II., 1159, 1160.
promise without knowledge of material circumstances, II., 1161.
(4) burden of proof on the plaintiff to show acknowledgment of liability and promise to pay, II., 1162.
promise must be absolute to operate as waiver of laches, II., 1163.
what amounts to promise, II., 1163.
when conditional promise, coupled with other circumstances, held to be presumptive evidence of promise, II., 1164.
what offer insufficient, II., 1163.
(5) part payment after maturity stands on same footing as promise to pay, II., 1165.
is presumptive evidence of fixed liability, II., 1166.
when offer to pay part of bill or note is sufficient to dispense with demand and notice, II., 1167.
part promise is only waiver *pro tanto*, II., 1168.
8. *Excuses for non-presentment, etc., which are not sufficient:*
general classification, II., 1169.
(1) want of prejudice or injury to drawer, II., 1170.
(2) bankruptcy or insolvency of acceptor and maker, II., 1171, 1172.
drawer or indorser, II., 1172.
(3) loss or mislaying of bill or note, II., 1173.
as to bill at sight, loss excuses reasonable delay, II., 1173.
if bill be lost *before acceptance*, demand should be made and bill be protested on refusal, II., 1174.
(4) appointment of drawer or indorser as executor or administrator of maker or acceptor, II., 1175.
if maker's estate be insolvent, demand and notice not excused, II., 1175.
(5) transfer of bill or note as collateral security, II., 1176.
party not indorsing not entitled to notice, II., 1176.
(6) death of maker or acceptor, II., 1177.
death of drawer or indorser, II., 1177.
query, whether death of *drawee*, before bill is presented for acceptance, excuses non-presentment *for acceptance*, II., 1178, 1179.
(7) misdating of bill or note by a foreign resident, II., 1180.
questionable if holder excused, though misled by false date, II., 1180.
what is due diligence on part of holder, II., 1180.
cases where maker resides in one State, and makes and dates note in another, II., 1180.

EXECUTION.
whether negotiable note subject to, for debt of payee, 800*a*.
bank notes subject to, II., 1672, 1673*a*.
how stockholders' interest in corporation may be subjected to, II., 1708*a*.

EXECUTORS. *See* FIDUCIARIES; PRESENTMENT; NOTICE.

EXPENSES. *See* DAMAGES; EXCHANGE; PAYMENT.

EXPERT.
testimony of, as to signature, II., 1219.

EXPRESS COMPANIES.
as collecting agents, 348.

EXTINGUISHMENT. *See* DISCHARGES.
of acceptor's obligation, 541 to 549.

FAC-SIMILE.
signature to coupon bonds may be in *fac-simile*, II., 1492.

FACTOR.
under *del credere* commission, liability of, on bill or note, 314.

FEDERAL COURTS.
follow decisions of State courts of last resort, 10.
generally apply principles of law merchant, 10, 863, 864.
jurisdiction, as dependent upon negotiability of instrument, 10*a*.
sometimes disregard State statutes in applying law merchant, 449.
have jurisdiction of suits between citizens of different States, 863, 864.
follow decisions of highest State courts in cases arising under them, II., 1525.
but will not follow all vacillations of decisions, II., 1525.
will not respect State decisions violating general principles of law merchant, II., 1525.

FEDERAL GOVERNMENT. *See* GOVERNMENT.

FELONIES.
compounding felonies illegal, 196*a*.

FEME COVERT. *See* MARRIED WOMAN, 239.

FICTITIOUS AND NON-EXISTING PARTIES.
person fraudulently using fictitious name guilty of forgery, 136.
use of such names discountenanced, 136.
holder having knowledge that name of payee is fictitious can not recover of acceptor, although he also knew it, 136.
it is policy of law to interdict fictitious names, 136.
when *bona fide* holder may recover against acceptor when payee is fictitious, 136.
English doctrine making acceptor's knowledge of fiction criterion of holder's recovery, 137.
dissertation on and criticism of this doctrine, 138.
innocent holder, where there is fictitious payee, may treat paper as payable to bearer, 139.
same doctrine applicable to notes as to bills, 139.
payee deemed fictitious, though there be really such person, if he was not in intention to be made party, 139.
payee knowingly indorsing note executed in name of fictitious person, liable as maker, 139.
but if such real person was in mind of drawer, his genuine indorsement is essential to transfer, 140.
party may adopt and use fictitious name as his own, 141.
may be sued in such case and declared against as having contracted by such adopted name, 141.
if party uses fictitious name, but does not adopt it, remedy is by action of tort, 141, 307.
if partner draw bill in fictitious name, and indorse firm's name, firm bound on indorsement, 360.

FICTITIOUS AND NON-EXISTING PARTIES — *continued.*
maker can not show payee to be, 93. 227. 242.
when drawer's name is fictitious, effect of acceptance, 540.
when fictitious name is forgery, II., 1345.

FIDUCIARIES AS PARTIES TO NEGOTIABLE INSTRUMENTS.
1. *Personal representatives,* 261.
who is called executor and who administrator, 261.
when powers of, accrue, and to what time they relate, 261.
can not bind decedent's estate by negotiable instrument, 262.
party signing himself "A. B., executor," binds himself personally, 262.
decedent's estate discharged by taking bill or note of representative, 263.
assets in hands of, good consideration for bill or note made by, 263.
when may show want of assets, 263.
total or partial want of assets good plea between original parties, 263.
may restrict liability by making instrument payable out of assets, 263.
have a right to bills and notes of deceased, 264.
duty to present, demand, and give notice of dishonor, when taking bills and notes of deceased, 264.
act in place of deceased, 264.
if note made to deceased by name, whose death not known, it is payable to his representative, 264.
so, if death were known, but name of deceased were used in good faith, 264.
can not purchase note against estate he represents, 264.
may transfer bills and notes of deceased by indorsement or assignment, 265.
would be liable on indorsement, unless it were restrictive, 265.
if transfer made for representative's private debt, it is a fraud, 265.
either of several may indorse bills and notes payable to deceased, 266.
rule where note payable to several representatives, 266.
name of deceased written as indorser is nugatory, unless there was delivery in his lifetime, 267.
if deceased delivered note without indorsement, which was necessary, representative may be compelled to indorse, 267.
but might protect himself from personal liability, 267.
note payable to A., "as executor," is assets, at least at his election, 268.
how such note should be sued on, 268.
effect of making debtor executor, 269.
effect of representative giving note not negotiable for decedent's debt 270.
2. *Guardian can not bind ward's estate by bill or note,* 271.
are personally bound to pay bills and notes, although signing "as guardians," 271.
3. *Trustees, same rule applies to them as to guardians,* 271.
4. *Clerks and commissioners of court.*
unauthorized indorsements by, voidable only, 271*a*.

FIGURES.
amount or sum payable usually specified in, 86.
when they differ from words in instrument, words prevail, 86.
if amount be expressed in figures alone it suffices, 86.
marginal no part of bill or note, 86.
coupon bond, II., 1499*a*.
if amount be only expressed in marginal figures, instrument defective 86.

FINDER. *See* LOST INSTRUMENTS.
in general acquires no rights, II., 1468.
liability of, II., 1468.
of bank note may recover from depositary on proving genuineness, and value claimed, II., 1674.

FIXED INDORSERS. *See* REISSUE, and II., 1240, 1241, 1242.
are those whose liability has been established by demand and notice, II., 997.
if they reissue bill or note after liability is so established, with their names upon it, they are bound without demand or notice, II., 997.
but this may be question of intention, II., 1242.
are still sureties of the debt, II., 1305.

FORBEARANCE.
to sue is good consideration, 760, 830.

FOREIGN BILLS. *See* BILLS.
"for collection," meaning of term, 336, 698*a*.,

FOREIGN LAWS. *See* CONFLICT OF LAWS.
not judicially noticed, 891.
presumptions as to, 891.
enforced only by comity of nations, 866.

FORGERY OF NEGOTIABLE INSTRUMENTS. *See* CHECKS.
1. *Definition and nature of forgery*, II., 1344.
special exemplifications of what amounts to, II., 1344.
habitual use of assumed name is not, II., 1345.
when use of fictitious name is, II., 1345.
procuring signature of innocent party, II., 1345.
making material change in completed instrument, with intent to defraud, is forgery, II., 1346, 1347.
the making of bill or note must be *counterfeit* or *false* to be forgery, II., 1348.
intent to defraud is essential element of forgery, II., 1349.
"uttering" of bill or note is necessary to complete crime of forgery, II., 1350.
what amounts to uttering, II., 1350.
not competent to show similar forgery in evidence, II., 1350.
2. *Liability of party who adopts a forged signature as his own*, II., 1351.
ordinarily can not deny its genuineness, II., 1351.
bound by admissions, II., 1351.
but if he states it to be genuine through mistake, and corrects error before holder has changed his relations to instrument, forgery may be pleaded, II., 1352.
whether deliberate adoption of forged signature binding, II., 1352*a*.
admission with knowledge is binding, II., 1352*a*.
observations on conflicting views, II., 1352*b*.
party by his acts or course of conduct may be bound, though signature is forged, II., 1353.
customary payment of similar paper, II., 1353.
party should promptly disclose forgery, II., 1353.
3. *When one party is estopped from denying genuineness of another's signature*, II., 1354.
(1) in respect to the maker of note, he may generally deny other signatures to be genuine, II., 1354.
when he may not, II., 1355.
(2) drawer of bills stands in same relation, ordinarily, as maker of note, II., 1356.
(3) indorser is bound though prior names be forged, II., 1357.

FORGERY OF NEGOTIABLE INSTRUMENTS — *continued.*
(4) transferrer by delivery comes within rule of implied warranty of genuineness of article sold, II., 1358.
(5) when drawee or acceptor is bound, though drawer's name be forged, II., 1359.
cases and opinions cited, II., 1360.
distinction taken between bill received after acceptance and an unaccepted bill, II., 1361.
where drawee is estopped from denying genuineness of drawer's name, the loss is thrown on him, II., 1361.
unless (1) holder has preceded him in negligence, and (2) he was deceived as to genuineness of signature, II., 1362.
admission of acceptor extends only to the signature of drawer, and not to terms of instrument itself, II., 1363.
4. *When one party is estopped from denying another's signature*, II., 1354.
maker can generally deny payee's signature, II., 1354.
and recover back money paid to indorsee, if forged, II., 1355.
but if name on note when he delivered it, he can not deny its genuineness, II., 1356.
drawer generally stands in same position as maker, II., 1356.
indorser warrants genuineness of all prior signatures, II., 1357.
if he pays under subsequent forged indorsement, may generally recover back the amount, II., 1357, 1358.
drawee must know drawer's signature, II., 1359.
generally held that if he pays money on forgery of drawer's name, he can not recover it back, II., 1359.
distinction between drawee recovering from party who received bill before acceptance, and party receiving it afterward, II., 1361.
acceptor's admission extends only to signature of drawer, II., 1363.
and not to terms of bill, II., 1363.
if amount altered, acceptor may generally recover back from holder, II., 1363.
how far negligence deprives him of this right, II., 1363.
drawee who accepts or pays is not thereby regarded as admitting genuineness of signature of indorser, II., 1364.
extent to which distinction between drawer's and indorser's signature has been carried, II., 1365.
circumstances under which acceptor who has paid bill under forged indorsement can not recover amount of holder, II., 1366.
payee whose indorsement is forged may recover on instrument, II., 1366.
thus if forged indorsement were on bill when issued by drawer, II., 1366.
for then drawee or acceptor could charge it on account against drawer, II., 1367.
if acceptor accept and negotiate bill with knowledge of forged indorsement on it, he is bound, II., 1366.
5. *Exceptions to general rule that drawee or acceptor can not recover back money paid on forgery of drawer's name*, II., 1367.
(1) when payment is made to payee, II., 1367.
(2) when holder peculiarly, or parties mutually in fault, II., 1367.
(3) when party has paid for honor without negligence, II., 1368.
6. *Recovery of money paid on forged instrument*, II., 1369.
generally money paid under mistake of fact may be recovered back, II., 1369.
if valid, surrendered for forged paper, it is no payment, II., 1369.
and will not discharge fixed indorser, II., 1369.
bank paying forged draft of depositor is still bound to him, II., 1370.
duty of depositor as to examination of pass-book, II., 1370.

FORGERY OF NEGOTIABLE INSTRUMENTS — *continued.*
party paying without opportunity of inspection may recover amount, II., 1370.
party collecting on forged indorsement liable to owner, II., 1370.
7. *When notice of forgery must be given and demand of restitution made,* II., 1371.
if holder surrenders indorsed paper for forged, must discover it in time to notify indorser, else he is discharged, II., 1371.
number of days considered too long delays, II., 1371.
doctrine approved that restitution may be demanded in reasonable time after discovering forgery, II., 1372.
when forged paper need not be returned, II., 1372*a*.
if party has paid money for or upon forged instrument when some parties thereto are genuine, II., 1372*a*.
if bill or note wrongfully converted, owner may sue in tort, II., 1372*b*.
or may waive tort and recover money as received for his use, II., 1372*b*.
8. *Of checks.* *See* CHECKS, and II., 1654 to 1657.
9. *Rights of bona fide holder under forged indorsement,* 809.

FOREIGN PROMISSORY NOTES.
protest of, II., 928.

FORMAL REQUISITES OF BILLS AND NOTES. *See* DATE; SIGNATURE; AMOUNT; TIME OF PAYMENT; PLACE OF PAYMENT; DRAWER; DRAWEE; MAKER; PAYEE; NEGOTIABILITY; ADVICE; ATTESTATION; CONSIDERATION.
no particular words essential, 73.
order under note, "please pay above note and hold against me in our settlement," held a good bill, 73.
so, such an order under an account, 73.
so, an indorsement on a bond ordering contents to be paid for value received, 73.
signature may be on any part of instrument, 74.
how signature may be made, 74. *See* SIGNATURE.
the name is not necessary if it be sufficiently indicated who the party is, 75.
informality of expression or grammatical error immaterial, 76.
"I promised" construed as "I promise," 76.
"pound" construed as "pounds," 76.
"seventy-five after date" construed "seventy-five days," 76.
other instances, 76.
instrument may be written on parchment, leather, or any convenient substitute for paper, 77.
whether may be on metal, stone, or wood, 77.
may be printed and similar to bank notes, 78.
whole of bill or note must be written or printed, 79.
memorandum on any part of instrument may qualify it, 79.
there may be stipulations affecting instrument on detached paper, 79.
evidence inadmissible to vary, 80.
instances, 80.

FRAUD. *See* BONA FIDE HOLDER.
instruments obtained by, 177, 847.
vitiates consideration, 193.
fraud in inception of paper shifts burden of proof, 769, 810, 819.
when consideration evidence of, 779.
notice of, impeaches holder's title, 789.
what notice suffices — affects holder if he gets it before payment, 789.
constructive notice sufficient, 789.
what damages party defrauded into execution of note may recover, 776*a*.
in drawing without funds, II., 1074 to 1084.

FRAUDS. *See* STATUTE OF.

FUNDS.
want of as excuse. *See* EXCUSES, and II., 1073.

FUTURES.
illegal, 195*a*.

GAMING CONSIDERATION.
when note given for, is void in all hands, 195.

GARNISHMENT.
when assignment takes priority, 16 to 23*a*.
whether payee of negotiable note subject to, 800*a*.

GIFT. *See* DONATIO MORTIS CAUSA; CONSIDERATION.
of negotiable instrument, not negotiation in usual course of business, 181.
but holder without notice could recover, 181.
deposit may constitute gift *inter vivos*, 612*b*.

GIVING TIME.
effect of in discharging surety, II., 1312, 1317.

GOVERNMENTS AS PARTIES TO NEGOTIABLE INSTRUMENTS. *See* COUPON BONDS.
when officer of Federal or State government is authorized to bind it by negotiable in strument, validity can not be questioned against *bona fide* holder without notice, 436.
government in such case bound like individual, 436.
government bound though completed treasury notes fraudulently put in circulation, 436.
at present no Federal officer can bind government as party to negotiable paper, 436.
the Floyd acceptances, 437.
order by Government of United States on Government of France not bill of exchange, 438.
foreign governments may be parties, 439.
difference between governmental and private agents, 440.
powers of governmental agents defined by statute, 440.
coupon bonds of Federal and State governments negotiable, 441.
treasury notes of United States negotiable, though under seal, 441.
after maturity, subject to equities, 441.
when not negotiable, 441.
State pledging fund to pay interest on bonds can not divert it, 442.
if agent or officer authorize to sell bonds at par, sale below par would be void, 442.
when public officer contracts in scope of authority, he is presumed to act officially, 443.
as where bill payable to "T. T. T., Treasurer of United States," 443.
other instances, 443.
who are deemed public agents, 443*a*.
books are destitute of cases precisely in point, 443*a*.
officer or agent can not ratify contract unless empowered to make it, 444.
governmental officers and agents not personally bound on contracts, even though if they were private persons they would be bound, 445.
reason and theory of the distinction, 445.
if officer or agent does not disclose official character, he is bound by contract, 445*a*.

GRACE, DAYS OF.
allowed by favor to drawee of foreign bill, to enable him to provide for payment, 614.

GRACE, DAYS OF — *continued.*
called "days of grace," or "respite days," because gratuitous, 614.
by custom universally recognized now as matter of right, 614.
demand before or after their expiration unavailing, 614.
interest chargeable for period of, 614.
apply to all parties to the paper, 615.
and to inland bills and promissory notes, 616.
and to all bills and negotiable notes except those payable on demand, 617.
if no time of payment specified, on demand understood, 617.
bills and notes payable at sight, entitled to grace, 617.
conflicting views, 617, 618.
rule affected sometimes by statute, 618.
bill payable "one day after sight" is due four days after sight, 617.
"after sight" in bill means after acceptance or refusal, 619.
"on demand at sight" equivalent to "at sight," 621.
"at or after sight" in note means that it must be again exhibited to maker, 619.
only negotiable instruments entitled to, 620.
apply to each instalment when paper payable in instalments, 621.
are calculated exclusive of day of payment, 621.
generally confined to three days in England and United States, 622.
courts judicially notice, 622.
usage in different places may fix different periods of grace, 622.
rules respecting usages of banks as to number of days allowed in particular localities, 623.
may be dispensed with, 633.
words "without grace," or "no grace," or "fixed," dispense with grace, 633.
"without defalcation" does not. 633.
nor does marginal note of day of maturity, 633.
but if acceptor fix day of maturity without grace, it does, 633.
allowance of, and number of days fixed by law of place of payment, 634.
law merchant, allowing three days, presumed to prevail, 634.
if last day of grace fall on Sunday, paper becomes due the day before, 627.
so if last day of grace be a legal holiday, 627.
and if Sunday be last day of grace, and Saturday be legal holiday, paper falls due on Friday, 627.
rule is different as to paper not negotiable, 627.
if Sunday or holiday intervene in days of grace, it does not affect them, 627.
latest business day within or before period of grace is day of payment, 627.
days of religious observance of particular sects, how regarded, 628.
what days are legal holidays, 629.
usage of banks as to holidays, 629.
whether suit may be brought on last day of grace, II., 1207 to 1211.

GREENBACK CURRENCY.
whether instruments payable in, are negotiable, 57.
held negotiable in Arkansas and New York, 57.

GROSS NEGLIGENCE. *See* BONA FIDE HOLDER.
whether, and how far, affects holder's title to bills and notes, 774, 775, 776.
to coupon bonds, II., 1502.
to bank notes, II., 1680.

GUARANTIES.
1. *Definition and nature of guaranty*, II., 1752.
divided into two classes — entire and separate, 1770*a*.
former, not revocable, and not terminated by death of guarantor, 1770*a*.
latter, may be revoked, and are terminated by death of guarantor and notice of that event, 1770*a*.
guaranty and warranty are synonymous terms, II., 1752.
guaranty is a peculiar kind of suretyship, II., 1753.
but differs from indorsement and from the ordinary contract of suretyship, II., 1753.
the difference defined, II., 1753, 1754.
surety's obligation is primary and direct like that of principal, II., 1753.
guarantor's is secondary and collateral, II., 1753.
guarantor contracts to pay if, by exercise of due diligence, the debt can not be made out of the principal debtor, II., 1753.
surety is an insurer of the debt, guarantor of the solvency of the debtor, II., 1753.
guaranty does not inure to the benefit of prior indorser, II., 1753.
guarantor's liability is more onerous than an indorser's, II., 1754.
he is not absolutely discharged by failure to make presentment and give notice within reasonable time, II., 1754.
opposite rules for the interpretation of guaranties laid down in the cases, II., 1755.
reasons why they should receive a fair and liberal interpretation, II., 1755.
main object should be to ascertain and effectuate the intentions of the parties, II., 1755.
if the guaranty propose a credit, that particular credit must be granted or the guarantor is not bound, II., 1755.
held in Massachusetts that one authorized to draw drafts "at ten or twelve days," had an option to draw either *after date* or *after sight*, II., 1756.
effect of writing one's name on back of note payable to a particular payee before such payee's name, II., 1757.
when note is not negotiable such party is to be deemed a guarantor, II., 1757.
when note is negotiable the opposite presumption arises, II., 1757.
guarantor of payment by payee, becomes vested, on paying the note, with the same rights which payee had against maker, and no more, II., 1758.
when guaranty of note made after its execution, upon a new and sufficient consideration, is valid, II., 1758.
2. *As to consideration of guaranties*, II., 1759.
valuable consideration is necessary to validity of guaranty, II., 1759.
three classes of cases to be discriminated, II., 1759.
(1) when guaranty is contemporaneous with principal contract, II., 1759.
in which case it is necessary for the consideration of the guaranty to be distinct from that of the bill or note, II., 1759.
when the guaranty is made prior to delivery of bill or note, it will be presumed to be upon consideration of the credit, and will be valid, II., 1759.
(2) when the guaranty is made after the contract is completed, and is not for benefit of guarantor, II., 1760.
in which case there must be some new and sufficient consideration to support it, II., 1760.
and plaintiff must prove such new consideration, II., 1760.
rule does not apply where there are circumstances to show that the guaranty was intended to relate back to the delivery of the instrument, II., 1760.

GUARANTIES — *continued.*
(3) when the guaranty is made after the contract is completed, and is for the benefit of the guarantor, II., 1761.
in which case it becomes his own debt which guarantor promises to pay, II., 1761.
3. *As to operation of statute of frauds* (29 Charles II.), II., 1762.
special provision requiring promises to answer for another's debt to be in writing adopted generally in all the States, II., 1762.
construction of, in England and United States, II., 1762.
and herein (1) when the guaranty is a promise to answer the debt of another, II., 1763.
distinction between real and apparent promise to answer for another's debt, II., 1763.
verbal guaranty that note passed by guarantor in part payment for a horse "was good and collectible," held to be valid, II., 1763.
where one sells a note and guarantees its payment, the guaranty need not be written, II., 1763.
(2) as to the terms of the guaranty, II., 1764.
in England, the word "agreement" construed to embrace both the consideration and the promise, II., 1764.
in this country the opinion predominates that if the promise be written it is sufficient, II., 1764.
where the consideration is not required to be expressed, the name of the party in blank is sufficient writing to satisfy the statute, II., 1765.
where the statute only requires the *promise* to be in writing, it is not necessary for the consideration to appear, II., 1765.
sufficient in any case that the consideration appears by reasonable intendment, II., 1766.
rule formerly in New York, where original contract and guaranty were contemporaneous, II., 1767.
now, by statute in that State, the consideration must be expressed in writing, II., 1767.
words "value received" sufficient expression of the consideration, II., 1767.
if guaranty be under seal that imports consideration, II., 1767.
guaranty written on promissory note after delivery requires distinct consideration to support it, 1767*a*.
statute of a State requiring consideration to be expressed in writing renders guaranty void unless so expressed, 1767*a*.
4. *Guaranty of bill or note need not be in any particular form*, II., 1768.
though generally written, there may be valid *verbal* guaranties, II., 1768.
when written, it may be by separate instrument or by writing on the instrument guaranteed, and may be sealed or unsealed, II., 1768.
when on separate paper, it should accurately describe bill or note to which it refers, II., 1768.
a general guaranty is to whomsoever may accept the proffer made, II., 1768*a*.
a special guaranty is one to a particular person, II., 1768*a*.
what is an *absolute* and what a *conditional* guaranty, II., 1769.
any extraneous event besides mere default of principal makes guaranty *conditional*, II., 1769.
import of phrases, "I guarantee the collection of the within note," "I promise that this note is good and collectible after due course of law," "I warrant this note good," and "I hereby guarantee the payment of the within note 'without protest,'" II., 1769.
guarantee in such cases must act with due diligence in collecting note, II., 1769.
what is due diligence, II., 1769*a*.

GUARANTIES — *continued.*
otherwise, if principal be insolvent or has removed from State where contract was made, II., 1769*a*.
but guarantee must proceed against principal first if he resided in a foreign State when the contract was made, II., 1769*a*.
5. *A guaranty may be limited or unlimited in respect to amount guaranteed,* II., 1770.
it may be limited to a single transaction, II., 1770.
and within a certain period of time, II., 1770.
and it may be a continuing and standing guaranty, II., 1770.
examples of each, II., 1770, 1771.
expression "from time to time," or "at any time," or for "any debt," how construed, II., 1772.
guaranty in such case is not confined to one instance, but applies to debts successively renewed, II., 1772.
doctrine in the United States, II., 1773.
6. *Negotiability of guaranties,* II., 1774.
(1) not generally negotiable when written on separate paper, II., 1774.
if addressed to a particular person, it is a contract limited to such person, II., 1774.
the party to whom the guaranty is made may in equity assign it when he transfers the bill or note, II., 1774*a*.
views of Senator Verplanck of New York respecting negotiability of guaranties on separate paper from instrument guaranteed, II., 1775.
(2) rule when guaranty is written upon the paper at time of its execution, II., 1776.
if such guaranty be not expressed in negotiable words, held in some cases that its being written upon a negotiable instrument does not make it negotiable, II., 1776.
in others, the contrary view is maintained, II., 1777.
the latter seems the better doctrine, II., 1777.
views of Judge Story and Prof. Parsons on this question, II., 1778.
doctrine in New York that guarantor is liable as a joint and several maker not sustained, II., 1779.
distinction in these cases between secondary and absolute obligation by guarantor, II., 1780.
what words of indorsement will make guarantor an original promisor, II., 1780.
(3) as to effect of guaranties written on the paper by the transferrer at time of transfer, II., 1781.
better opinion is, that such transferrer is liable, both as indorser and guarantor, II., 1782.
but other authorities say such guaranty operates only in favor of the party who first took the instrument on faith of it, II., 1782.
what was held in Massachusetts where payee transferred note with the words, "I guarantee the payment of this note within six months," II., 1783.
holder who transfers note and guarantees *collection,* makes a special contract, and is not liable as an indorser, II., 1784.
7. *Requisites to establish and preserve guarantor's liability,* II., 1785.
and herein (1) as to notice of acceptances of guaranty, II., 1785.
no notice of acceptance is required where there is a personal treaty between guarantor and guarantee as to specific existing demand, II., 1785.
but where a proposition for a guaranty is made, it must be accepted before it is binding, II., 1785.
and when addressed generally to any person, notice of its acceptance should be given by the party acting upon it, II., 1785.
doctrine of U. S. Supreme Court in reference to letter of credit which contemplates future guaranties, II., 1785*a*.

GUARANTIES — *continued.*
notice of acceptance by particular person to whom it is addressed is necessary, II., 1785*a*.
decision of State courts, II., 1785*b*.
knowledge derived from circumstances equivalent to notice in such case, II., 1785*b*.
when guaranty has been accepted, it is not necessary to give notice of each particular advance made in accordance with it, II., 1785*b*.
(2) demand upon the principal and notice of default of guarantor, II., 1786.
when guaranty depends on happening of contingent event, notice of its happening should be given the guarantor within reasonable time, II., 1786.
query, whether demand and notice required in case of absolute guaranty? II., 1786.
the correct doctrine seems to be that the guarantor is entitled to have demand made upon the maker, and notice of his default, II., 1787.
same strictness as to demand and notice which obtains in case of indorser is not required to charge guarantor, II., 1788.
guarantor will only be discharged provided he has suffered loss, and to the extent of such loss, II., 1788.
guarantor presumed to receive no injury from delay as to demand and notice, where principal is insolvent at maturity of debt and so remains, II., 1788.
injury is sufficiently proved if guarantor was solvent when debt matured, and became insolvent before demand and notice, II., 1788.
guarantor, by writing, may waive notice of acceptance, and also demand and notice of default, II., 1788.
also he may waive by a promise to pay after maturity, II., 1788.
(3) as to what will discharge guarantor, II., 1789.
he is effectually discharged by a release of his principal, II., 1789.
by the guarantees allowing extension of time to the principal upon consideration, II., 1789.
by a renewal which suspends the original debt, II., 1789.
by the surrender of any security held by the creditor, II., 1789.
revocation by death, II., 1789.
effect of payment by guarantor, II., 1789*a*.

GUARDIANS. *See* FIDUCIARIES.

GUARDIANSHIP.
persons under can not contract, 259.

HALF NOTES. *See* BANK NOTES, and II., 1695, 1697.

HANDWRITING.
proof of, when necessary, II., 1219.
whether, and when comparison of signatures may be made, II., 1219.

HOLDER. *See* BONA FIDE HOLDER.

HOLIDAYS. *See* GRACE.
what days are legal holidays, 629.
usage of banks as to holidays, 629.
law making legal holidays, and thereby affecting grace, does not impair obligation to contract, 629.

HONOR, ACCEPTANCE, AND PAYMENT FOR.
acceptance for honor or *supra protest*, II., 1254, 1258.
payment for honor or *supra protest*, II., 1254 to 1258.

HOURS OF BUSINESS.
what are, 464, 600.

HUSBAND AND WIFE. *See* MARRIED WOMAN.

IDENTITY.
of parties of same name, II., 1218, 1607, 1612.
when party is marksman must be shown, II., 1218.

ILLEGALITY OF CONSIDERATION. *See* CONSIDERATION; RENEWAL BILLS AND NOTES.
illegal and void considerations, 196, 197, 198.
how purged, 207.

ILLNESS.
as excuse for want of presentment, protest, and notice. *See* EXCUSES, and 478. II., 1066, 1125, 1126, 1127.
when epidemic disease operates as excuse, II., 1066.
sudden illness and death of, or accident to holder, as excuse, II., 1125, 1126.
must prevent due diligence, II., 1127.
when necessary is over, usual steps must be taken, II., 1125.

IMBECILE. *See* LUNATIC, and 109.

IMMATERIAL ALTERATIONS. *See* ALTERATION, and II., 1398, 1403, 1411, 1416.

IMMORAL CONTRACT. *See* CONSIDERATION, and 195 *et seq.*
void at common law, 195.
illustrations, 195, 196.
bill or note based on, valid in hands of *bona fide* holder without notice, 197.
otherwise if statute declares contract void, 197.
no nation will enforce contracts made in another country *based upon immoral consideration*, 866.
illustration, 866.

IMPLIED.
authority of agent. *See* AGENT, and 278, 289.
of copartner to bind firm. *See* PARTNERS, and 355, 358.
of corporation, *See* CORPORATION, and 379.
acceptance. *See* ACCEPTANCE, and 499, 501.
consent to alteration. *See* ALTERATION, and II., 1401.
notice. *See* BONA FIDE HOLDER, 789*a*, 795*a*, 795*b*.

IMPRISONMENT. *See* EXCUSES, and II., 1120.
no excuse for delay as to presentment and notice, II., 1120.

INABILITY TO FIND PARTY. *See* EXCUSES, and II., 1114, 1123.
as excuse for delay in presentment and notice, II., 1114 to 1123.

INCAPACITY. *See* CAPACITY; INFANTS; ALIENS; LUNATICS; MARRIED WOMEN; BANKRUPTS; GUARDIANS.

INDEMNITY. *See* EXCUSES, and II., 1128, 1480.
as excuse for non-presentment and notice, II., 1128 to 1131.
when paper lost, II., 1480.

INDORSEMENT, and transfer by indorsement. *See* COUPON BONDS, II., 1500.
1. *Forms of transfer, and transfer by indorsement*, 663.
bill or note payable to bearer or indorser in blank, may be transferred like currency by delivery, 663.
other bills and notes by indorsement of transferrer's name, and delivery to party named, 663.
if not expressed to be payable to order of any person or to bearer, they are not negotiable in the United States or England, unless by statute, 663.

INDORSEMENT — *continued.*
payee who puts his name on paper payable to bearer or indorsed in blank, is liable as indorser, 663*a*.
when such indorsement is alleged, it must be proved, 663*a*.
note payable to "A. B. or bearer" is same as if simply to bearer, 663*a*.
party renders himself liable when he indorses a non-negotiable note payable to him *only*, 664.
when instrument is payable "to order," payee's indorsement is necessary to transfer legal title, 664*a*.
of corporation with seal is good, 664*a*.
delivery by indorser is necessary to complete contract, 665.
implies acceptance by indorsee, 665.
effect of wrongful retention of note by proposed indorsee, 665
offer to indorse must be accepted in reasonable time, 665.
meaning of the term "indorsement," 666.
technically, it is applicable only to negotiable paper, 666.
literally, it means writing one's name on the back of instrument, 666.
technically, it means writing one's name on instrument with intent to incur liability in certain contingencies, 666.
term "indorsement" includes delivery, 667.
indorsement can not be partial in respect to amount, 668.
indorsement is a new contract embodying all the terms of the instrument indorsed, 668.
is equivalent to drawing new bill, 669.
indorser of instrument warrants (1) that it will be accepted or paid according to its purport, 669*a*, 671.
(2) that it is genuine, 669*a*, 672.
(3) that it is valid, 669*a*, 673, 674.
(4) that the ostensible parties are competent, 669*a*, 675, 676.
(5) that indorser has a lawful title to it, 669*a*, 677.
indorsement "without recourse" implies that indorser declines to assume any responsibility as a party to bill or note, 670.
holder may recover against indorser "without recourse," (1) if any of the prior signatures are not genuine; (2) if note is invalid between original parties; (3) if any prior party is incompetent; and (4) if the indorser is without a title, 670.
indorser of bill contracts to pay at maturity if bill be not accepted according to purport, and he be notified of its dishonor, 671.
of accepted bill, or of a note, contracts to pay it if not duly paid by the acceptor or maker, 671.
contracts that the bill or note is neither forged, fictitious, nor altered, 672.
engages that the bill or note is a valid subsisting obligation which binds all prior parties, 673.
indorsement by joint payee does not warrant genuineness of the first, 672.
wherein considered and cases cited, 674.
indorser contracts that the original parties were competent to bind themselves, whether as drawer, acceptor, or maker, 675.
query, whether this engagement extends to all antecedent parties, 676.
indorser contracts that he has a lawful title to bill or note, and a right to transfer it, 677.
indorsement, as to its obligation, is determined by the law of the place of its execution, 678.
circumstances which invalidate any other contract apply to indorsement, 678*a*.
there must be a consideration for the indorsement between the immediate parties 679.,
2. *Who may indorse or assign bills and notes,* 680.
any person legally capable of contracting may be the indorser or transferrer by delivery of negotiable paper, 680.

INDORSEMENT — *continued.*
indorsement by assignee in bankruptcy, 680.
personal representative, 680, 686.
other fiduciaries, 680.
marriage of *female payee*, or *indorsee* of bill or note, vests property thereof in her husband, 681.
by married woman of note assigned before marriage, 681.
an *infant*, by his indorsement, may transfer paper to any subsequent holder against all parties thereto, except himself, 682.
if instrument be payable or indorsed to copartnership, any member may transfer it and indorse it in name of firm, 683.
but if partnership is dissolved otherwise than by the death of a partner, the survivor can not indorse in name of firm, 683.
if several persons, not partners, are payees, all must indorse, 684.
note payable to executor may be transferred for a debt of the estate, 685.
indorsement by agent, 301.
transfer of bill or note may be made to any one capable of contracting with transferrer, 686.
it may also be made to an infant or a married woman, 686.
or to a trustee or personal representative, 686.
by president or cashier, binds bank, 685.
in which case, though it is a transfer to him personally, the trust attaches to proceeds, 686.
if to A. for use of B., A. is indorsee, 685.
promissory note payable to "J. C., Sh'ff," and indorsed "J. C., Sh'ff," does not of itself impart notice to indorsee that the money is payable to J. C. in his official capacity as sheriff, 686.
if a bill or note is payable to a party as cashier, it will be regarded as payable to his bank, 687.
3. *Forms and varieties of indorsement*, 688.
transferrer's name is generally written on the back of instrument, 688.
but "indorsement" is good if name be written on any other portion of the paper, 688.
initials, or any mark to indicate name, will suffice, 688*a*.
examples of what is sufficient indorsement by figures or other indicia, 688*a*.
whether party who writes sale or assignment is indorser, or mere assignor of instrument, 688*b*.
peculiar expressions used in transfers, 688*b*.
amounts to ordinary indorsement in an elaborate form, 688*b*.
American decisions in similar cases, 688*c*.
indorser may authorize another to write his name, 689.
as a general rule, indorsement must be on the paper, or attached to it, 689*a*.
promise to indorse for valuable consideration will support an action for its breach, 689*a*.
transfer of a note with a guaranty is good, though the guaranty be void under statute of frauds, 689*a*.
not necessary for indorsement to be on the original paper, 690.
may be on slip of paper attached thereto, 690.
called *allonge*, 690.
various liabilities evidenced by terms of indorsement, 691.
(1) indorsement in full, 691, 692.
(2) indorsement in blank, 691, 693.
no difference between note indorsed in blank and one payable to bearer, 693.
indorsement of blank paper is a "letter of credit for an indefinite sum," 694.
when there are several indorsers in blank, holder may strike out any he pleases, 694*a*.

INDORSEMENT — *continued.*
but if there be a special indorsement to a particular person, holder can not strike it out and insert his own name, 694*a*.
subsequent indorsers are not discharged when holder fills up a prior blank indorsement, payable to himself, 694*a*.
blank indorsement does not *per se* transfer a title, 695.
bill or note once indorsed in blank, *and afterward in full*, is still payable to bearer against all parties, save special indorser, 696.
title of latter must be made through his indorsee, 696.
holder can not fill up blank so as to make note payable partly to one and partly to another person, 696*a*.
4. *What are absolute and what conditional indorsements*, 697.
rights between banks, and between banks and depositors, under restrictive indorsement "for collection," 336 *et seq.*
what are restrictive indorsements, 698.
indorsee of restrictive indorsee, 698*a*.
can not sue the drawer or acceptor upon it, 698*a*.
mere mention of consideration in the indorsement would not render it restrictive, 698*b*.
illustrations of restrictive indorsements, 698*c*.
indorsement "for collection," 698*d*.
when inserted in indorsement and instrument put in bank for collection, 698*d*.
makes indorsement restrictive, 698*d*.
indorser for collection, but in terms unrestricted, not liable to subsequent holder under indorsement "for collection," 698*e*.
indorsement "for my use," or, "for collection," may be recalled at pleasure, 699.
indorsement "without recourse," or "at the indorsee's own risk," makes indorser a mere assignor of the title to the instrument, 700.
security continues negotiable notwithstanding such indorsement, 700.
some peculiar cases, 700*a*.
without recourse must be clearly indicated, 700*a*.
cases cited, 701.
samples of different modes or forms of indorsement, 702.
successive indorsers are liable to each other in the order they indorse, 703.
relations of successive indorsers of accommodation paper, 703*a*.
contribution between successive indorsers does not arise, except by special agreement, 703.
indorser may be first in point of contract, though second in point of time, 704.
it may be shown by parol proof who are actually prior indorsers, 704.
joint payees who indorse are not regarded as "successive indorsers," 704.
examples of *irregular* intervening indorsements, 705, 706.
party who indorses after payee a note payable to his (payee's) order, can not show by parol that he did not intend to be bound as indorser, 707.
intention to become liable as surety or guarantor must be clearly indicated, 707.
form of contract *prima facie* determines construction, 707.
party placing his name on a note payable to bearer, in fact or effect, is an indorser only, 707*a*.
query, whether party who writes his name before that of payee on note is an indorser, 709.
when the intention in such case may be shown by parol evidence, 710.
when not, 712.
grounds for admission of parol evidence, 711.
whether party signing on back before payee is presumably joint maker, 713*a*.

INDORSEMENT — *continued.*
view that third party is presumed to be surety or guarantor in the form of joint maker, 713*b*.
view that such third party is *prima facie* only secondarily liable as guarantor, 713*c*.
California decisions and statute, 713*c* note, 714.
view that such third party is second indorser, 713*d*.
reasons for regarding such person, as a general rule, to be *first* indorser, 713*e*.
rule in New York, 713*e*.
comments and conclusions, 714.
English cases cited, 714*a*.
opinion diverse as to what parol evidence determines liability of person who signs before payee, 715.
if party describes himself as surety, guarantor, or indorser, he thereby gives notice of his character, of which other parties should take cognizance, 716.
what is a material alteration by maker, 716.
query, how far parol evidence is applicable to ascertained indorsements, 717.
Mr. Byles' views as to indorsements in blank, 717.
controverted by text, 718.
general rule stated, to wit: that in an action by indorsee against his indorser, no evidence is admissible save such as would be in suit against drawer by one in privity with him, 718.
instances of exclusion of parol evidence between indorser and indorsee, 719.
whether contemporaneous waiver of demand and notice may be shown by parol evidence, 719*a*.
what parol evidence permissible between indorser and indorsee, 720.
limitations to rule as to evidence in an action by indorsee against his indorser, etc., are:
(1) it may be shown that indorsement was without considera- 720*a*.
(2) that it was upon trust for a special purpose, 721.
(3) that fraudulent representations were made to indorser at time of indorsement, 722.
(4) that it was made merely to transfer legal title to real owner, 720*a*.
cases illustrating these views, 723.
distinction taken between indorsement for value and for accommodation, 723.
after maturity negotiable paper circulates, but transferee only acquires the right and title of transferrer, 724*a*.
negotiable paper may be transferred by indorsement, or by delivery, either before or after maturity, 724.
dishonor for non-payment or non-acceptance does not destroy its negotiability, 724.
indorsee of overdue paper takes it subject to existing equities, 725.
what equities are pleadable, 725*a*.
must be those inherent in paper itself, 725*a*.
exception in case of *accommodation* paper, 726.
indorsee of overdue paper may recover if his indorser could, 726*a*.
as to equities of third parties, 726*a*.
rule as to equities applies to party who indorses "without recourse," and reacquires bill or note after maturity, 727.
equity will not compel surrender of pastdue note, 727.
undated indorsement is presumed to have been made at time of execution, or before maturity and dishonor, 728.

INDORSEMENT — *continued.*
indorsement will be presumed to have been made at place where instrument is dated, 728.
bill or note is merged in a judgment, and can not be thereafter indorsed or assigned, 728.
may be transferred pending suit, 728.

INDORSER. *See* INDORSEMENT.
when agent is deemed, 301, 416, 417.
bound as, 314.
what law applies to indorser, 898 to 902.
liability of, for re-exchange, interest, and damages, 918. II., 1448 to 1452.
notice to, II., 970, 1038.
how bound on bill or note reissued by him, II., 997, 1241.
whom he may sue, II., 1204.
when may be sued, II., 1212.
may require receipt on payment, II., 1229.
of forged paper, II., 1355.

INFANTS.
persons under 21 years of age are, 223.
how contracts of, have been classified, 223.
distinction as to void and voidable contracts obsolete, 223.
may bind themselves for necessaries, 224.
whether they may execute notes for necessaries, 224.
can not bind themselves absolutely as drawers, acceptors, makers, or indorsers of negotiable instruments, 225.
doctrine generally accepted that they can not be parties to negotiable instruments, 225.
views of the text — that instrument executed by infants not necessarily void because negotiable in form, 226.
and that if for necessaries, such instruments are valid to extent of their value, 226.
Scotch law on the subject, 226.
payee indorsing paper executed by, warrants validity, 226.
if payee be infant, maker, drawer, or acceptor is bound to his indorsee, 227.
whether payment may be made to infant payee, 227.
rights and liabilities of antecedent parties, 228.
infant not bound by his own indorsement, 228.
indorser may rescind contract, 229.
views of Story, 228.
remarks thereon, 228.
infant's indorsement voidable, not void, 229.
if he disaffirms contract after age, must return consideration, 229.
ratification by adult validates instrument in all respects, 230.
instrument may be sued on in such case without alleging ratification 230.
ratification may be after action brought, 230.
it inures to benefit of every subsequent holder, 230.
verbal ratification sufficient unless written required by statute, 231.
what words amount to ratification, 231, 232.
promise of adult must be made to party or his agent, 233.
if promise conditional, condition must be fulfilled, 233.
part payment does not amount to ratification by adult, 234.
what does not amount to ratification, 234.
effect of adult keeping property purchased when infant, 234.
or retaining consideration for contract, 234.
whether ignorance of law exonerates adult, 235.
statutory enactments respecting ratification by adults, 236.

INFANTS — *continued.*
comparison between ratification by adult, and by principal of agent's act, 236.
adult retiring from firm of which he was a member when infant must give notice, 237.
but if he continues in firm it is no ratification of its prior contracts as to himself, 237.
whether infant making joint note with adult, should be sued jointly, 238.

INFORMALITY.
mere informalities of expression do not affect negotiable instruments, 76.

INITIALS.
of maker suffice for signature, 74.
so of drawer, indorser, or acceptor, 688.
must be shown to whom they apply, II., 1218.

INJUNCTION.
lies to restrain illegal subscriptions by corporations, II., 1522*a*.
negotiation of instrument originating in fraud, 789.

INJURY.
lack of, no excuse for want of presentment, protest, and notice of bills and notes, II., 1170, 1175. *See* CHECKS.

INLAND BILLS. *See* BILLS OF EXCHANGE, and 6 to 14.
as to protest of. *See* PROTEST, II., 926.

INSANITY AND INSANE PERSON. *See* LUNATIC.

INSOLVENCY. *See* EXCUSES.
no excuse for non-presentment and notice, II., 1171, 1172.

INSTALMENTS.
note payable in, with condition that if default made in payment of first, the whole shall be due, is negotiable, 48.
grace allowable on each instalment of bills and notes payable in, 621.
when note payable in, is overdue, 787.
if instalment of principal of overdue note subject to equities, 787.
otherwise as to instalment of interest, 787.
action lies on, as they fall due, II., 1213.

INTERDICTION of commerce and intercourse as excuse for non-presentment, protest, and notice. *See* EXCUSES, and II., 1063.

INTEREST. *See* EXCHANGE: CONFLICT OF LAWS; USURY.
what law applies to, 918.
alteration in amount of, II., 1384.
recoverable against all parties to bills and notes, II., 1458.
need not be specially claimed, II., 1458.
note "with interest" carries interest from date, II., 1458.
when contract rate prevails, II., 1458*a*.
on coupon bonds, II., 1513, 1515.
recoverable on coupons, II., 1513.
prior demand of payment not necessary to recovery of, II., 1514.
but readiness to pay at time and place abates interest, II., 1515.
when recoverable on bank notes, II., 1687.

INTERPRETATION OF CONTRACTS. *See* CONFLICT OF LAWS.
by what laws governed, 871.

INTOXICATION. *See* DRUNKENNESS, 214, 215

I. O. U.
whether negotiable, 36.

IRREGULAR AND AMBIGUOUS INSTRUMENTS, 128.
ambiguities may in general be explained, 87, 88.
drawer and payee may be same person, 128.
drawer may draw bill on himself payable to his own order, 128.
or to order of third person, 128.
when drawer and drawee are same, paper may be treated as a note, 128.
or as an accepted bill, 128.
drawer in such case bound without notice, 128.
identity of drawer and drawee must be proved, 128.
usual to regard such papers as bills, and to declare accordingly, 128.
where partnership has two places of business, and draws on itself from one place to another, it is same as note, 129.
same rule applicable to corporations, 129.
note by maker to himself a nullity, 130.
but if he indorse it, it becomes payable to bearer, or to order, 130.
if paper so ambiguous that it is doubtful whether it be bill or note, it may be treated as either, 131.
instances, 131, 132.
effect of substituting "*at*" for "to" in address of bill, 133.
notes sometimes certified as checks, 134.
bank becomes debtor when it certifies notes, 134.
when bank may retract certificate, 135.

JOINT DRAWEES.
if not partners all must accept, 488.
otherwise bill should be protested, 488.
but party accepting will be bound, 488.

JOINT AND SEVERAL NOTES AND BILLS. *See* JOINT PARTIES.
note by two or more makers may be joint, or joint and several, 94. II., 1294.
if note running, "I promise," signed by several, it is joint and several, 94.
so note running "we or either of us promise," 94.
note signed "A. B., principal, C. D., surety," and running, "we promise" — is joint, 94.
if such note run, "I promise," it would be joint and several, 94.
a joint and several note is joint note of all, and several note of each, 94.
as joint note it may be valid, and as several invalid, 94.
two signing as makers are *prima facie* joint makers and not partners, 94, 361.
how note of firm should be signed, 95.
delay in presenting to joint maker when excused, II., 1089.

JOINT OWNERS.
no implied authority in one to bind others, 358.

JOINT PARTIES. *See* COVENANT NOT TO SUE: PRINCIPAL AND SURETY.
must unite in action if living, II., 1183*a*.
on death of one remedy survives to those living, II., 1183*a*.
how discharged, II., 1294.
discharge of one discharges all, II., 1294.
but not if holder's rights are expressly reserved, II., 1295.
rule as to partners, II., 1295.
judgment against one is bar to suit against all others, II., 1296.
but not if liability is several also, II., 1296.
whether giving time to one discharges others, II., 1297.

JOINT PARTIES — *continued.*
effect of death of one, II., 1298.
when note of one discharges all, II., 1299.
whether joint party may be shown by parol to be surety, II., 1336.

JUDGMENT.
power to confess in bill or note, whether it impairs negotiability, 61.
how rendered on instruments payable in currency and in coin, II., 1247.
effect of, as merger, II., 1283, 1285.
when good offset, II., 1425, 1426.

JUDICIAL NOTICE.
taken of almanac, 70.
not taken of laws of foreign countries, 865, 891.

JUDICIAL SALE.
purchaser of note at, may recover full amount of accommodation indorser, 767*a*.
but is not purchaser in usual course of business, 780, 781.

JURISDICTION. *See* FEDERAL COURTS, and 10*a*.

JURY.
when questions of diligence are for it to determine, whether question of reasonable time of presentment and acceptance for court or jury, 466.
what are business hours is question for, 601.

LACHES.
in presentment for acceptance, 452, 465.
debt discharged by laches in enforcing collateral, II., 1278*a*.

LAW MERCHANT.
applied by Federal courts in determining character of instrument as affecting jurisdiction, 10*a*.
presumptions as to, 891*b*.

LEGAL TENDER. *See* TENDER.

LETTERS OF CREDIT. *See* GUARANTIES.
definition of, II., 1790.
are general or special, II., 1790.
nature of engagement by, II., 1790.
views of Bell, Hallam, and Marius, II., 1791, 1792, 1793.
how far similar to bills, II., 1794, 1795.
special letter only available to person addressed, II., 1797.
when amounts to acceptance or promise to accept, II., 1797.
general letter available to any person who accepts its proposition, II., 1797, 1798.
this rule applies even when letter addressed to particular person proposing to be his surety to third person making advance or giving credit, II., 1797.
provided that credit is given or advance made on faith of it, II., 1797.
whether or not, and how far negotiable, II., 1798.
when amount to acceptance, II., 1799.

LEX DOMICILII, 863 to 866.

LEX FORI, 882 to 892.

LEX LOCI CONTRACTUS. *See* CONFLICT OF LAWS, and 867 to 875.

LEX LOCI REI SITÆ, 893 to 894*a*.

LEX LOCI SOLUTIONIS, 879 to 881.

LIEN. *See* MECHANICS' LIEN, and II., 1281.
See BANKERS' LIEN, and 334*a*, 337. II., 1708*c*, 1708*d*.
meaning of, II., 1279.
how waived, II., 1279.
vendor's lien as to personal property waived by taking bill or note, II., 1279*a*.
or selling goods on credit, II., 1279*a*.
but note on demand would not defeat, II., 1279*a*.
if goods remain in vendor's hands until bill or note given for them matures, vendor's lien revives, II., 1280.
unless bill or note has been negotiated, which would alter rule, II., 1280.
taking bill or note does not waive vendor's lien on real estate, II., 1281.
rule where third person is security on bill or note, II., 1281.
whether taking bond waives vendor's lien on real estate, II., 1281*a*.
lien of vendor passes with note to transferee, II., 1281*b*.
unless vendor guarantees note, or indorses without recourse, II., 1281*b*.
rule as to mechanics' lien, II., 1282.
taking bond does not waive lien, II., 1282.

LIMITATION OF SUIT. *See* ACTION, and II., 1214, 1215.
how far applicable to bank notes, II., 1683.

LIMITED GUARANTY. *See* GUARANTIES.

LIS PENDENS.
does not affect negotiable paper, 800*a*.

LOSS OF BILL OR NOTE. *See* EXCUSES.
as excuse for non-presentment and notice, II., 1173.

LOST AND DESTROYED BILLS AND NOTES.
1. *Rights and duties of loser, finder, and holder*, II., 1461.
duty of holder to give immediate notice of loss to all parties to note or bill, II., 1461.
loser should notify the public of his loss, II., 1462.
but notice unavailing unless it reaches holder, II., 1462.
advertisement not necessary to holder's recovery, II., 1463.
loss of instrument is no excuse for failure in demand, protest, and notice, II., 1464.
demand should be made on copy, II., 1464.
drawer or acceptor can require production of bill or proof of loss, with indemnity, II., 1465.
in France if original be lost, drawer and indorsers are compellable to give a new bill, II., 1466.
general rule in England in such case different, II., 1466.
rule when one part of a foreign bill *drawn in sets* is lost by drawee, II., 1467.
owner of lost bill or note may maintain suit against the finder, II., 1468.
bailee who tortiously converts note or bill is liable in trover, or for money had and received, II., 1468*a*.
semble in case of maker or drawee who wrongfully seizes and retains bill or note, II., 1468*a*.
rule where a third party acquires lost note from robber or finder, II. 1469.
general doctrines of evidence respecting lost and destroyed instruments, II., 1470, 1471.
suit cannot be maintained upon note fraudulently destroyed, II., 1471
affidavit of loss or destruction necessary, II., 1472.

LOST AND DESTROYED BILLS AND NOTES — *continued.*
question of loss or destruction is generally one for the courts and not for the jury, II., 1472.
when notarial copy admissible, II., 1472.
if bill or note is lost after suit is brought, plaintiff may recover, as in other cases of lost instruments, II., 1473.
rule as to indemnity in such case, II., 1473.
when debtor voluntarily remits note to creditor, and it is lost, the loss falls on him, II., 1474.
otherwise if remitted at the creditor's request, II., 1474.
2. *Suit against parties to,* II., 1475.
owner of lost instrument, on fixing liability of parties by demand and notice, may enforce payment by suit, II., 1475.
query, what is the proper mode of procedure in such cases? II., 1475.
doctrine approved that equity is the proper forum, II., 1475.
in England remedy on lost negotiable instrument confined to equity, II., 1475.
distinction in England between instrument lost before and after maturity, II., 1477.
in United States decisions vary, II., 1478.
rule as to bank notes cut in halves, II., 1479.
must be tender of indemnity before payment may be required, II., 1480.
but this rule does not apply where paper is not negotiable, II., 1481.
where, though negotiable, it is payable to order and unindorsed, or specially indorsed, II., 1481.
where it has been destroyed, II., 1481, 1482.
where it has been traced to defendant's custody, II., 1483.
where defendant is protected by statute of limitations, II., 1485.
same exceptions applicable to rule requiring suit to be in equity, II., 1482, 1485.
lost certificate of deposit payable to order, unindorsed, rights of owner, II., 1481, note.

LUNATICS AS PARTIES, 209.
every person presumed sane, 209.
insanity or imbecility in England must be specially pleaded, 209.
early authorities held that party could not stultify himself by showing lunacy or imbecility, 209.
doctrine that defence must show that defect of mind was known to other contracting party, 210.
doctrine criticised and repelled, and right to show lunacy or imbecility upheld, 210.
Lord Tenterden's views, 210.
weakness of mind, immaturity of reason, or inexperience generally, no defence, 211.
what sufficient weakness of mind to operate as defence, 211.
imbecile as to necessaries stands on same footing as infant, 212.
contracts for necessaries made in good faith are binding, 212.
cases of necessaries, 212.
inquisitions of lunacy as evidence, 213.
rule in England and in United States, 213.
ratification by lunatic after restoration to reason, 213.

MAKER. *See* AGENTS; CORPORATIONS; IRREGULAR INSTRUMENTS; JOINT AND SEVERAL NOTES; SIGNATURE.
must be indicated with certainty, 91.
if promise in alternative, as, for instance, if note be signed "I, A. B., or else C. D.," the note is not negotiable, 91.
initials suffice as signature, 74, 688.
mark likewise, 74.

MAKER — *continued.*
agrees to pay amount to payee or his indorsee, 93.
estopped from showing that payee had no capacity to indorse, 93, 227, 242.
therefore can not show payee was infant, married woman, bankrupt, lunatic, illegal corporation, or fictitious person, 93, 227, 242.
if payee became insane after note made, his indorsement would be nullity, 93.
what law applies to, 895.

MALA FIDES. *See* BONA FIDE HOLDER, and 769 to 776*a*.
gross negligence may be evidence of, but is not same in effect, 774, 776.

MALIGNANT DISEASE as excuse for non-presentment, protest, and notice. *See* EXCUSES, and II., 1066.

MARGINAL FIGURES.
not a part of bill or note, 86, 86*a*.

MARK.
any mark used *as* signature suffices, 74.
need not be accompanied with certificate of witness, 74.
does not prove itself like signature, but is adminicle of proof, 74.
any peculiarity may be shown as evidence of genuineness, 74.
unless there be attesting witness, must be proved by other testimony, 74.

MARRIED WOMAN.
1. *General principles.*
wife's personalty by common law merged in husband's, 239.
can not bind herself as party to negotiable instrument, 240.
when promise by widow to pay note made during her marriage is binding, 240.
can not contract with husband, 241.
husband's note to wife void, 241.
can not sue on husband's note in his lifetime, or his executor after death, 241.
husband making note to wife is bound to her indorsee, 241.
wife bound upon her indorsement of husband's note, 241.
he is likewise bound by his indorsement of wife's note made to himself, 241.
when husband's note to wife for money advanced out of her separate estate constitutes declaration of trust, 241.
note to single woman becomes husband's by marriage, 242.
can not transfer bill or note, 242.
drawer, acceptor, and maker can not show that payee was married woman when instrument was executed, 242.
indorsee may recover against them, 242.
indorser subsequent to married woman warrants her capacity, and is estopped, 242.
rule that married woman can not contract applies, although she lives separate from husband, 243.
or has eloped from him, 243.
or has separate maintenance, 243.
or has been divorced from bed and board, 243.
rule in Massachusetts, 243.
divorce from bond of matrimony restores capacity of, 243.
2. *Exceptional cases in which contracts of, are binding.*
(I) when husband is alien enemy or civilly dead, 245.
so if husband is alien who has never been in country where she is resident, 245.
but not if he has lived in that country, 245.

MARRIED WOMAN — *continued.*
rule in Massachusetts, 246.
when husband has been banished or transported or imprisoned for crime, 246.
or has abjured civil life, 246.
or has been abroad and unheard of seven years, when his death is presumed, 246.
(2) when she has separate estate, it is liable in England for debts contracted on faith of it, 247.
English cases, 247.
authorities conflicting in United States, 248.
in New York held essential either (1) that intention to charge separate estate be declared in contract, 248.
or (2) that consideration be for direct benefit of separate estate, 248.
but in latter case, not necessary that bill, note, or other contract specify particular property, 248.
in United States, general rule is that separate estate is liable in equity, on all debts expressly or impliedly charged thereon, 248.
in New York rule at law same as in equity, 248.
how intent to charge separate estate inferred, 248.
construction of note to husband, 249.
rule in Massachusetts under statute, 249.
when separate estate charged, all held at time of judgment liable, 249.
promise by widow to pay debt contracted in marriage void, 249.
but otherwise if she had separate estate, 249.
(3) when wife is sole trader, she is liable by custom of London, but husband must be joined in suit, 250.
statutes in United States, 250.
without husband's consent can not generally bind herself in trade, 250.
(4) if husband fail to supply her with necessaries she may bind him, 251.
(5) husband using wife's name, bound by it, 252.
thus, if he sign note in wife's name, 252.
so if she signs her name with his assent, 252.
so if he authorizes, or ratifies contract in her name, 252.
so if husband conducts business in her name, 252.
(6) may bind husband as his agent, 253.
must use husband's name as his agent unless authorized to use her own, 253.
authority to bind husband must be clearly proved, 253.
if agent, can not delegate authority, 253.
husband may make same defences, when she has used his name by authority, as if he used it himself, 253.
3. *Marriage entitles husband to bills and notes of wife possessed before*, 254.
husband may indorse note made to her when single, 254.
or may sue on it in his own name, 254.
or allow wife to indorse in her name, 254.
in last case it may be sued on as indorsed by wife with his consent, or as indorsed by him, 254.
if husband loaning money, takes note to self and wife, it purports gift to her if she survives, 255.
if note made after marriage to husband and wife as joint payees, legal interest on it goes to survivor, 255.
husband must reduce wife's choses in action to possession, 256.
if he dies without doing so, right survives to her, 256.
if wife die, her representative may sue on her choses in action, but proceeds go to husband, 256.
husband entitled to be her personal representative, 256.

MARRIED WOMAN — *continued.*
if husband after her death gets possession of her choses in action, they belong to him, 256.
if husband dies without qualifying as representative of deceased wife, right to administer passes to his next of kin, 256.
what amounts to reduction into possession by husband of wife's choses in action, 257.
husband liable for contracts made by wife when single, 258.
husband and wife must be sued jointly on such contracts, 258.
if husband dies, wife only bound by her contracts made when single, 258.
if wife dies, her representative only liable, 258.
creditors of wife may follow her unreduced choses in action in husband's hands, 258.

MATERIAL.
upon which bills and notes printed, need not be paper, 77.
metallic tokens only evidence of debt, 77.

MECHANICS' LIENS.
not generally waived by taking bill or note for debt, II., 1282.
nor by taking bond, II., 1282.
such securities are cumulative, II., 1282.

MEMORANDUM CHECKS. *See* CHECKS.

MEMORANDUM ON NEGOTIABLE INSTRUMENTS, 149.
it does not affect certainty of the paper, does not prevent negotiability, 149.
purport of paper must be collected from all eight corners, 149, 151.
instances of memoranda affecting operation of instrument, 149, 150, II., 1383.
conflicting decisions, 152.
memoranda of consideration does not affect it, 51*a*, 60*a*, 150.
memorandum merely earmarking instrument does not affect it, 153.
when, by whom, and under what circumstances memorandum written may be shown, 154.
will be presumed to have been contemporaneous with execution of instrument, 154.
if contemporaneous is constituent part of it, 154.
if subsequent and with consent of all parties will bind them, 154.
if made by stranger, and without parties' consent, is spoliation, 154.
if made by subsequent party, without others' consent, is spoliation as to his predecessors, 154.
when part of instrument can not be varied by parol evidence, 154.
when questions concerning, are for jury to decide, 154.
if evidently intended not to affect instrument, it will not do so, 155.
instances, 155.
as to place of payment, II., 1383.
when material, and effect of obliterating, II., 1383, 1384, 1385.

MERGER. *See* DISCHARGES.
at common law appointment of debtor as executor merges debt, II., 1285.
this principle does not obtain in United States, II., 1285.
bill or note merged in bond or covenant because of higher nature, II., 1293.
but no merger if face of bond or covenant shows it is mere additional security, II., 1293.

MESSENGER. *See* NOTICE.
employment of, to give notice, II., 1004, 1033, 1034.

MISDATE.
of bill or note as excuse for failure in respect to presentment and notice, II., 1180.

MISDATING BILL OR NOTE. *See* EXCUSES.
as excuse for non-presentment and notice, II., 1180.

MISDEMEANORS.
compounding misdemeanor an illegal consideration, 196*a*.

MISDESCRIPTION. *See* NOTICE, II., 974, 981.
of bill or note in notice will not vitiate unless it misleads, II., 974, 979*a*.
of payee's name may be explained, 100.

MISLAYING BILL OR NOTE. *See* EXCUSES.
as excuse for non-presentment and notice, II., 1173, 1174.

MISNOMER.
immaterial, 399.

MISSTATEMENT.
whether notice vitiated by, II., 984.

MISTAKE. *See* FORGERY; ALTERATION; BONA FIDE HOLDER; CHECKS.
in amount between privy parties may be shown, 813.
of fact, money paid under may be recovered back, 732, 733. II., 1226, 1243, 1269, 1655, 1661.
but not if paid under mistake of law, II., 1226.
if note be surrendered by mistake, only part being paid, balance may be recovered, II., 1243.
negligence in paying under mistake of fact does not divest right of recovery, II., 1362, 1369, 1655.
holder of instruments executed under, 850, 853.

MONEY. *See* PAYMENT; PROMISSORY NOTES; CONFLICT OF LAWS.
negotiable paper must be payable in, 56, 59.
whether negotiable if payable "in Canada money," 58.
legal tender decisions, II., 1246 to 1249.
agent to collect can take nothing else, 335. II., 1245.

MONTH.
by common law, lunar month is applied in construing ordinary contracts and statutes, 624.
by law merchant, calendar month applied to negotiable instruments in England and the United States, 624.
how months computed in respect to negotiable instruments, 625.
how impossible date—for instance, 31st September—corrected, 625.

MORTGAGE.
whether mortgage to secure bill or note passes with it clear of equities, 834, 835.
party who can enforce note may enforce mortgage, 834*a*.
parties to, may substitute renewal notes without affecting validity of surety, 835*a*.
not discharged by change of form of indebtedness, 835*a*.
deed of trust on same footing, 684.
prior liens on land protected, 834*b*.
assignee of, chargeable with constructive notice, 634*b*.
mortgage and note delivered by third party in violation of condition, void, 855.
peculiar case in Wisconsin, 855.
whether governed by law of place where property located, or that of place where money is to be paid, 889.

MUNICIPAL BONDS.
1. *Nature and powers of municipal corporations*, II., 1519.
definition of municipal corporations, II., 1519.
private corporations, II., 1519.
differences between the two kinds of corporations, II., 1519*a*.
powers of municipal corporations are only such as are expressly conferred or are incidental to their existence, II., 1519*a*.
municipal corporation has no incidental power to borrow money, or issue securities for debt, II., 1520.
can not without legislative authority issue bonds for extraneous objects, II., 1520.
may have a power conferred to do either thing for a *public purpose*, II., 1520.
or to give to a *public purpose*, II., 1521.
what are "public purposes," II., 1522.
injunction lies to restrain for private purposes, II., 1522*a*.
whether railroad is, II., 1521.
constitutional restrictions on States do not apply to municipal divisions, II., 1524.
on municipal divisions do not apply to States, II., 1524.
townships included in county, II., 1524.
only apply prospectively, and do not annul existing acts, II., 1524.
construction of statutes applicable to, II., 1524, 1525.
rules of the Federal courts, II., 1525, 1526.
2. *Express and implied powers of municipal corporations*, II., 1527.
classification of corporate powers, II., 1527.
when municipal corporations may contract debts, borrow money, or issue negotiable securities, II., 1527*a*.
municipal, never like private corporation, II., 1527*a*, 1528.
difference between contracting debt, and borrowing money, II., 1530.
when power to borrow is clear, negotiable security may be given to pay, II., 1531.
power to borrow means power to borrow whatever is money according to Constitution of United States, 1246*a*.
and power to issue negotiable bonds includes power to make them them payable in such money, gold coin for instance, 1246*a*.
power to borrow correlative with nature of funds looked to for payment, 1246*a*.
various decisions on these questions, II., 1530, 1532.
municipal bonds may be sold by holder for any sum, II., 1533.
but not by municipality issuing them, II., 1533.
authority to issue bonds for stock does not authorize sale of them, II., 1533.
for loans, does not imply authority to sell below par, II., 1533.
sale below par, when usurious, II., 1533.
holder of bonds, knowing them illegally issued, not entitled to recover, II., 1533.
usuary impeaches bonds in all hands, II., 1533.
but seller bound for the consideration paid, II., 1533.
case of usury where bonds sold for larger sum in depreciated currency, II., 1534.
how question of municipal subscription submitted to popular vote, II., 1535.
construction of conditions that voters must assent, II., 1535*a*.
various cases, II., 1535*a*.
how election impeached, II., 1536.
3. *Powers of municipal officer or agent to bind the corporation*, II., 1537.
views of the United States Supreme Court, II., 1537.
qualifications of its doctrines, II., 1538 to 1544.

MUNICIPAL BONDS — *continued.*
decisions illustrating its views, II., 1539.
held by U. S. Supreme Court that recitals in bonds issued in excess of constitutional limit conclusive in favor of *bona fide* holder, 1543*a*.
township has no inherent authority to contract a debt, II., 1544*a*.
not included in "corporate bodies," II., 1544*a*.
4. *How invalidity of bonds cured by acquiesence or ratification,* II., 1545.
general principles which have been adopted:
(1) by failure of members of corporation to enjoin issue, II., 1545.
(2) by their submitting to taxation to pay them, II., 1545.
(3) by voting for, or submitting to payment of principal or interest, II., 1545.
(4) by receiving or keeping proceeds, II., 1545.
decisions illustrating these views, II., 1546, 1547, 1548.
remarks upon them, and qualifications, II., 1549.
(5) to be capable of ratification, bonds must be constitutional, and not illegal, II., 1547.
5. *General principles of municipal liability,* II., 1550.
series of propositions on the subject, II., 1550.
series of decisions illustrating them, II., 1551, 1552, 1553.
where statute points out particular course, it must be pursued, II., 1555*a*.
6. *Legislative control over municipal obligations,* II., 1556.
may legislature compel municipal corporation to discharge indebtedness which it did not contract? II., 1556.
can legislature authorize municipal officers to contract debt without popular vote in its favor? II., 1557, 1558, 1559.
may legislature validate municipal securities invalid when issued? II., 1560, 1561, 1562, 1563.
may legislature authorize municipal officers to ratify invalid securities without popular vote? II., 1564.
may legislature abolish right of municipality to plead defence of illegality? II., 1565.

MUNICIPAL CORPORATIONS AS PARTIES TO BILLS AND NOTES. *See* CORPORATIONS; COUPON BONDS; MUNICIPAL BONDS; DRAFTS OR WARRANTS.
have no implied power to execute negotiable instruments, 420.
but may receive express or implied power, 420.
ordinary warrants, orders, etc., not negotiable, 420.
what officers or agents may act for them, 421.
as to mayors of cities, 422, 427.
supervisors have no implied power to bind municipality by negotiable paper, 422.
nor have trustees of towns, villages, townships, and parishes, 422.
nor selectmen, 422.
nor auditors, 422.
nor police juries of parishes, 422.
nor clerks of county courts, 422.
nor clerks of boards of supervisors, 422.
nor county judges, 422.
nor recorders, 422.
difference between municipal and private corporations as to liabilities for official acts, 423.
renewal of note by defunct official, void, 422.
"towns" in New England have power to borrow money in absence of statutory or constitutional restrictions, 422*a*.
this power limited to borrowing for discharge of legal liabilities, 422*a*.
must be exercised by town meeting either beforehand or ratified afterward, 422*a*.
not enough that money was paid to town officer, 422*a*.

NATIONAL BANK.
as purchaser of note, 769, note.

NECESSARIES. *See* INFANTS, 225, 226.
when and how infant bound for, 225, 226.

NEED.
provision in case of, 111.

NEGLIGENCE. *See* MISTAKE; BONA FIDE HOLDER; AGENT; ALTERATION; CHECKS.
liability for, of agent for collection, 327, 329.
party carelessly framing instrument so as to admit of alteration, II., 1405, 1409, 1659.
in mistaken payment does not bar recovery, II., 1362, 1369, 1655.
carrier can not stipulate for exemption from liability for, 1741.
effect of gross negligence, 774, 775, 776. II., 1503, 1680.
line of demarcation between negligence and notice, 779.

NEGOTIABILITY.
meaning of term, 1, 1*a*.
words of, 104.
by what law ascertained, 903.

NEGOTIABLE INSTRUMENTS. *See* BILLS OF EXCHANGE; PROMISSORY NOTES; BONDS; COUPON BONDS; CHECKS; CERTIFICATES OF DEPOSIT; BANK NOTES; CERTIFICATES OF STOCK; MUNICIPAL CORPORATIONS; DRAFTS; WARRANTS; BILLS OF CREDIT; CIRCULAR NOTES; BILLS OF LADING; GUARANTIES; LETTERS OF CREDIT.
when instrument is called negotiable, 1.
meaning of term, 1*a*.
peculiar characteristics of, 1.
at common law, choses in action not transferable, 1.
bills of exchange, first relaxation of rule, 1, 2.
bills first negotiable instruments, 2.
origin and history of bills and notes, 3 to 5.
English statute of Anne, 5.
what terms necessary to, 104.
bill need not be negotiable to be entitled to grace, 104.
no precise words necessary to, 104.
when payability at bank is the criterion of negotiability, 90.
note may be *negotiable* at bank, but not *payable* there, 107.
making note in terms "negotiable" at bank, cuts out offsets, 106.

NON-ACCEPTANCE, NOTICE, PROTEST.
proceedings upon, 449, 450. II., 926.

NON-EXISTING BILL. *See* PROMISES TO ACCEPT, 550, 565.

NOTARY. *See* BANKS; PRESENTMENT FOR PAYMENT; PROTEST; NOTICE.
liability of bank or other agent employing him for his default, 341 to 343.
whether holder can sue him for default when he was employed by collecting bank, 344 to 349.
whether demand must be made by, as ground of protest, 579 to 587. II., 938.
charges of, when recoverable, II., 933.
must follow instructions given, II., 934.
his authentication of protest, II., 945.
duty of, as to protest, II., 939, 959.
not incumbent on, to give notice, II., 960.
evidence of, as to notice, II., 1055 to 1058.

NOTICE OF DISHONOR. *See* GUARANTIES.
1. *Nature and necessity of notice,* II., 970.
duty of holder to give immediate notice of dishonor for non-acceptance or non-payment to drawer and indorser, II., 970.
party primarily liable not entitled to, II., 970.
rule as to notice and protest applies only to commercial paper, II., 970.
it is part of contract of drawer and indorser to have due notice, II., 970.
neglect to give notice discharges parties entitled to it, II., 970.
debt for which bill was drawn or bill or note indorsed as to drawer and indorser, II., 971.
2. *Power of government to regulate notice,* II., 970*a*.
where no constitutional restraint, government may regulate notice as to existing bills and notes, II., 970*a*.
States of U. S. can not impair obligation of contracts, II., 970*a*.
therefore can not change law applicable to notice of dishonor as to existing bills and notes, II., 970*a*.
3. *Formal and essential elements of notice,* II., 972.
notice may be either verbal or written, II., 972.
verbal less strictly construed than written, II., 972.
mere knowledge of dishonor is not notice, II., 972.
no particular phrase or form is necessary, II., 973.
object of, is to inform party of presentment, dishonor, and that he is held liable for payment, II., 973.
notice must give correct description of bill or note, II., 973, 974.
if party knows instrument referred to, it suffices, II., 975.
description must be reasonable, II., 975, 976.
in ascertaining sufficiency of notice to identify instrument, parties are not confined to its face, II., 975, 976, 977.
circumstances of each case looked to, II., 976.
rule where several notes of same person, of same date, are payable at different times, II., 976, 977.
omission of maker's name is fatal, II., 978.
notice describing bill as "drawn by you," suffices, II., 978.
description of note as bill, or drawer as acceptor, or indorser as maker, not defective, II., 978.
if note is payable to two persons jointly, notice may be given either jointly or severally, II., 978.
need not state who is holder or at whose request it is given, II., 979.
nor where demand made, nor hour of presentment, II., 979.
other cases, II., 979.
should indicate whence it comes, II., 979.
when description void for uncertainty, II., 979.
when without date it is defective, II., 979.
but extraneous evidence admissible to perfect it, II., 979.
misdescription of date does not vitiate, unless it misleads, II., 979*a*.
nor does misstatement of amount, nor names of parties, nor time when due, II., 979*a*.
particular instances, II., 980, 981.
presentment and dishonor must appear from notice by "reasonable intendment," II., 982.
demand for payment must be stated in terms, II., 982.
or legal excuse alleged for failure to make demand, II., 982.
statement that note is "unpaid" is not sufficient, II., 983.
except when payable at bank, II., 983.
enough to say note is "dishonored," which implies presentment and demand, II., 983.
and generally to use any words which indicate dishonor, II., 983.
query, whether indorser is discharged by misstatement of time of presentment, II., 984.

NOTICE OF DISHONOR — *continued.*
notice need not state expressly that the party is looked to for payment, II., 985.
when notice must state that bill was protested, II., 986.
if bill were *noted* for protest, no statement of protest necessary, II., 986.
not necessary that copy of protest of foreign bill shall accompany notice of dishonor, II., 986.
4. *Who may give notice of dishonor,* II., 987.
it is duty of holder to give notice of dishonor to all parties liable to him, II., 987.
but he is entitled to benefit of notice given by others, who would be liable to him if he had given notice, II., 987.
intermediate indorser is substituted to rights of holder on paying him, II., 987.
conflicting decisions, II., 987.
notice from a mere stranger is not good, II., 988.
must come from party whose liability is fixed, or who on paying is entitled to reimbursement, II., 989.
query, whether acceptor who fails or refuses to pay can give notice, II., 990.
notice by his agent is same as if given by holder himself, II., 991.
factor or attorney may give, II., 992.
banker with whom instrument is deposited, or other agent, for collection, is holder for purposes of notice, II., 992.
notary not bound to give notice, II., 991.
if holder is dead, personal representative must give notice, II., 994.
sending note to bank for collection implies authority to give notice, II., 993.
such bank may use its own or holder's name, II., 993.
holder as collateral security may give notice, II., 993.
5. *To whom notice should be given,* II., 995.
all indorsers, whether for value or mere agents for collection, must have notice of dishonor, II., 995.
not necessary for notary to inquire as to residence of any indorser except the last, II., 995.
bank or other agent indorsing for collection, entitled to., II., 995*a*.
drawer of bill entitled to notice, II., 995.
acceptor and maker not entitled to, II., 995.
not sufficient to inclose notice to subsequent indorser, II., 995.
nor is transferrer by delivery entitled to, II., 995*a*.
accommodation drawer or indorser entitled to notice, II., 995*b*.
not so if accommodated, II., 995*b*.
if note payable on demand be indorsed, though overdue, notice of default must be given within reasonable time, II., 996.
if indorser before maturity reissues after paying note, when liability of all parties is fixed, no new demand and notice are required, II., 996, 997.
decision in California, II., 996.
notice to general agent of party is same as to principal in person, II., 998.
but not to party's attorney or solicitor, II., 998.
agent signing his own name entitled to, but otherwise principal only, II., 998.
agent to indorse not necessarily agent to receive notice, II., 998.
war does not dissolve agency, II., 998.
notice to copartner good even after dissolution, II., 999.
semble, where one member is distant from and another at place of protest, notice must be given to the latter, II., 999.
case of separation by war, II., 999.
if drawer be partner of acceptor, no notice necessary, II., 999*a*.

NOTICE OF DISHONOR — *continued.*
if partner die, notice to survivor suffices, II., 999*a*.
if joint indorsers be not partners all must have notice, II., 999*a*.
if party dies before note is due, notice must be given to executor or administrator, if ascertainable, II., 1000.
how notice should be addressed, if representative unknown, II., 1000.
notice to one of several executors, etc., suffices, II., 1000.
whenever notice duly received, it suffices, II., 1000.
if there be no personal representative of decedent, it is enough to leave notice at family residence, II., 1001.
in case of bankrupt, should be given assignee, II., 1002.
if no assignee, to party representing estate, II., 1002.
6. *Mode and formalities of notice when parties reside in same place,* II., 1003.
mode immaterial when notice duly received, II., 1003.
if parties reside in the same place, it must be received, II., 1003.
if in different places, only necessary to put it in post, II., 1003.
whether telegraph may be employed to send notice, II., 1004.
when parties reside in same place, should be sent to dwelling or place of business, II., 1005.
mail in such case can only be used when the protest was at a different place, II., 1005*a*.
various cases on this subject, II., 1005*a*.
depositing notice in street letter-box, sufficient mailing, II., 1005*a*, 1054.
delivery of notice to letter-carrier sufficient, II., 1005*a*, 1054.
rule when note payable at place where party to be notified resides, II., 1006, 1007.
as exceptions to general rule, penny post may be used when parties reside in same place, II., 1008.
deposit in penny post in due time must be shown, II., 1009.
and must be shown that the penny post reached the vicinity of party notified, II., 1009.
in London and Edinburgh the delivery by post perfected, II., 1010.
post may be used when indorser or drawer is dead, and there is no representative, II., 1011.
rule where there are distinct villages connected by mail, II., 1012.
usage of bank may affect the matter, II., 1013.
who are to be regarded as of the same place, II., 1014.
party residing out of town, but receiving mail there, may be notified by post, II., 1015.
conflicting decisions, II., 1015.
when it suffices to leave notice at dwelling or place of business, II., 1016.
whether sufficient to send notice to place of business without there leaving it, II., 1016.
rule when party has two business places in same town, II., 1016.
if party holds out that a certain place is his place of business, it may be so treated, II., 1016.
posting notice in conspicuous place in office sufficient, II., 1016.
with whom notice may be left at dwelling or place of business, II., 1017.
what places may be regarded as party's dwelling or place of business, II., 1018, 1019.
7. *Mode and formalities of notice when parties reside at different places,* II., 1020.
it suffices in such cases to send notice by mail, II., 1021.
should be properly addressed to party entitled to receive it, II., 1021*a*.
should be addressed to post-office at or nearest party's residence, unless he receives his mail at another office, and then it should be addressed thereto, II., 1022.

NOTICE OF DISHONOR — *continued.*
if party has residence in one place and place of business at another, may be sent to either, II., 1022, 1024.
place where party actually resorts for his mail is always appropriate address, II., 1022.
residence need not be domicile, II., 1022.
former address of insolvent firm sufficient, II., 1022.
indorser may direct where notice shall be addressed, II., 1023.
notice should not be directed generally to parish or county where there are several offices, II., 1024.
rule where there are two offices in same town, II., 1024.
whether delivery to bellman suffices, II., 1024.
what is place of residence, II., 1025.
notice should not be sent away from place of residence to place of business, II., 1025.
rule in respect to temporary residents or sojourners, II., 1027.
rule in respect to members of Congress and legislative bodies, II., 1027.
when a party has several post-offices, notice may be sent to either, II., 1028.
as to notice addressed to party living in a large city, how name should be written, II., 1029.
party holding out a certain place of residence can not deny it, II., 1029*a*.
when party gives information to holder of intended absence, notice should be sent to place mentioned, II., 1029*a*.
notice put in keyhole of residence sufficient, II., 1029*a*.
place of date of instrument is *prima facie* evidence of residence of drawer of bill, II., 1030.
but not of that indorser, II., 1030, 1031.
English and American decisions, II., 1030, 1032.
at maturity of bill, party is presumed to reside at same place where he resided when it was drawn or indorsed, II., 1032.
notice may in all cases be sent by a special messenger, II., 1033, 1034.
in which case holder must prove safe arrival of letter in due time, II., 1033.
what in such case is due time, II., 1033, 1034.
when messenger is necessary or most convenient, his expenses are chargeable to party notified, II., 1034.
when special messenger must be employed, II., 1034.
8. *Time within which notice may and must be given*, II., 1035.
notice implies that dishonor has taken place, II., 1035.
knowledge by anticipation not equal to notice, II., 1035.
as soon as demand is made after dishonor, holder need not wait till close of business hours to send notice, II., 1036.
Mr. Chitty's views, II., 1036.
holder is not obliged to give notice on the very day of dishonor, although he may, II., 1037.
when holder and party reside in same place, he has till expiration of following day to give notice, II., 1038.
if given at place of business, must be during business hours, II., 1038.
if at residence, may be at any time before hours of rest, II., 1038.
when not in same place, notice must be sent in time to go by first mail after day of dishonor, provided mail does not close before early and convenient business hours, II., 1039.
what is meant by "next practicable mail," II., 1039.
views of Chancellor Kent, Parsons, Story, and Chitty, II., 1040.
no precise hour arbitrarily fixed, II., 1041.
what are reasonably early and convenient hours, II., 1041.
if drawer or indorser throw difficulty in the way, time is extended, II., 1042.

NOTICE OF DISHONOR — *continued.*
Christmas-day, Sunday, Fourth of July, and other days on which transaction of business is forbidden, are not computed in giving notice, II., 1043.
each holder has a day to give notice to his predecessor, II., 1044.
safe rule for indorser to pursue, II., 1045.
over-diligence in one party does not excuse want of diligence in another, II., 1045.
if party dwell beyond the seas, it is sufficient to send notice by first regular ship, II., 1046.
what ship should be selected, II., 1046.
what ship will not suffice, II., 1046.
9. *Allegation and proof of notice,* II., 1047.
what declaration on instrument must allege with reference to facts which dispense with presentment and notice, II., 1047.
views of Byles, II., 1047.
in the United States, evidence of due diligence to obtain payment is admissible under the general averment of due demand, protest, and notice, II., 1048, 1049.
views of Greenleaf and Edwards, II., 1048.
burden of proof as to notice rests on plaintiff, II., 1050.
plaintiff must prove due diligence in giving notice on proper day, II., 1050.
or that notice was actually received, II., 1051.
will not do to show that notice was sent on one of two days, II., 1051.
contents of notice must be shown, II., 1051.
always suffices to show due deposit in office where mail may be used, II., 1051.
postmark is *prima facie* evidence of notice being mailed on that day, II., 1052.
how genuineness of postmark shown, II., 1052.
due course of mails must be shown by plaintiff, courts do not notice them judicially, II., 1053.
any party bound *prima facie* when notice received in such time as it would occupy for intermediate parties to transmit it, II., 1053.
ocular evidence of posting letter not required, II., 1054.
what is sufficient evidence of deposit of notice in office, II., 1054.
protest of foreign bills is evidence of presentment and dishonor, but not of notice, II., 1055.
how rule is varied by statute or local usage, II., 1055.
decisions upon sufficiency of testimony, II., 1056.
entries in notary's book good secondary evidence after his death as to giving notice, II., 1057.
even when protest is not required by law, II., 1057.
in what other cases, and what, secondary evidence is admissible, II., 1058.
due diligence, when facts ascertained, is a question for the court, II., 1058.
otherwise for the jury, II., 1058.
when due diligence exercised, no further notice necessary, II., 1058*a*.
what law applies to notice, 910.

NOTING. *See* PROTEST, and II., 939.

NOVATION.
illegal consideration purged by novation of debt, 207.
usurious consideration purged by novation, 207, 761.

OCCUPATION OF COUNTRY BY ENEMY.
as excuse for non-presentment, protest, and notice. *See* EXCUSES, and II., 1064.

OFFSET. *See* SET-OFF.

ON CALL.
same as on demand, 89, 599.

ON DEMAND.
meaning of, 89.

ONUS PROBANDI. *See* BURDEN OF PROOF.

OPERATION OF LAW.
assignment by, 748.
discharge by. *See* DISCHARGES, and II., 1283, 1286.

ORAL. *See* VERBAL.

"OR ORDER."
meaning of words, 104.

ORDER.
when for whole fund operates as assignment, 21.
when for part of fund it operates as equitable assignment, 22, 23.
New York cases, 23*a*.

OVER-CHECKS. *See* CHECKS, and II., 1629.

OVER-DILIGENCE.
of one party does not supply negligence of another in respect to notice, II., 1045.

OVERDUE BILLS AND NOTES. *See* BONA FIDE HOLDER; CHECKS; COUPON BONDS.
what defences may be set up when paper overdue at time of transfer, 724 to 725.
holder acquiring paper when overdue, rights of, 782 to 787.
overdue checks. *See* CHECKS, and II., 1629.

OVERWHELMING CALAMITY AS EXCUSE. *See* EXCUSES, and II., 1067, 1125.

PAROL ACCEPTANCE. *See* ACCEPTANCE; STATUTE OF FRAUDS.

PARTICULAR FUND. *See* ASSIGNMENT.
instruments payable out of, not negotiable, 50.
but reference to such fund as source of reimbursement does not affect negotiability, 51.

PARTIES PRIVY.
who are parties privy to negotiable instruments, 174.
who are remote parties, 174*a*.

PART PAYMENT. *See* PAYMENT.
by drawee does not amount to acceptance, 497*a*.
is generally only payment *pro tanto*, II., 1289.
generally agreement that it be in full discharge is ineffectual as to residue, II., 1289.
but if accompanied by agreement of compromise or composition is effectual discharge, II., 1289, 1289*a*.
is effectual discharge when so agreed if made before maturity, II., 1289*a*.
by a stranger, II., 1289*a*.
by bill or note, with surety, II., 1289*a*.
if advantageous to creditor, II., 1289*a*.
recent decisions, II., 1289*a*, note.

PART PAYMENT — *continued.*
after maturity as waiver of non-presentment and notice. *See* EXCUSES, and II., 1165.
after maturity as evidence of fixed liability, II., 1166.
does not discharge surety except *pro tanto*, II., 1327.
is otherwise if accompanied with stipulation hurtful to surety's interest, II., 1327.
is not sufficient consideration for agreement to extend time, II., 1317.
otherwise if note given for balance, II., 1317*b*.
if made by purchaser when he receives notice of defect in notice he is only protected *pro tanto*, 789*a*.

PARTNERS AS PARTIES TO NEGOTIABLE INSTRUMENTS. *See* PRESENTMENT FOR ACCEPTANCE AND FOR PAYMENT.
1. *Nature and varieties of partnership*, 350.
partnership bound when name used, whether partners named in firm and whether known or not, 350*a*, 351.
nominal or ostensible partner is bound by firm's contracts, as if actual, 352.
nature of general and limited, or special partnerships, 352*a*.
are unknown to common law and exist by statute, 352*a*.
retiring partner should give notice, 353.
how notice of retirement given, 353.
if there be common partner in two firms, one firm can not sue the other at law, 354.
but may sue the other in equity, 354.
statute sometimes changes rule, 354.
third party holding paper to which both firms are parties, may sue both at law although there be common partner, 354.
when one partner has good defence it avails all, 354.
one member of firm may loan money to another, and receive his note on individual account, 354.
note of firm to member valid in hands of indorsee, 354.
after dissolution, ex-partner may sue another on note for balance struck, 354.
one partner can not become purchaser of firm note, 354.
2. *Authority of copartner to bind firm*, 355.
authority of one partner to bind firm, springs from mutual agency, 355.
waive demand and notice, 1109*a*.
person raising money to enter firm, can not bind firm for payment, 355.
authority of one to bind all, applies only to acts in scope of partnership business, 355, 356.
within scope of business express assent of all to acts of one unnecessary, 356.
the fact of partnership creates each member an agent of all within scope of its business, 356.
each member of firm engaged in trade, may bind it as party to negotiable instruments, 357.
joint owner of property can not bind other joint owners by negotiable instrument, 358.
nor can partner bind firm otherwise than in scope of business, 358.
partner can not bind firm by bill or note, unless partnership be in trade or concern to which the issuing or transfer of such paper is necessary or usual, 357, 358*a*.
what are trading and non-trading partnerships, 357, 358*a*.
of farming partnership has no implied authority to bind it by negotiable instrument, 358*a*.

PARTNERS AS PARTIES TO, ETC.— *continued.*
nor can one of a firm engaged in mining, 358*a*.
gaslight concern, 358*a*.
law practice, 358.
medical practice, except for necessaries, 358*a*.
manufacturing lumber, 358*a*.
insurance, real estate, and collecting business, 358*a*.
nor can partner in keeping tavern, except strictly in the business, 358*a*.
if firm is engaged in trading as well as farming, one partner has implied authority to bind it, 358*a*.
rule when firm engaged in business requiring large capital and credit, 358*a*.
rule when note given for necessaries, 358*a*.
general authority of one partner exists only by implication, and may be rebutted, 358*a*.
but if authority implied to one partner, it can not be denied against party not having notice that it did not exist, 368.
if firm hold proceeds of transaction made by partner in excess of authority, it is bound, 359.
and this rule applies whether paper be signed in partner's or firm's name, 359.
delay of firm to disaffirm contract of partner, may amount to ratification, 359.
if firm repudiate contract exceeding authority as soon as it is heard of, it is not binding, 359.
3. *Formal signature of firm's name*, 360.
style of firm should be used, 360.
by "A. B." the signing partner may be added, 360.
should clearly appear that signature was intended for firms, 360.
in general, name of one partner will not bind firm, 360.
the words, "I, A. B., promise, for A. B. C. D. & Co.," would sufficiently indicate firm as bound, 361.
so "I promise," signed in firm's name, 361.
if partner draws in fictitious name, and indorses firm's name, latter is bound by indorsement, 361.
immaterial variation from firm's name unimportant, 361.
partner executing joint and separate note in firm's name would bind it jointly only, 361.
bill drawn on firm may be accepted by one partner, 362.
See ACCEPTANCE, and 362, 488
and his own name in such case shows he acted for firm, 362, 488.
conflicting authorities, 362, 488.
bill drawn on "E. M. and others, trustees," and written on "accepted, E. M.," binds all as acceptors, 362.
where firm consists of one person transacting business with the addition "Co." or "& Co.," 362*a*.
in such case individual signatures bind firm, 362*a*.
firm may conduct business in one partner's name, 263; see also 304, 360, 399.
but *prima facie* single name binds single partner only, 363.
Story's views, 363.
if paper signed by single partner's name be used in firm's business, it presumptively binds firm, 363.
if bank account kept in single partner's name, his check will bind firm, 364.
if firm adopt single partner's name, bill or note signed by him for individual purposes will bind him only, 364.
otherwise if used for benefit of firm, 364.

PARTNERS AS PARTIES TO, ETC. — *continued.*
4. *Accommodation, private, and prohibited transactions*, 365.
no member of firm can bind it as accommodation drawer, acceptor, maker, or indorser, 365.
holder knowing character of paper must prove assent of all the partners, 365.
if paper shows its character on its face, holder can not recover without proving assent of all, 365.
if word "surety" be added, that gives notice, 365.
if bill be carried to bank for discount by drawer or maker, with partnership name on it as indorser, it shows that it is accommodation indorsement, 365.
if one partner gets firm paper discounted, having it put to his credit is not notice that there is fraud on firm, 365.
if partnership indorsement is for firm's benefit, it is valid, 365.
where A., B. & C., partners, indorsed for accommodation, and A. dying, E. & C. renewed it; held, A.'s estate discharged an old paper for want of notice, and not bound on renewal for want of authority, 365.
but if A., B. & C. were makers of note, rule would be different, 365.
no member can bind firm for his private debt, 366.
party taking firm's paper for partner's debt, must prove assent of firm, 366.
English authorities, and views of Parsons and Chitty, 366.
what proof necessary of firm's assent, 366.
may be implied by circumstances, 367.
admissions of partner who used firm's name for his own debt not admissible, 367.
one partner has no authority to bind firm by blank acceptance, there being no drawer to bill, 367.
partner's implied authority to bind firm may be limited by agreement, 368.
it is fraud to violate such agreement, 368.
but it does not affect *bona fide* holder without notice, 368.
the burden of proof in respect to partnership paper, 369.
rules as to shifting of burden from one side to the other, 369.
5. *The effect of dissolution of firm, by retirement or agreement*, 369*a*.
dissolution may occur by agreement, 369*a*.
change of membership, 369*a*.
retirement of partner, 369*a*.
operation of law, 369*a*.
death or bankruptcy of partner operates dissolution, 369*a*.
notice of dissolution by operation of law necessary, 369*a*.
unnecessary when dormant partner retires, 369*a*.
otherwise if dormant partner be known as member, 369*a*.
notice of dissolution necessary when it occurs by agreement or retirement, 369*a*.
continuing members bound by bankrupt member if they so hold out, 369*a*.
method of giving notice of dissolution, 369*b*.
strangers entitled only to general and constructive notice, 369*b*.
customers entitled to particular notice, 369*b*.
how effect of notice is done away with, 369*b*.
indorsee with notice may get good title from indorser without, 369*b*.
dissolution operates revocation of authority to make new contract, 370.
but not authority to arrange, liquidate, settle, and pay those before created, 370.
ex-partner can not give note or accept bill in firm's name, 370, 370*a*.
nor indorse bills and notes given to firm before dissolution, 370, 370*a*.

PARTNERS AS PARTIES TO, ETC.— *continued.*
nor renew bills and notes of firm, 370.
rule in New York, 370.
when dissolution not caused by death, ex-partner has no implied authority to indorse bills or notes of firm, 370*a*.
otherwise when dissolution is caused by death, 370*a*.
reason of distinction, 370*a*.
note antedated can not bind firm after dissolution, unless holder not affected with notice, 371.
rule as to instruments signed in firm name before dissolution and issued afterward, 371*a*, 372, 372*a*.
various decisions, 372, 372*a*.
one ex-partner may bind firm after dissolution as party to bill or note, if authorized verbally or in writing, 373.
authority to give or renew note in firm's name not implied by authority to settle up or close business, 373.
nor will such authority be implied by authority "to settle business of firm, and sign its name for any purpose," 373.
nor by authority "to use the name of the firm in liquidation only of past business," 373.
nor "to settle all demands in favor of or against firm," 373.
cases in England and Pennsylvania, 373.
how partnership debt taken out of statute of limitations, 374.
doctrine in Massachusetts, 374.
notice of dissolution should be given, 369*a*, 375.
otherwise firm bound by use of its name by one partner, 369*a*, 375.
effect of indorsement "in liquidation" on firm's paper, 369*b*.
6. *Discharge of firm's debt by bill or note of one partner*, II., 1229.
generally, bill or note of one partner is good discharge of consideration for firm's debt, II., 1299.
but such bill or note may be taken as collateral merely, II., 1300.
burden of proof is on party alleging to show separate note of partner was taken in extinguishment of firm's debt, II., 1300.
effect of delivering up firm's note on taking note of separate partner, II., 1300.
renewal in firm's name after dissolution, II., 1300*a*.
mere promise to look to one partner not binding, where no new security taken, II., 1301.
effect of third parties entering into the arrangement, II., 1301.
effect of partner changing his situation, II., 1301.

PASS-BOOKS of savings banks not negotiable, II., 1711*a*.

PATENT RIGHT NOTES.
when purchaser not put on inquiry, 199*a*.
when open to defences in hands of *bona fide* holder, 199*a*.

PAYEE. *See* AGENTS; CORPORATIONS; COUPON BONDS; NEGOTIABLE INSTRUMENTS.
must be indicated, 99.
sufficient if paper payable to A., or order, or bearer, or holder, or to order, 99.
or to certain persons "or assigns," 99.
so if payable "to administrators of A.'s estate," it suffices, 99.
so if to "trustees of A.'s will," 99.
or to "heirs of A," 99.
or to "A. or his heirs," 99.
or to "the order of indorser," 99.
whether "to estate of A." suffices, 100.
of father and son of same name, father presumed to be payee, 100.
but son in possession could recover, 100.
misdescription or misspelling immaterial, 100.

PAYEE — *continued.*
to "secretary for time being of certain society," insufficient, 101.
but to "the now secretary," sufficient, 101.
so suffices if payable to "treasurer of corporation," 101.
or to "treasurer, or his successors in office," 101.
note payable to people of Illinois means State of Illinois, 101.
if no one named as payee and no blank left, it is fatal defect, 102.
thus "good for $100; value received," is waste paper, 102.
but "received of A. $100, which I promise to pay on demand," sufficiently indicates A., 102.
payee's name may be left blank, to be filled up by holder, 145.
as to rights of holder to fill up blank, 145, 146.
not good negotiable note if payable to A. or B., 103.
See ALTERNATIVE PAYEES, and 103 *et seq.*
if payable to "bearer A.," same as payable to A. simply, 104.
to "order of A." same as to "A., or order," 104.
"A., or bearer," same as bearer, 104.
to "A. *only*," not negotiable, 105.
but A. would be bound on his indorsement, 105.
no precise words necessary to negotiability, 106.
maker can not show payee to be infant, married woman, lunatic, bankrupt, or fictitious, 93, 227, 242.

PAYMENT. *See* PRESENTMENT FOR; CONDITIONAL AND ABSOLUTE PAYMENT; DISCHARGES; CHECKS.
1. *Nature of payment*, II., 1221.
it is not a contract, II., 1221.
difference between payment and sale, II., 1221.
credit given by drawer, or other party liable, to holder at his request is equivalent to payment, II., 1221.
does not necessarily mean payment of money, II., 1221.
party to instrument who pays can not show he paid as secret agent of another, II., 1222.
and where stranger pays overdue note and says nothing *as to purchase*, it is payment, II., 1222.
payment by checks, II., 1623.
2. *Who may make*, II., 1222.
any party to bill or note may pay it, II., 1223.
stranger can not pay so as to acquire the rights of a holder, II., 1223.
but he may always purchase, II., 1223.
payment by party legally discharged can not be recovered back, II., 1223.
of what indorser should be assured before he pays, II., 1224.
of what maker of note or acceptor of bill must satisfy himself when it is presented for payment, II., 1225.
money paid with knowledge of facts, but under mistake of *law*, can not be recovered back, II., 1226.
party who pays should be sure instrument is in possession of whomsoever demands payment, II., 1227.
possession of note by maker raises presumption of payment, II., 1229.
receipt ought always to be taken on back of bill or note, II., 1228.
indorser who pays should take receipt and require delivery of instrument, II., 1229.
3. *To whom may be made*, II., 1230.
payment should be made to legal holder or his authorized agent to receive same, II., 1230.
if payable to bearer or indorser in blank, party in possession is presumed to be entitled to payment, II., 1230.
payment to *special indorsee*, II., 1230*a*.
payments to assignee of bankrupt, personal representative, guardian, and husband of female payee, II., 1231.

PAYMENT — *continued.*
others to whom payment may be made, II., 1231.
when *feme sole* holder marries, payment to her does not exonerate acceptor though ignorant of marriage, II., 1232.
4. *When may be made,* II., 1233.
payment before maturity must be with consent of both debtor and creditor, II., 1233.
different if paid holder at maturity, II., 1233*a*.
in making payment after maturity, payor must be certain who is then holder, II., 1233*a*.
recovery or cancellation of paid note or bill, II., 1233*a*.
payment may be demanded any time after business hours on day of maturity, II., 1235.
payor has whole day to pay in, II., 1235.
if not paid in business hours, paper should be dishonored, II., 1235.
if made after action brought, holder may proceed for his costs, unless included, II., 1235.
rule when paper long dishonored, or torn and pasted, II., 1235.
payment to wrong party, II., 1235.
paid note or bill should be so marked or stamped as to show payment, II., 1235*a*.
5. *Effect of, and who may reissue bill or note,* II., 1236.
payment by maker or acceptor discharges drawer and indorsers (who are liable as *sureties*), and cancels instrument, II., 1236.
effect of payment by co-maker, II., 1236*a*.
if drawer pay part, holder may yet sue acceptor for whole amount, II., 1237.
in which case he is trustee for drawer for what he paid, II., 1237.
on a bill or note reissued by acceptor or maker, drawer and indorser are not liable to even *bona fide* holder, II., 1238.
when last of several indorsers pays and reissues, prior parties remain liable, II., 1238.
drawer can not reissue bill so as to bind acceptor,
(1) where acceptance was for his accommodation, II., 1239.
and (2) where name of any indorser to whom he is liable remains upon it, II., 1240.
in all other cases drawer or indorser may reissue bill or note, II., 1241.
parties who knowingly negotiate instruments after payment, thereby only charge themselves, II., 1242.
meaning and effect of agreement to "retire" a bill, II., 1243.
if paper surrendered by mistake, part only being paid, balance may be recovered, II., 1243.
otherwise not, II., 1243.
6. *Medium of payment and legal tender cases,* II., 1244.
money paid must be that current at place of payment, II., 1244.
terms construed as of time and place of contract, II., 1244.
if coin alloyed after contract, debtor must make good full value, II., 1244.
so if name of coin changed to apply to a lesser value, II., 1244.
medium must be that of face of paper, II., 1245.
agent can take nothing but money, II., 1245.
if paper payable "in currency," not negotiable, II., 1245.
meaning of "in currency," II., 1245.
what is legal tender. *See* TENDER, and II., 1246, 1247, 1248, 1249.
7. *Appropriation or application of payment,* II., 1250.
question as to how credit should be applied arises when debtor is indebted to same creditor in various items of account, and pays a certain sum, II., 1250.
general principles as to:
(1) debtor may appropriate as he pleases, II., 1250.
after once appropriating, can not change, II., 1250.

PAYMENT — *continued.*
if but one debt, no question as to application, II., 1250.
after controversy arises, can be no election as to, II., 1250.
(2) if debtor makes no application, creditor may, II., 1251.
silence of debtor leaves matter to creditor, II., 1251.
can not apply to debts not due, II., 1251.
can not apply so as to peculiarly injure debtor, II., 1251.
appropriation can not apply to compulsory payments, II., 1251.
can not be applied to unlawful items by creditor, II., 1251.
if once made by creditor, can not be changed, II., 1251.
if debtor deny one debt, creditor can not apply payment to it in exclusion of acknowledged debt, II., 1251.
if creditor receive money, must apply it as directed, II., 1251.
(3) if neither party appropriate, law will, according to equity and probable intent of parties, II., 1252.
various cases illustrating legal application, II., 1252, 1253.
8. *Payment supra protest or for honor*, II., 1254.
generally stranger can not pay debt and require reimbursement, II., 1254.
exception as to bills and negotiable notes, II., 1254.
after protest stranger may pay bill or note for honor of drawer, indorser, acceptor, or maker, II., 1254.
or may pay for honor *generally*, that is, for honor of all, II., 1254.
such payment does not discharge paper, II., 1254.
but transfers holder's rights to party paying, II., 1254.
if for honor of an indorser, payor may sue him and all prior parties, II., 1254.
if for honor generally, he may sue all parties, II., 1254.
so if for honor of last indorsee, II., 1254.
how to declare in such cases, II., 1254.
party paying for honor of drawer can not sue acceptor unless drawer could have done so, II., 1255.
acceptor can not pay for honor of indorser because himself bound to him, II., 1256.
but acceptor may sue drawer if he pays for honor, provided his acceptance were for drawer's accommodation, II., 1256.
party desiring to pay for honor must be ready and offer to do so at time and place of payment, II., 1257.
party should not pay for honor, without ascertaining genuineness of signatures, II., 1257.
such party can not recover back money paid for honor unless he discovers mistake and gives notice in time to prevent loss, II., 1257.
when notice must be given in case of forgery, II., 1257.
as to liability of acceptor for honor, II., 1258.
the formal mode of making payment *supra protest*, II., 1258.

PENCIL.
signature may be made by, 74.

PENNY POST.
use of, for transmission of notice, II., 1008, 1009, 1010, 1012, 1013.

"PER ADVICE."
meaning of phrase, 109.

PERSONAL REPRESENTATIVE. *See* FIDUCIARIES; PRESENTMENT; NOTICE.

PERSONS UNDER GUARDIANSHIP.
can not contract, 259.

PLACE OF PAYMENT. *See* PRESENTMENT FOR ACCEPTANCE, AND PRESENTMENT FOR PAYMENT; also, MEMORANDA AND ALTERATION.
need not be, but often is specified in paper, 90.
effect of making paper payable at certain place "only and not elsewhere," 90, 459, 563, 635, 643.

PLACE OF PAYMENT — *continued.*
place of maker's residence understood, if none named in note, 90.
and of drawee's residence, if none named in bill, 90.
circumstances may alter this rule, 90.
as criterion of negotiability, 90*a*.
if note payable on face at bank in certain town, but name of bank left blank, payee may insert particular bank in such town, 90*a*.
maker bound to holder, though payee exceed his authority, 90.
date as evidence of, 639.
alteration of, II., 1378, 1383.
place of payment of coupon bonds, II., 1497.

POLITICAL DISTURBANCE.
as excuse for non-presentment, protest, and notice. *See* EXCUSES, and II., 1065.

POSSESSION. *See* PRESENTMENT FOR PAYMENT; ASSIGNMENT; ACTION.
when sufficient evidence of ownership, 573.
of unindorsed paper not in hands of payee not in usual course of business, 781*a*, 812.
whether possession of drawer or acceptor is in ordinary course of business, 781*a*, 812.
effect of, by personal representative, 812.
by maker raises presumption of payment, II., 1228.

POST. *See* NOTICE.
remittance by, 287. II., 1474.
presentment of check by, II., 1599.
notice by, II., 1005, 1008, 1013, 1015, 1020.

POST DATE. *See* DATE.

POSTMARK.
as evidence, II., 1052.

POST NOTES. *See* BANK NOTES, and II., 1670.

POUND STERLING.
value of, II., 1441.

POWERS OF ATTORNEY. *See* ATTORNEY, and 274. II., 1708*g*.

PRECEDENT OR PRE-EXISTING DEBT. *See* COLLATERAL SECURITY.
good consideration for bill or note, 184.
bill or note transferred as security, 825.
See COLLATERAL SECURITY, and 824 to 831.

PRESENTMENT FOR ACCEPTANCE.
1. *Nature and necessity for*, 449.
holder may present bill for acceptance as late as day before maturity, 449.
on day of maturity presentment for acceptance is merged in presentment for payment, 449.
if acceptance refused, bill dishonored, 449.
and all parties may be at once sued, 449.
suit in Federal court in such case, not affected by State statute, 449.
presentment to drawee for, necessary, even though drawer has requested him not to accept, 450.
sometimes relations of parties excuse failure of, 450.
acceptance must accord with tenor of bill, else it should be dishonored, 450.
effect of acceptance as assignment, 451.
if holder bound to present for acceptance fails, he forfeits not only remedy on bill, but also original debt, 452.

PRESENTMENT FOR ACCEPTANCE — *continued.*
2. *Formalities of,* 454.
bills payable on demand need not be presented for acceptance, 454.
if payable at bank, rule not allowed, 454.
is usual when bill payable at future day, 454.
if acceptance refused, must be protest and notice, 454.
rule as to bills payable at or after sight, or after other event, 454.
unreasonable delay discharges drawer and indorsers, 454.
acceptance may be waived in body of bill, 454.
in such case proceedings merged in presentment for payment, 454.
presentment must be made by holder or authorized agent, 455.
party in possession presumably holder, 455.
protest will inure to benefit of rightful holder, 455.
if drawee not found, presentment should be to person indicated in case of need, 455.
if there are two drawees not partners, must be to both, 455.
but query? 455.
to one partner suffices, even if firm is bankrupt, 455.
if drawee not found, holder should assure himself of agency of party acting for him, 456.
difference between person to whom presentment for acceptance and for payment should be made, 456.
may be to clerk at drawee's counting-room, 457.
if drawee dead, whether should be made to his representative, 458.
at what place should be made, 459.
Sergeant Onslow's act in England, 459.
statutes as to place of presentment in United States, 460.
should be at place of drawee's domicile, 460.
if drawee has removed, should be at new place of residence, if ascertainable, 460.
may be at dwelling or place of business, 461.
bill should be actually exhibited, 462.
if drawee can see bill, and give intelligent response, it suffices, 462.
drawee may require production of bill, 463.
but may waive it, and accept, 463.
if holder leave bill with acceptor, and by negligence enable third party to get possession, can not sue acceptor in trover, 463.
either of a set of bills may be presented, 463.
indorsement of one of set carries all, 463.
3. *Time of,* 464.
should be during business hours, 464*a*.
what are business hours, 464.
if bill payable at day certain, need not be presented until maturity, to charge drawer and indorsers, 465.
exceptions to this rule:
(1) when there is express direction to payee or holder, 465.
(2) when bill put in hands of agent for negotiation, 465.
if bill not payable on day certain, it must be presented in reasonable time, 465.
when question of law and when of fact, 466.
due diligence must be exercised, 467.
distinction between bills payable at certain time after date, and certain time after sight, 467.
circumstances affecting question, 468.
(1) passing of bill into circulation, 468.
(2) falling or rising of exchange, 468.
(3) facility of communication between places, 468.
question not affected by solvency of drawer, 475.
agent's duty in presenting for acceptance, 476.
must act speedily, without unreasonable delay, 476.

PRESENTMENT FOR ACCEPTANCE— *continued.*
has not same latitude as principal, 476, 477.
effect of war, sickness, accident, and other reasonable causes of delay, 478.

PRESENTMENT FOR PAYMENT. *See* GRACE; CHECKS; CONFLICT OF LAWS; GUARANTIES.
1. *Nature of, by whom and to whom made,* 571.
nature of acceptor's and maker's engagement, 571.
drawer's and indorser's, 571.
presentment may be made by any *bona fide* holder or person lawfully in possession, 572.
mere possession sufficient evidence of right to present, 572, 573.
except where unindorsed by payee or indorsee, or indorsed specially, 574.
when payment to agent valid, 573.
may be made by agent, 572.
but mere possession of instrument not indorsed by payee, or special indorsee, is not evidence of agency, 574.
Mr. Chitty's views, 575.
what evidence of ownership suffices without indorsement, 573.
rule where indorser presents bill or note bearing subsequent special indorsement, and no prior indorsement in blank, 576.
rule in case of note not originally negotiable, 577.
if holder die, representative must make, 578.
if no representative at time, must be made in reasonable time, 578.
in case of bankrupt, assignee must make, 578.
if *feme sole* marry, husband must make, 578.
if copartner die, survivor must make, 578.
whether or not demand of payment of foreign bill by notary's clerk is sufficient ground of protest, 579.
English authorities, and Mr. Chitty's views, 580.
authorities in United States, 581, 582.
generally held that demand in such cases must be at common law, by notary in person, 581.
distinction, in Kentucky, between deputy and clerk, 583.
rule applies to protest of inland bills and promissory notes, 584.
statutory authority or general custom for clerk to present, may be proved, 586.
clerk can not make the protest, 586.
custom as to clerk's authority must be shown to relate to foreign bills, 587.
must be made to drawee, acceptor, maker, or agent, 588.
personal demand not necessary, 589.
sufficient if at residence, place of business, or to wife or agent of payor, 589.
may be to clerk at counting-room, 588.
what sufficient statement as to presentment, 590.
distinction taken between presentment for acceptance and for payment, 589.
whether holder must see drawee personally in presenting for acceptance, 589.
opinion expressed in negative, 589.
to what persons, at place of payment, it may be made, 588.
presentment to *cashier* suffices if paper payable at bank, 511.
general principles as to time of, and what constitutes "reasonable hours," 590.
rule where acceptor or maker is dead, 591.
rule in partnership cases, 592.
sufficient if to any partner, even after dissolution, 592.
if to agent of one partner in absence of other, 592.
if to survivor, where one partner dies, 593.

PRESENTMENT FOR PAYMENT—*continued.*
rule where there are several promisors not partners, 594.
semble, sufficient if to one on day of maturity, and as speedily as practicable thereafter to others, 594.
sufficient if to one of *several* as well as joint promisors, 594.
if joint maker die, should be to survivor, 596.
2. *When must be made*, 597.
need not be made on day of maturity to bind acceptor or maker, 597.
rule where paper payable at particular place, 597.
must be on day of maturity to charge drawer or indorser, 598.
if paper payable in instalments, should be as each instalment falls due, 599.
unless whole amount falls due on default as to one instalment, 599.
if no time named, "on demand" is understood, 599.
"on demand at sight" is same as "at sight," 599.
"on call," or "when called for," is same as "on demand," 599.
if paper payable at bank, should be made during banking hours, 600.
insufficient after such hours unless officer there, or some one who gives response, 600.
how rule affected by usage, 600.
if paper payable "at bank," usual banking hours of the place will control, 601.
what are "business hours" is question for jury, 601.
how far courts take judicial notice of such hours, 601.
"business hours," when paper not payable at bank, range through the day to hours of rest, 602.
retirement to rest of payor does not affect question, 602.
if at *place of business* must be when such places are customarily open, 603.
sufficient at any hour if response be given, 603.
if no time of payment be specified, "reasonable time" is understood, 604.
what is "reasonable time" depends on circumstances, 604.
rule as to bills payable on demand, 605.
notes payable on demand, 606.
given for a loan, 607.
payable on demand with interest, 608.
what delay discharges indorser, 609.
the true principles to be deduced, 610.
rule when instrument is indorsed after maturity, 611.
how question of reasonable time determined, 612.
3. *Place of presentment for payment*, 635.
should be made at city, town, or other place where maker or acceptor has domicile or place of business, 635.
if place designated in bill or note, should be there, 635.
averment of presentment there suffices, 635.
if maker or acceptor has residence and place of business in same place, may be at either, 635.
so may be at either place, if residence in one place and business place in another, 635.
if paper payable in particular town, presentment at all banks there suffices, 635.
at private dwelling suffices, 635, 636.
drawee must pay immediately, or bill be dishonored, 635.
business house most suitable place for, 636.
if business house closed, sufficient if at dwelling, 636.
so if business place can not be found, 636.
if bill payable at bank, and bank is holder at maturity, that amounts to presentment, 636.
if business place closed, party holding paper should go to residence, 637.

PRESENTMENT FOR PAYMENT—*continued.*
so if no place of business, 637.
"usual place of business" is meant by "place of business," 637.
place not important if there is actual presentment and response, 638.
whether presentment on street sufficient, 638.
place of date *prima facie* place of payment, 639.
if paper payable generally, parties may agree as to place of payment, 639.
paper not necessarily payable at place of date, 640.
due diligence in seeking maker or acceptor, 640.
if paper payable in particular city, but at no specified place, sufficient to have it there at maturity, 640.
whether acceptance to pay at particular place is absolute or qualified, 641.
decisions and statutes in England, 641.
decisions and statutes in United States, 643.
views of U. S. Supreme Court, 643.
when paper payable at particular place, drawer and indorser discharged by failure to present there, 644.
indorser discharged by such failure, though paper negotiated by his consent at bank other than that named as place of payment, 644.
averment and proof of demand when paper payable "on demand" or "on demand after a certain time," 645.
rule as to bank notes, 647.
if paper payable at either of two places, presentment at either suffices, 648.
so if payable at either of two banks, 649.
rule when drawee or acceptor resides in one place, and bill is payable in another, 651.
place of payment material part of description of paper, 653.
4. *Mode of*, 654.
paper must be actually exhibited, 654.
or at least it must be clearly indicated to be at hand, 654.
if refusal to pay be on other grounds, its presence or absence immaterial, 654.
written demand delivered to servant at promisor's house insufficient, 654.
by letter through post-office insufficient, 654*a*.
must be according to tenor of instrument, 654.
whether physical presentment implies demand of payment, 655.
if paper in bank named as place of payment, that suffices, 656.
but mere physical presence in bank insufficient, if bank ignorant of it, 656.
if paper be property of bank it suffices, 657.
conventional demand by notice that bill or note is held in bank for payment, 658.
rule as to maker, acceptor, drawer, and indorser, 659, 660.
how far custom controls in the matter of presentment for payment, 659.
what law applies to, 660, 662.

PRESIDENT OF CORPORATION. *See* CORPORATIONS; CHECKS.
has implied authority to take charge of litigation, 393.
employ counsel, 393.
of bank has implied authority to receipt for deposits, 393.
whether bank president has implied authority to draw on funds, 393.
general and special power as to negotiable paper, 394.
may certify checks, II., 1609.
has no authority to release debts, 395.
effect of signature as "A. B., President," 403, 405, 410.

PRESUMPTION. *See* BONA FIDE HOLDER; BURDEN OF PROOF; EVIDENCE; JUDICIAL NOTICE.
in favor of holder of negotiable instruments, 810.
of payment, II., 1205, 1271.
as to foreign laws, 891.
as to common law, 891*a*.
in favor of protest, II., 964.

PRINCIPAL. *See* AGENT.

PRINCIPAL AND SURETY; AND WHAT DISCHARGES SURETY.
general remarks as to law of principal and surety, II., 1302.
1. *Who are principals and who sureties*, II., 1303.
acceptor and maker are principals, II., 1303.
drawer and indorsers are sureties for maker and acceptor to holder, II., 1303.
but not as between themselves co-sureties liable for contribution, II., 1303.
if drawer and indorser for accommodation agree each to pay half, they are bound by the agreement, II., 1303.
in New York held that indorser, though he be surety, is answerable on independent contract, II., 1304.
though liability of drawer and indorser be fixed by demand and notice, their relation as sureties is not altered, II., 1305.
final judgment against them destroys suretyship, II., 1305.
what discharges maker and acceptor, discharges drawer and indorsers, II., 1306.
whatever discharges prior indorser discharges all subsequent indorsers, II., 1307.
when surety may be bound, though principal not, II., 1306.
2. *Acts of creditor which discharge surety*, II., 1308.
misrepresentation, concealment, duress, diversion, and alteration, II., 1309.
payment by maker or acceptor, II., 1310.
release and satisfaction, II., 1310.
extinguishment distinguished from satisfaction, II., 1310.
covenant not to sue prior party discharges surety, II., 1310.
so parting by creditor with security for debt, II., 1311.
as to withdrawal of execution, II., 1311.
and extension of time or forbearance to sue, II., 1312.
effect of taking renewal note, II., 1312.
taking renewal of note secured by, but maturing before, collateral, II., 1312.
if legal impossibility of injury, principle does not apply, II., 1313.
principal may have defence not available to surety, II., 1314.
elements which constitute indulgence, II., 1315.
(1) must be consideration for promise to indulge, II., 1316.
indulgence at *will of creditor* does not impair obligation of surety, II., 1316.
what amounts to such consideration, II., 1316.
agreement to forbear suit in consideration of usurious premium discharges drawer or indorser, II., 1317.
but query? II., 1317.
where usurious premium goes as part payment, II., 1317.
but query? II., 1317.
whether payment of interest in advance is good consideration, II., 1317.
whether agreement to pay same rate is, II., 1317*a*.
part payment insufficient consideration, II., 1317*b*.
but otherwise if note given for balance, II., 1317*b*.
(2) promise must be absolute, II., 1318.
but may be implied as well as express, II., 1318.

PRINCIPAL AND SURETY, ETC.—*continued.*
(3) indulgence must not be indefinite, II., 1319.
and if for no longer period than required for judgment, and given *after action brought*, it is immaterial, II., 1319.
agreement to continue case for *valuable consideration* discharges surety, II., 1320.
(4) surety's assent prevents his discharge, II., 1321.
thus where drawer said "you may do as you like," II., 1321.
(5) surety not discharged when rights of creditor are reserved against the surety, II., 1322.
whether reservation can be proved by parol when agreement is in writing, II., 1323.
(6) agreement for indulgence must be made with maker or acceptor, or other principal party, II., 1324.
thus surety may waive discharge, II., 1325.
3. *Acts of creditor which do not discharge surety*, II., 1326.
mere delay or passivity of creditor, II., 1326.
part payment made to holder by maker or acceptor, II., 1327.
receipt of collateral security by holder, II., 1328.
query, as to taking collateral payable at future day, II., 1329.
if principal discharged by negligence to collect, collateral surety is also, II., 1330.
if holder does not use due diligence to collect collateral, delay may discharge surety, II., 1330.
composition with maker or acceptor to receive a certain per cent. of debt for whole amount, and receipt of note of third party for such per cent., discharges surety, II., 1331.
4. *Accommodation and joint parties as sureties*, II., 1332.
party who adds word "surety" to his name is to be treated as such, II., 1332.
semble as to word "principal," II., 1332.
rule in respect to parties ostensibly principals, but in reality only *for accommodation* of others, II., 1332*a*.
in England, if indorser of accepted bill, knowing it is for accommodation of drawer, gives time to him on payment of part, acceptor is discharged, II., 1333.
different where holder does not know that acceptance was for accommodation, II., 1334.
English cases at law and in equity, II., 1334.
general rule in United States that parties may be treated according to ostensible relations, II., 1335.
query, whether joint promisor can be shown by parol evidence to be only surety, and holder to have known the fact, II., 1336.
English decisions, II., 1337.
in U. S. weight of authority is in favor of allowing evidence that joint party is surety, and that holder knew it when he took the paper, II., 1338
rights of surety for sureties, II., 1338*a*.
5. *General summary of sureties' remedies*, II., 1339.
as to contribution between co-sureties, II., 1340.
accommodation indorser as surety, II., 1342.
when co-surety may sue for contribution, II., 1341.
surety who pays bill or note may recover back from principal with interest, II., 1342.
whether payee who is accommodation indorser can recover whole amount against maker, II., 1342.
limit of recovery is amount necessary to indemnify him, II., 1342.
surety making payment is entitled to benefit of all the principal's securities, II., 1343.

PROCURATION.
authority under written instruments by, 280.
signature "by procuration" puts party dealing with instrument on inquiry, 280.
and such party is chargeable with notice of extent of agent's authority, 280.

PROMISE TO ACCEPT BILL OF EXCHANGE. *See* ACCEPTANCE; STATUTE OF FRAUDS.
written promise to accept existing bill, made to drawer and communicated to third party, operates as acceptance, 550.
same as to non-existing bill, 551.
effect of such promise respecting *existing* bill, not communicated to third party who takes bill, 552.
effect of such promise as to *non-existing* bill, not communicated, 553, 554.
verbal promise to accept *existing* and *non-existing* bills, communicated and not communicated, 555, 556, 557, 558.
verbal generally as efficient as written promise, 559.
review of adjudicated cases and remarks on conflict of authority, 559.
difference between promise to accept and actual acceptance, 560.
promise must be made in reasonable time before bill drawn, 560.
must sufficiently describe and identify the bill or bills referred to, 560.
what particularity of description necessary, 560.
particular cases, 561.
semble, applies only to cases of bills payable on demand, 562.
whether mere promise to accept applies to bills not payable at drawee's or payee's place of business, 562.
when offer to accept may be withdrawn, 562.
if acceptance written on bill, every holder may avail of it, 563.
so if acceptance be on separate paper, 563.
and same rule applies to parol acceptance, 563.
damages recoverable for breach of promise to accept, 564, 565.
measure of damages for breach of agreement to accept is inconvenience and loss, 564.
if bill lost by agent's negligence, damages *prima facie* amount of bill, 564.
extent of damages, and who may recover them, 565.
promise to pay bill at maturity amounts to acceptance, 565.

PROMISE TO MARRY.
is legal consideration, 187*a*.
delay in fulfilling promise and service rendered during engagement good consideration for note, 187*a*.
in Scotland bill given a woman as security for a promise to marry valid, 187*a*.

PROMISE TO PAY. *See* EXCUSES.
as waiver of non-presentment and notice, II., 1147 to 1164.
as waiver of *proof* of, II., 1156 to 1164.

PROMISSORY NOTES. *See* NEGOTIABLE INSTRUMENTS.
1. *Nature and history* of, 1*a*, 3, 28.
in vogue before bills, but not negotiable so early, 2.
obscure in origin, 5.
history of, 5.
whether negotiable at common law, 5.
declared negotiable by statute of Anne in 1705, 5.
definition and essential requisites of, 28.
parties to, 28.
term "credit drawer," 28.
similarity to bills, 29.

PROMISSORY NOTES — *continued.*
2. *Must be open, that is unsealed, to be negotiable*, 31.
seal must be recognized in body of note to render it sealed instrument, 32.
conflicting decisions, 32.
statutes changing this rule, 33.
scroll generally same as seal, 34.
instrument may be sealed as to one party, and unsealed as to other, 34.
one action of debt in such case may be brought against both parties, 34.
3. *Promise to pay must be certain*, 35.
whether due-bill is negotiable, 36, 37, 38, 39, 40.
4. *The fact of payment must be certain*, 41.
conditional terms which destroy negotiability of, 41, 42, 43, 44.
effect of promise to pay "as soon as realized," 45, 45*a*.
"in course of season now coming," 45.
"on return of this certificate," 45.
"on return of my guaranty," 45.
"as soon as crop can be sold," 45.
in Massachusetts essential to negotiability that it be payable at a definite time at the election of holder, 45*a*.
this view in Missouri, 45*a*.
"when A. shall come of age," 46.
"when A. shall die," 46.
"one day after date, or at my death," 46.
"when government ship is paid off," 46.
effect of words to pay at certain time after happening of two events, one of which may not happen, 46.
"certain sum as required within thirty days after demanded, or notification in newspaper," 47.
"by or on a certain day," 46.
"in such manner and proportions, and at such time and place as A. shall require," 47.
if a note be in part for a sum certain, and part upon contingency, not negotiable, 47.
if made payable by instalments conditional that if default in first payment whole immediately payable, 48.
negotiable within the statute of Anne, 48.
"six months after peace is declared between the United States and the Confederate States," 49.
if payable out of particular fund not negotiable, 50.
certificates of receiver of court not negotiable, though framed in negotiable words, 50*a*.
indication of mode of reimbursement does not vitiate, 51.
nor does memorandum of consideration, or security, 51.
effect of words "*ne varietur*," 52.
5. *Amount to be paid must be certain*, 53.
when amount is not certain, 53.
if amount ascertainable from face of paper, it is certain, 53.
words "current exchange," whether they affect negotiability, 54.
when these words may be rejected as surplusage, 54.
whether an instrument payable "with exchange" on another place can be regarded a bill or note, 54*a*.
6. *Medium of payment must be money*, 55, 56.
not negotiable if payable:
"in cash or specific articles," 55.
"in merchantable whisky at trade price," 55.

PROMISSORY NOTES — *continued.*
"in ginned cotton at eight cents per pound," 55.
"in work," 55.
"in good East India bonds," 55.
"in foreign bills," 55.
"in notes of the United States bank or either of the Virginia banks," 55.
"in current bank bills or notes," 55.
"in office notes of a bank," 56.
effect of payability "in currency," 56.
"in good current money" or "current money" do not affect negotiability, 56.
effect of the words "in currency" not affected by legal tender act, 57.
decision as to words "in greenback currency," 57.
words "in Canada money" held to destroy negotiability, 58.
but see *contra*, 58.
7. *Contract must be only for payment of money*, 59.
if additional contract added, instrument not negotiable, 59.
it destroys negotiability to add promise:
"to deliver up horses and a wharf," 60.
"to take up a note," 60.
"to pay all fines according to rule," 60.
"that note shall be void if dispute arises," 60.
"that note is only security for certain balance," 60.
effect of authority to confess judgment contained in note, 61.
cases denying negotiability in such case, 61.
cases upholding negotiability in such case, 61.
effect of promise to pay collection fees, 62.
why instruments illustrated in preceding section should be upheld as negotiable, 62*a*.
8. *Note must be delivered.* *See* DELIVERY, and 63.
protest of foreign notes as evidence, II., 928.
note imports contemporaneous debt, 71.
settlement, 71.

PROTEST FOR BETTER SECURITY.
peculiar kind of protest, when it occurs, 530.

PROTEST OF BILLS AND NOTES.
1. *Nature and necessity of protest*, II., 926.
in England and the United States, protest is essential only in case of foreign bills to charge drawer and indorser, II., 926.
by statute in some States, inland bills and promissory notes may be protested, II., 926.
whether checks subjects of, II., 1600.
protest is indispensable as evidence of dishonor in case of foreign bills of exchange, II., 926.
statutes permitting protest of notes not compulsory, II., 927.
bills must be *negotiable* by custom of merchants to require protest, II., 927.
not so negotiable when payable "in currency" or other legal money, II., 927.
notice not necessary to charge maker of a foreign promissory note, II., 928.
when indorsed it partakes of nature of bill of exchange, II., 928.
query, whether protest is evidence against indorser of foreign note, II., 928.
what is meaning of "protest," II., 929.
in what cases necessary, II., 930.
what is refusal to honor a bill, II., 931.
absence from home of drawee does not amount to such refusal, II., 931.

PROTEST OF BILLS AND NOTES — *continued.*
no difference as to protest whether bill is payable at a certain time after date or sight, II., 932.
bill protested for non-acceptance need not be presented for payment, II., 932.
query, whether notarial fees are not chargeable against indorser when protest not indispensable, II., 933.
2. *By whom and where protest must be made*, II., 934.
as general rule, protest must be made by a notary public, II., 934.
notary must follow instructions, II., 934.
when it may be by a private person, II., 934*a*.
place of dishonor is place for protest, II., 935.
English statutes and decisions, II., 935.
law of protest is law of place of presentment, II., 936.
3. *Formalities of protest*, II., 937.
presentment and demand must be by notary in person, 581, 583. II., 938.
effect of custom for clerk or deputy to act, 581 to 587.
dishonor must be noted on very day of non-acceptance or non-payment, II., 939.
what is meant by "noting," II., 939.
when protest may be extended, II., 940.
what is meant by extending protest, II., 941.
as to extending when there is payment *supra protest*, II., 941.
extended protest only available in evidence, II., 942.
simple notice without copy or memorial of instrument is sufficient, II., 943.
copy of bill usually accompanies, II., 943.
notary's official seal is *prima facie* proof of its authority, II., 945.
seal not needful, but protest without seal does not prove itself, II., 946.
impression on paper sufficient seal, II., 947.
if State law require seal, protest without, not evidence elsewhere, II., 948.
protest should be signed by notary, II., 949.
4. *Contents of protest; what the certificate should set forth*, II., 950.
should state time of presentment, II., 951.
if hour of the day not stated, proper hour will be presumed, II., 951.
if place of payment be specified, it ought to be stated in protest, II., 952.
exhibition of bill or note should be set out, II., 953.
whether mere "demand" is enough, II., 953.
statement of "presentment" merely not sufficient, II., 953.
refusal to accept or pay must be stated, II., 954.
must inform party of dishonor, II., 954.
must show expiration of the time for payment, II., 954.
must state name of person on whom demand is made, II., 955.
need not name officer of bank at which paper was presented, II., 955.
party for whom protest is made, II., 956.
need not state reasons of refusal to honor, II., 957.
verbal mistakes do not vitiate certificate of protest, II., 958.
5. *The protest as evidence*, II., 959.
certificate is *prima facie* evidence of all facts it contains, if they be in scope of notary's duty, II., 959.
if certificate lost, notary may give new one, II., 940.
when not evidence in foreign State, II., 959.
is evidence of presentment, demand, and dishonor, but not evidence of notice, II., 960.
proof of custom can not dispense with documentary evidence of notice when requisite, 960*a*.
effect of proof of custom of bank in giving notices, 960*a*.

PROTEST OF BILLS AND NOTES — *continued.*
notice must be proved by notary himself or depositions of witnesses, II., 961.
protest is evidence only of facts stated, II., 962.
conflicting decisions on this question, II., 962.
whether statement that "due notice" was given suffices, II., 963.
legal presumptions are in favor of protest, II., 964.
in what cases such presumptions are applied, II., 964, 965.
protest is not evidence of collateral matters, II., 966.
such facts as, for instance, that the drawee was not in funds, or was willing to pay in bank bills, or that the notary inquired diligently, II., 966.
may be secondary evidence of notice, II., 967.
as in case of death of parties, II., 967.
protest admissible evidence by law merchant only in case of foreign bills, II., 968.
whether admissible in State where protest made, II., 968.
parol evidence admissible to supply omissions of protest, II., 969.
for instance, to show that cashier to whom presentment was made was *at* the bank, II., 969.
or that the note was *in* the bank, II., 969.
or that the note was not paid, II., 969.
or that the party on whom demand was made was agent, II., 969.
other cases, II., 969.
what law applies to protest, 908 *et seq.* *See* CONFLICT OF LAWS.

PROVISION.
meaning of term, II., 1457.
is allowance to agent in certain cases, II., 1457.

PROVISION IN CASE OF NEED. *See* AU BESOIN.

PRUDENT MAN.
rule that circumstances to excite suspicions of prudent man vitiates title of purchaser of negotiable instrument no longer obtains, 773, 774, 775, 776.

PUBLIC AGENTS. *See* GOVERNMENTS AT PARTIES, 436.
duties defined by statutes which are notice of their authority, 440.
if they sign with official designation, act deemed official, 443.
who are deemed public agents, 443*a*.
no official can ratify contract but one who can make it, 444.
not bound by contract on behalf of government, although they would be bound if acting for individual, 445.
liability of, when they exceed authority, 445*a*.

PUBLIC PURPOSE.
what is, II., 1522.

PUBLIC RECORDS.
not notice to a purchaser of negotiable instruments, 800.

PURCHASER.
for value. *See* BONA FIDE HOLDER.

RATIFICATION. *See* AGENTS; INFANTS, and 230 to 234; also, FORGERY, and II., 1338 *et seq.*

REASONABLE TIME.
what is, 465.
whether question for court or jury, 466, 478.
circumstances affecting question, 466, 604 to 607.
whether paper payable in, negotiable, 88.

RECEIPT. *See* RENEWAL, and II., 1266, 1267.
on back of bill, handwriting must be proved, II., 1206.
of payment not necessarily implies absolute payment, II., 1266.
whether party paying may claim, II., 1228.
indorser may, on payment, II., 1229.

RECEIVERS.
do not acquire negotiable instrument in usual course of business. 781.
certificates issued by, not negotiable, 50*a*.

RE-EXCHANGE. *See* EXCHANGE.

REGISTERED BONDS.
not deemed negotiable, 1501*b*.

REISSUE. *See* PAYMENT, and II., 1236 to 1242.
who may reissue bill or note, II., 1236, 1242.
payment by maker or acceptor discharges and cancels instrument, II., 1236.
after payment by maker or acceptor, drawer or indorser would not be bound by reissue, II., 1238.
if indorser pay bill or note he may reissue it with or without his indorsement, II., 1238.
but intermediate indorser can not reissue it as to subsequent indorsers, II., 1240.
whether drawer may reissue bill, II., 1238.
drawer may reissue bill except when acceptance is for his accommodation, II., 1239, 1241.
or there is name of indorser on it to whom he is bound, II., 1240, 1241.
indorser who reissues bill or note is bound by first or second indorsement, according to alteration, II., 1242.

RELEASE. *See* DISCHARGES.
technically instrument under seal, II., 1290.
but bill or note may be released by agreement for valuable consideration, II., 1290.
discharges a joint party and all subsequent parties, II., 1290.
of acceptor or maker discharges drawer and indorsers, II., 1310.
releasor need not be holder of instrument at time of release, II., 1290.
release of drawee before he accepts is no bar to suit on acceptance, II., 1290.
agreement to operate as, must be on consideration, II., 1290.

REMOVAL. *See* EXCUSES.
as excuse for nonpresentment and notice, II., 1032.

RENEWAL OF BILLS AND NOTES.
renewal bill or note open to same defence as original, 177, 179, 205.
if original fraudulent, renewal void, 205.
unless party signing it know of the fraud, 205.
renewal secured by mortgage same as original, 205.
parties to mortgage may substitute renewal note without affecting validity of security, 835*a*.
has benefit of any security for original, 748.
if renewal be forged, original not discharged, although surrendered, 205.
nor is indorser of original discharged if he were notified, 205.
if original based on part illegal consideration, renewal void, 206.
but new note for good part of consideration is valid, 206.
if several new notes given for old one, some of them may be taken for legal part of consideration, 206.
ex-partner can not bind firm by, to party with notice of dissolution, 370. II., 1300*a*.

RENEWAL OF BILLS AND NOTES — *continued.*
but renewal note by ex-partner is valid in hands of creditor without notice of dissolution, 370, II., 1300*a*.
effect of such renewal note, II., 1300*a*.
decision in New York and comments, 370.
renewal bill or note suspends right of action on original, II., 1266.
various and conflicting views, II., 1266.
effect of surrender of old note, II., 1266*a*.
when debt would be lost, renewal not deemed payment, II., 1266*b*.
effect of renewals of notes in bank, II., 1266*c*.
better opinion is that until promise is redeemed there is no payment, II., 1266.
evidence admissible to show intention of parties, II., 1267.
receipt "in full" or "in satisfaction" open to explanation between parties, II., 1267.
and "absolute payment" not presumed, II., 1267.
giving indorser on new note may raise presumption of payment, II., 1267.
agreement to take note in payment may be express or implied, II., 1268.

RESIDENCE. *See* PRESENTMENT; NOTICE.
date as evidence of residence, II., 1030.
place of payment, 639.
presentment at party's residence, 635, 639.
who deemed residents of same place, II., 1014.
when and how notice may be left at party's residence, II., 1016, 1018, 1019.

RESTORATION. *See* ALTERATION, II., 1414, 1415.
right of, as to instruments innocently altered, II., 1414, 1415.

RESTRICTIVE INDORSEMENT. *See* INDORSEMENT, and 697.

RETIRE.
effect of agreement to, II., 1243.

REVENUE LAWS. *See* CONFLICT OF LAWS.
how far enforced by foreign courts, 913, 914.

REVOCATION OF AUTHORITY. *See* AGENT, and 288*a*.
principal revoking authority of general agent should give notice, 288*a*.
different rule applicable to special and limited agents, 288*a*.
death of principal revokes all agencies not coupled with an interest, 288*a*.
war does not, 222, 288*a*.

ROBBERY. *See* EXCUSES, and II., 1125.

SALE OF NEGOTIABLE INSTRUMENTS, AND AMOUNT OF RECOVERY. *See* BONA FIDE HOLDER; MUNICIPAL BONDS; STOPPAGE IN TRANSITU.
1. *Validity of the negotiation*, 749.
note from A. to B. for value, may be sold by B. for any price to C., and sale is not usurious, 750.
C., in such case, may recover whole amount of maker, 750.
if B. transfer without indorsement, it is clearly a sale, 750.
the rule where A. makes note for B.'s accommodation is different, 750.
general principles as to what notes may be sold, and what sales are not usurious, 751.
held not to apply where note is obtained by fraud, and delivered to payee as a valid security, 752.

SALE OF NEGOTIABLE INSTRUMENTS, ETC.— *continued.*
holder who receives note, not knowing it to be not a valid subsisting security, may recover of maker, 752.
rule as to usury where note is offered by maker for discount, and indorsed for his accommodation, 753.
semble, as to accepted bill offered for sale by acceptor, 753.
as to bill or note offered by payee for discount, who indorses prior to others, 753.
does not apply to bill offered by drawer for discount, 753.
purchaser of bill or note must assume title of holder and liability of prior indorsers to be indicated by paper itself, 753*a*.
delivery not necessary to contract of, 753*b*.
maker bound by representations of broker who is agent for sale, 753*a*.
2. *Amount of recovery.*
holder may recover full amount of bill or note against the drawer or maker, whether originally given for value or not, provided he paid *full* value, 754.
where he pays less than value, authorities differ as to his recovering more than the amount advanced, 754, 758*b*.
English view of subject as stated by Mr. Chitty, 755.
English cases as to amount of recovery, 756.
distinction taken between out and out sale of bill, and pledge of same as security for money advanced, 756.
what seems to be the true doctrine in the United States, 757.
rule as to amount of recovery on bill or note obtained from drawer or maker by fraud, 758, 758*b*.
discussion of conflicting authorities, 758*a*.
rule when there is usury between indorser and indorsee, 759.
same in case of a subsequent indorsee, not a party to the usury, 760.
recovery on bill given in consideration of contract of copartnership which has been broken, is confined to damages actually sustained by non-performance of contract, 760.
in case of *novation of the debt*, whole amount may be recovered, 761.
3. *Validity of transfer, and amount of recovery against indorser*, 762.
general remarks as to usury upon transfer of negotiable instruments, and amount of recovery against the transferrer, 762, 762*a*.
where transferrer does not indorse, or indorses "without recourse," sale at any price is not objectionable, 762*a*.
so where holder receives instrument from agent of indorsee, not knowing him to be such, 762*a*.
yet transfer of bill or note by delivery may be a feature of a usurious contract, 762*a*.
as to effect *per se* of indorsement of bill or note upon transfer for less amount than legal rate of discount, various views are held, to wit:
(1) view presented that contract is usurious as between indorser and indorsee, and that latter can not sue any prior party, 763.
effect on question of statute that does not declare instrument void, 763*a*.
decision of U. S. Supreme Court, 763*a*.
(2) view presented that although contract is usurious as between indorser and indorsee, and void as to the former, the latter may enforce a recovery against prior parties for the full amount, 764.
(3) view presented that transaction is not usurious, being made merely for the purpose of transfer, and the purchaser may recover against all prior parties except his indorser, 765.
(4) view that it is not usurious, because the indorsee, being a purchaser, may recover of indorser amount paid with legal interest, and of other prior parties the whole amount, 766.
(5) view presented that it is not usurious, because the contract as between indorser and indorsee is conditional, 767.

SALE OF NEGOTIABLE INSTRUMENTS, ETC.— *continued.*
the last view adopted by the text, 768.
distinction between loans of money and purchase of securities in the usual course of business, 768.
rule respecting indorsement for less than legal rate of discount, applies to case of drawer of bill, who parts with it in same manner, 768.

SATISFACTION. *See* DISCHARGES; PAYMENT.

SCROLLS used as seals, 34.

SEAL, 31, 34; *See* PROTEST, II., 945, 948; also NOTICE; NOTARY; COMMERCIAL PAPER, 31.
added to commercial paper destroys negotiability, 31.
whether such is its effect in corporation drafts, 31.
note to which seal is added becomes bond or deed, 32.
this rule applicable to corporations as well as individuals, 32.
bonds not negotiable under statute of Anne, 32.
attaching seal to signature does not alone render instrument sealed, 32.
seal must be acknowledged in body of instrument, 32.
in some States sealed instruments placed by statute on same footing as bills and notes, 33.
scroll affixed as seal is generally same as seal, 34.
instrument may be bond as to one signer and note as to another, 34.
protest authenticated by notarial seal. *See* PROTEST, and II., 945, 948.
sealed instruments may be delivered as escrow, 68.
if custodian violate trust, obligor not bound, 68.
instruments under seal must be perfected before delivery, 148.
and can not be left blank as to any material part, 148.
this doctrine not applicable to coupon bonds, 148. II., 1499, 1500, 1501.
coupon bonds need not be sealed, II., 1495, 1495*a*.
powers of attorney, 274.

SECURITY. *See* EXCUSES.
as excuse for non-presentment and notice, II., 1128 to 1131.

SEPARATE ESTATE. *See* MARRIED WOMAN.

SET OF BILLS OF EXCHANGE.
foreign bills frequently drawn in several parts, 113.
all the parts constitute one bill, and are called a set, 113.
the practice is followed to prevent loss, 113.
drawer usually incorporates condition in each part of set, that it shall only be payable provided the others remain unpaid, 114.
for instance: "Pay this, my first of exchange — second and third remaining unpaid," 114.
this condition operates as notice, 114.
condition should mention every part of set, 114.
indorser bound to pass all the parts, 115.
if he pass two or more parts to different holders, he may be liable on each, 116.
either of set may be presented for acceptance, 116.
drawee should accept but one part, 116.
if he accepts more than one, he may have to pay twice, 116.
having accepted one part, should not pay another, 116.
when he pays accepted part, whole bill is extinguished, 116.
party entitled to bill should claim all parts, 116.
first holder of one part acquires right to whole, 116.
the part protested must be produced in suit against drawer or indorser, 117.
all of set need not be produced, 117.
but defendant may show prior claim on other party than plaintiff, 117.
indorsement of one part carries whole bill, 117.

SET OF BILLS OF LADING. *See* BILLS OF LADING, and II., 1735, 1737.

SET-OFF.
1. *General principles of,* II., 1423 to 1434.
definition of set-off, II., 1422.
unknown to common law, II., 1422.
first introduced in equity, II., 1423.
exists generally by statute, II., 1422.
generally confined to actions *ex contractu,* II., 1423.
none but legal debt can be set off at law, II., 1423.
equity will not relieve party who has failed to plead at law, II., 1424.
must be actual subsisting debt, then mature, and not barred, II., 1425.
must be such claim as would sustain independent suit, II., 1425.
whether judgment may be, II., 1426.
set-off as to partnership debts, II., 1428.
joint and several debts, II., 1429.
debts of husband and wife, II., 1430.
agents and trustees, II., 1431.
personal representatives, II., 1423.
2. *Has but limited application to negotiable instruments,* II., 1435.
can only be availed of between parties privy, II., 1435.
whether party taking bill or note overdue takes it subject to set-off between original parties, II., 1435*a*.
in England he can not, II., 1436.
conflicting authorities in United States, II., 1437.
right of principal to plead equitable set-off does not extend to surety, II., 1437.
what law applies to, II., 1749.

SETTLEMENT.
note as evidence of, 73.

SICKNESS.
as excuse for non-presentment, protest, and notice. *See* EXCUSES, and 478. II., 1066, 1125, 1126, 1127.

SIGHT.
meaning of at and after sight, 617, 618, 619, 621.

SIGNATURE.
to bill or note, immaterial on what part of paper, 74.
the words "I, A. B., promise," or "I, A. B., request you to pay," are sufficient, 74.
may be in pencil or in ink, 74.
printed signature does not prove itself like written, 74.
by another in party's presence and at his request suffices, 74.
full name may be written, 74.
but initials suffice, 74.
mark also suffices, whether witnessed or not, 74.
but mark must be proved, 74.
name not necessary if party be sufficiently designated, 75.
by agent with authority satisfies allegation of signature by principal, 287.
how proved, II., 1219, 1220.

SLAVES.
notes for, 173.

SOLE TRADER. *See* MARRIED WOMAN.

SPENDTHRIFT.
under guardianship can not contract, 259.
indorsement is void, 259.

SPOLIATION. *See* ALTERATION.

STAMPS ON NEGOTIABLE INSTRUMENTS.
origin and use of stamp tax, 118.
the United States stamp act, 118.
much limited now in operation, 118, 119.
works on the subject, 121.
construction of stamp act, 122, 123, 124, 125, 126, 127.
not intended to apply to State courts, 123.
defence that stamped instrument was issued without stamp not available against *bona fide* holder for value without notice, 123, 124, 125.
if instrument void for want of stamp, original consideration may be recovered, 123.
stamp omitted must be shown to have been with intent to evade act, 124, 125.
penalty of Federal act against fraudulent, and not against accidental omission, 124.
whether omission *prima facie* evidence of fraudulent intent, 125.
fraudulent intent must be proved affirmatively and *aliunde*, 125.
whether Congress can prescribe formalities of records, contracts, process, and evidence, 126.
this power denied, 126.
Federal stamp act did not operate in Confederate States, 127.
how far foreign courts enforce stamp act, 913.
United States stamp act of 1898, 127*a*.
what instruments exempt from, 127*b*.
penalties for intentional violation of act 1898, 127*c*.
act of 1898 partially repealed, 127*d*.

STATES. *See* GOVERNMENTS; COUPON BONDS.
are foreign as to each other, 9.
are sovereign under Federal Constitution, 863, 864.

STATE SECURITIES RECEIVABLE FOR TAXES.
no State can, under United States Constitution, pass law impairing obligation of contracts, 446.
State held contracting party within meaning of Constitution, 446.
if States make certain securities receivable for taxes, they can not repeal law so as to affect existing rights, 447.
decisions of U. S. Supreme Court, 447.
States may repeal statute funding bonds as against all parties who have not accepted its terms, 448.
State control of taxation, 448.

STATUTE OF FRAUDS. *See* GUARANTIES; PROMISE TO ACCEPT.
whether parol acceptance is affected by, 566.
whether statute of frauds has application to commercial paper, 567.
acceptance not generally agreement to pay debt of another, 568.
drawee accepting acknowledges amount to be his debt, 568.
if drawee is in funds, acceptance is undertaking to pay his own debt, 568.
holder has a right to presume drawee who accepts to have been in funds, 568.
if holder *knows* when he takes bill that verbal acceptance was for accommodation, it seems that statute of fraud applies, 569.
for then it is known to be debt of another, 569.
if verbal acceptance be on independent consideration, it is binding, 570.
views of U. S. Supreme Court, 570.
in relation to gauranties, II., 1762.

STOPPAGE IN TRANSITU. *See* BILLS OF LADING, and II., 1730 *et seq.*
vendor of negotiable paper has right of, 67.
same rule applies as to other personal property, 67.
when consignor of goods has right to, II., 1730.
when right to divested by transfer of bill of lading, II., 1730.
sale of goods not yet received without transfer of bill of lading does not divest right of, II., 1730*a*.
is equitable remedy for protection of vendor, II., 1730*a*.
yields to superior equity of *bona fide* purchaser of bill of lading, II., 1730*a*.

STYLE.
Gregorian calendar or new style prevails in United States, 632.
difference between old and new style of computing time, 632.

SUBSCRIBING WITNESS. *See* ATTESTATION.

SUNDAY. *See* GRACE; DELIVERY.
by common law no interdiction of business on, 69.
statutes changing common law, 69.
bills and notes delivered on Sunday, when interdicted by statute, 69.
signing and dating on Sunday does not invalidate, if delivery be on other day, 69.
interest may begin to run on, 69.
if note void because delivered on, original consideration may be recovered, 69.
ratification on subsequent day, 69.
indorsement on Sunday on same footing as drawing or making, 70.
almanac is noticed judicially, 70.
indorsee chargeable with notice, if paper dated on Sunday, 70.
otherwise not, 70.
how counted in respect to grace, 627.
if contract on, void where suit brought, presumed to be void where made, 891.
when post date is as of Sunday, check can not be demanded until Monday, II., 1578.

SUPRA PROTEST OR FOR HONOR. *See* ACCEPTANCE; PAYMENT.
payment *supra protest* or for honor, II., 1256.

SURETY. *See* PRINCIPAL AND SURETY.

SURETY DRAWER. *See* DRAWER, and 95.

SURPLUSAGE, 262.

SUSPENSION. *See* CONDITIONAL AND ABSOLUTE PAYMENT.
of cause of action by taking bill or note, II., 1272, 1278.

SUSPICIOUS CIRCUMSTANCES.
do not vitiate title of *bona fide* holder of negotiable instrument for value without notice, 772, 774.

TAXES. *See* STATE SECURITIES.
securities when made receivable for, can not be divested of their tax receivability, 447.

TELEGRAPH.
bill may be accepted by, 496, 551*a*.
whether notice may be given by, II., 1004.

TENDER.
of payment, effect of, II., 1310.
no State can make anything but money legal tender, II., 1246.

TENDER — *continued.*
whether Federal Government can make anything but money legal tender, II., 1246, 1247, 1248.
legal tender act, II., 1246.
whether applicable to contracts made before its passage and solvable "in gold or silver coin," II., 1247.
how judgment entered on paper payable in coin, and on paper payable in dollars simply, II., 1247.
whenever contract in terms payable in coin, it is so enforced, II., 1247.

TERRITORY OF U. S.
or local division may issue coupon bonds, II., 1486.

TIME, COMPUTATION OF. *See* MONTH; DAYS; GRACE; SUNDAY; HOLIDAYS; STYLE.

TIME OF PAYMENT.
bills and notes usually payable at specified time after date, or after sight, or at sight, 88.
on demand understood, if no time specified, 88.
"on call," "when demanded," "when called for," or "on demand after date," equivalent to "on demand," 89.
meaning of twelve months after notice, 89.
meaning of on demand with interest after four months, 89.
the terms "in thirty days," "in thirty days from date," "at thirty days," and "thirty days after date," synonymous, 626.
meaning of "at sight," 617, 618.
meaning of "after sight," 619.
as controlled by separate contemporaneous written agreement, 156.

TOWNSHIP.
has no inherent power to contract debts and issue securities, II., 1544*a*.
such power not given under general authority to corporation, II., 1544*a*.

TRANSFER. *See* ASSIGNMENT; INDORSEMENT; SALE; CONFLICT OF LAWS.
by what law validity and effect of, governed, 898, 901.
liability of transferrer of bank notes, II., 1675.
by what law it is determined whether party is assignor or indorser, 902.

TREASURY NOTES. *See* GOVERNMENTS, and 441.
when negotiable, 441.
as tender in payment, II., 1247 to 1249.

TROVER. *See* CONVERSION.

TRUSTEE. *See* FIDUCIARIES, 271; CHECKS, II., 1612*a*, 1615.
personally bound by instrument issued in his name, 271.
if party be payee as trustee, the word trustee puts party acquiring instrument on inquiry, 271, 795*a*.
deposit in bank to credit of, charges bank with notice of its fiduciary character, II., 1612*a*.
trustees under joint power must act conjointly, II., 1615.

TRUSTEE PROCESS.
whether payee of negotiable note subject to, 800*a*.

ULTRA VIRES.
doctrine of, 377.

UNITED STATES. *See* GOVERNMENTS; FEDERAL COURTS; TREASURY NOTES.

USAGE. *See* CUSTOM.
when variant as to grace from law merchant must be proved, 622.
of banks as to grace, rules as to, 623.

USANCE.
in Europe bills frequently payable at one, two, or more usances, 88, 631.
origin and meaning of term, 631.
signifies time which, according to usage of country between which bills are drawn, is appointed for payment, 88, 631.
not established between United States and European nations, 631.
varies as to length of time in different countries, 631.

USURY. *See* INTEREST; SALE; CONFLICT OF LAW; MUNICIPAL BONDS.
when instrument usurious in inception, sometimes utterly void by statute, 197.
when considered usurious in inception, 750 to 752.
effect of, between indorser and indorsee, 759, 762, 768.
amount of recovery under usurious contract void *in toto* or *pro tanto* determined by statute, 759*a*.
provisions of Revised Statutes of U. S. as to, 759*a*.
in Texas, held, double interest actually paid may be recovered, 759*a*.
if usurious in inception, indorser nevertheless bound, 674.
so transferrer by delivery, 733.
if interest legal at place where contract made or to be performed, there is no usury, although illegal at one of the places, 924.
unless the transaction were a shift to cover usury, 925.
in sale of municipal bonds, II., 1533.

VALUE RECEIVED.
generally expressed, but not essential in bills and notes, 108.
in note import value received by maker from payee, 108.
in bill payable to order of third person are ambiguous, 108.
how construed in bill, 108.
declaration need not aver, 108.
import consideration, 161.

VENDOR.
right of stoppage *in transitu*, 67.

VERBAL ACCEPTANCE. *See* ACCEPTANCE; STATUTE OF FRAUDS.

VERBAL GUARANTY.
of solvency or payment when valid, 739*a*. II., 1763.

VERBAL NOTICE. *See* NOTICE.

VOUCHERS OF PAYMENT, II., 1227, 1228, 1229.

WAIVER. *See* EXCUSES.
of appraisement and homestead laws in bill or note, 61, 62.
of presentment, protest, and notice, II., 1086 to 1108.
See EXCUSES FOR NON-PRESENTMENT, PROTEST, AND NOTICE, and II., 1086 to 1108.

WAR. *See* ALIENS AND ALIEN ENEMIES; EXCUSES; CONFEDERATE STATES.
prohibits intercourse, 216 to 222.
does not annul agency, 222, 288.
excuses delay in presentment and notice, II., 1060.

WAREHOUSE RECEIPTS.
nature of and who may issue, 1713*a*.
transfer of by debtor to creditor operates a delivery of goods, and notice to warehouseman not necessary, 1713*a*.
not always necessary to be indorsed to transfer title to goods, 1713*a*.
at common law unlike bills of lading, and not negotiable, II, 1713.
sometimes made negotiable by statute, II., 1714.

WARRANTS, COUNTY.
not negotiable, 427.

WEIGHT OF EVIDENCE.
after evidence rebutting presumption of consideration, plaintiff must establish same by preponderance of testimony, 164.

" WITHOUT RECOURSE."
meaning and effect of indorsement " without recourse," 670, 705, 727.

WITNESS. *See* ATTESTATION; ALTERATION.
alteration of witnessed instruments, II., 1392, 1393.

THE END.